'The status and future of indefinite contracts within the EU'

By

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A. Introduction

1. The circumstances under which individuals are employed by the European institutions and their agencies have gradually evolved to reflect modern working conditions. Indeed, new types of employment contracts with new conditions of employment have had to be created in order to hastily respond to the institutions' employment needs. These contracts have been the subject of much debate and have led to multiple case law reversals, especially with regard to the evolution of these conditions. In two fairly recent judgments, the *Mangold*[2] case and the *Adeneler*[3] case, the Court of Justice of the European Communities (CJEC) held that contracts of indefinite duration constituted the general form of working relationships, but also recognised the fact that fixed term contracts could be the norm in certain sectors of activity where they suited both employers and workers better. The Court added that a Framework Agreement on Fixed-Term Work was introduced in order to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. This instrument created minimum protective provisions to avoid employees being forced into precarious situations. The position held by the CJEC in these two cases drew a path towards an adjustment of jurisprudence to more clarity and transparency in the working conditions.

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[2] Case C-144/04, *Mangold*, 22 November 2005, Rec p.I-9981, especially par.64.

[3] Case C-212/04, *Adeneler*, 4 July 2006, especially par.61-64.

2. In 2005, a new court was added to the court structure of the European Union: the European Civil Service Tribunal. This Tribunal has jurisdiction in any dispute between the Community and its civil servants according to Article 