

THE EUROPEAN COMMISSION

Brussels, 18 March 2010
2007/4835
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Sir,

The Commission wishes to draw to the attention of the Swedish government Sweden's incorporation of the Council's directive 1999/70/EG of 28 June 1999 concerning the framework agreement on fixed-term work signed by EFS, UNICE and CEEP (referred to below as *the directive*); and in particular clause 5 in the framework agreement in the directive's Annex (referred to below as *the framework agreement*) with respect to the measures taken to prevent the abuse of successive fixed-term employment contracts or relationships through maximum total durations, and the lack of measures concerning seasonal employment.

Background

On 14 March 2008, the European Commission sent a letter to Sweden's permanent representative to the EU to request comment on the issues raised in a complaint from TCO, registered as Complaint 2007/4835, concerning the changes in Section 5 of the Employment Protection Act, which came into force on 1 July 2007.

Sweden's permanent representative forwarded a response dated 15 May 2008 with an accompanying letter dated 21 May 2008.

On 10 November 2008, the European Commission sent a second letter to the Swedish authorities in which it requested clarification of the response the Commission had received to its first letter. Sweden's permanent representative forwarded a response dated 2 March 2009 with an accompanying letter dated 10 March 2009.

The directive

The purpose of the directive is to implement the framework agreement on fixed-term work which was concluded on 18 March 1999 between ETUC, UNICE and CEEP.

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Clause 1 of the framework agreement establishes the following:

“The purpose of this framework agreement is to:

- a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination; and*
- b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.*

Clause 5 of the framework agreement establishes the following:

”1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with the 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.”*

National implementation measures

The wording of Sweden's Employment Protection Act (1982:80) (referred to below as LAS) after 1 July 2007:

“Section 5 *A contract of employment for a fixed-term may be concluded*

- 1. for a general fixed-term employment,*
- 2. for a temporary substitute employment*
- 5. for a seasonal employment, and*
- 4. when the employee has attained the age of 67.*

If an employee has been employed for a period of five years by an employer either for a general fixed-term employment for in aggregate more than two years, or as a substitute for in aggregate more than two years, the employment is transformed into indefinite-term employment.

Evaluation

The changes in Sweden's legislation from July 2007 retain only such measures as prevent the abuse of successive fixed-term employment contracts or relationships with respect to general fixed-term contracts and temporary substitute employment contracts.

The only applicable provision in Sweden to prevent the abuse of successive fixed-term employment contracts or relationships is the one concerning the maximum durations specified in section 5 of LAS, that is, that an employee's employment is transformed into indefinite-term employment after two years under either a general fixed-term employment contract or temporary substitute employment contract¹. The maximum durations for these two types of fixed-term employment are independent of each other.

Because measures are lacking to prevent the abuse of successive fixed-term employment contracts or relationships for seasonal employment, and for employees who have reached the age of 67, and that the maximum total durations for general fixed-term employment contracts and temporary substitute employment contracts are independent of each other, there is a risk that different types of fixed-term employment contracts can be allowed to succeed each other. For example, an employer could employ an employee for six months under a seasonal employment contract, and subsequently 23.5 months under a general fixed-term employment contract, thereafter 23.5 months under a temporary substitute employment contract, and finally a further six months under a seasonal employment contract – that is, in total almost 5 years of successive fixed-term employment contracts. Another conceivable situation might be that an employee works for four months each year under a general fixed-term employment contract, four months under a temporary substitute employment contract, and a further four months under a seasonal employment contract. Under such a scenario, the employee would be required to work for six years to obtain the right to an open-ended contract (a contract of indefinite duration) – that is, have their employment add up to a total of two years in fixed-term employment or temporary substitute employment.

In its letter from 14 March 2008, which precedes the process under Article 226 of the Treaty on the Functioning of the European Union, the Commission requested clarification from the Swedish authorities of what was covered by the term *general fixed-term* in section 5, first paragraph, point 1 in LAS, and wider legislation did not specify any limits for the number of renewals (and/or objective reasons).

In the response sent to the Commission on 21 May 2008, the Swedish authorities clarified their position that, for an employer to be permitted to employ someone under a general fixed-term employment contract, the employer must have a need for a fixed-term employee; and stated that the issue of whether or not a fixed-term employment contract

¹ In addition to this, section 6 allows a single period of probationary employment not exceeding six months.

constituted an evasion of the principal tenet that employment contracts of indefinite duration should be the norm can be tested in court.

The authorities were also of the opinion that the new provisions did not constitute any reduction in the level of protection for employees, and that the provisions introduced in July 2007 do entail clear maximum durations. It was conceded that theoretically in fact there was a risk that different types of fixed-term employment contracts could be added onto each other, but stated that in all probability this would not continue for longer than four years, which was deemed to be not an unreasonable length of time. It was also pointed out that should it become apparent that this type of combining of fixed-term employment contracts does in fact occur, the government would deliberate anew on the issue of an ultimate maximum duration.

The Commission wrote again to the Swedish authorities on 10 November 2008 to request clarification of certain information in the Swedish authorities' response from May. In its letter of November, the Commission asked how the Court could determine whether or not an employer had a legitimate need for an employee under a general fixed-term employment contract, what criteria are used to determine if a job requires a fixed-term or indefinite-duration employment contract, and how the employer offering a general fixed-term employment contract under section 5 of LAS in practice would be able to demonstrate that they had a legitimate need for a fixed-term employee.

In its response of 2 March 2009, the Swedish authorities pointed out that one should not look only to the wording of the legislation but also take into consideration the intention of the legislation and the fundamental principles on which it is built. It was also emphasised that regulations based on an EU directive are to be interpreted and applied against the background of the directive's requirements.

In addition, they wrote, the general fixed-term form of employment does not require any objectively verifiable reasons to be permissible. There is nothing to prevent this form of employment being used, for example, for traineeships, holiday work or for conducting a variety of limited duration projects, and the employer does not need to specify any reasons for this form of employment contract having been chosen. This is in fact what characterises this form of employment contract and constitutes a difference in relation to, for example, temporary substitute employment and seasonal employment. The questions that the Commission had asked concerning evidence with respect to the employer's need for employees in fixed-term contracts therefore do not arise in the case of general fixed-term employment contracts.

Sweden has chosen to introduce maximum total durations as one of the three measures to prevent abuse of successive fixed-term employment contracts as specified in Clause 5.1 a) in the framework agreement. According to the framework agreement, there is to be "a maximum total duration of successive fixed-term employment contracts or relationships". The Commission is of the view that several successive fixed-term contracts under various forms of employment can continue for a considerable length of time, and that in actual fact there is no definitive endpoint specified. Thus, it is debatable as to whether there really is a clear maximum duration for successive fixed-term employment contracts. Although there is a maximum duration specified for the total time worked, a number of changes of successive fixed-term employment contracts are possible (in particular if the

employee has been unemployed between them) before the maximum total duration is reached.

The Commission therefore is of the view that it would have been more effective to combine the two-year maximum durations for general fixed-term and temporary substitute employment contracts, which are independent of each other under the current legislation, with another measure to prevent the abuse of fixed-term contracts, for example, an upper limit on the number of contract renewals.

It is however true that the framework agreement only requires the Member States to introduce one or more measures to prevent the abuse of successive fixed-term employment contracts, and that the Commission therefore cannot demand that several measures are to be implemented in combination.

Another way of achieving a more predictable result would be the introduction of a maximum total duration of two years for general fixed-term and temporary substitute employment contracts in combination, instead of having two independent two-year limits (i.e., a total of a maximum of two years of any fixed-term employment contracts, irrespective of the form of employment).

Another important point is that the existing maximum durations are only applicable to general fixed-term and temporary substitute employment contracts (and to probationary employment, which however has not been designed *per se* to function as a form of fixed-term employment).

It appears that there is neither a definition of nor a limit on fixed-term employment for seasonal employment, nor are there any measures to limit successive fixed-term employment contracts for employees who have reached the age of 67 years. Since there is no exemption from the measures to prevent the abuse of successive fixed-term employment contracts for these employment categories, the Swedish legislation does not comply with the requirements in clause 5.1 in the framework agreement.

The duration limits for general fixed-term and temporary substitute employment contracts (two years for each before the employment is transformed into indefinite-term employment) are such that it is not necessary to define what is meant by successive fixed-term employment contracts. The Swedish legislation therefore does not specify any fixed period between employment contracts for them to be deemed to be successive rather than continuous. Theoretically, seasonal employment could continue for most of the year and then resume after a break that could be deemed to be the equivalent of a long holiday period.

The Swedish authorities have pointed out that indefinite-duration employment (open-ended contracts) is the main rule under Swedish legislation, but the Commission cannot accept this as grounds for the conclusion that objective reasons must be demanded for fixed-term employment contracts. In actual fact, the change to the legislation that came

into force in July 2007 removed this particular requirement that certain conditions must be met for a fixed-term contract to be permissible².

Conclusion

The European Commission is of the view that i) the lack of a clear maximum total duration for successive fixed-term employment contracts concerning general fixed-term employment and temporary substitute employment; and ii) the complete lack of measures to prevent the abuse of fixed-term contracts for seasonal employment and for employees who have reached the age of 67; means that the requirement to prevent abuse of successive weeks term contracts under clause 5 in the Annex to Directive 1999/70/EG concerning the framework agreement on fixed-term work signed by EFS, UNCE and CEEP has not been fulfilled.

In accordance with Article 258 in the Treaty on the Functioning of the European Union, the Commission requests that the Swedish government submit its views on this matter within two months from the receipt of this letter.

In accordance with the same article, the Commission retains the right to issue a reasoned opinion after having received these views, or if these views have not been received within the appointed time.

Yours faithfully,

On behalf of the Commission

László ANDOR
Member of the EU Commission

² Section 5 in the changes to LAS from 2007 replace the previous section 5 which was worded as follows: "Contracts of employment for a fixed-term may be concluded in the following cases:

1. A contract for a fixed term, specific season or specific work, if caused by particular nature of the work
2. Fixed term contracts of employment for temporary substitutes, traineeships or holiday work.
3. Fixed term contracts, in aggregate not exceeding six months during a two-year period is occasioned by temporary peaks in work.
4. Contracts that are to apply for a period until such time as the employee is to begin national service under the Swedish Defence Act (1994:1809), which is to continue for more than three months.
5. Fixed term contract when the employee has reached the age of 67 years.

If an employee has been employed by an employer as a temporary substitute for a total of more than three years during the latest five years, the employment is transferred into indefinite-term employment." The Act (2001:298) on changes to the Employment Protection Act (1982:80).

CERTIFIED COPY
For the Secretary-General,
Jordi AYET PUIGARNAU
Director of the Registry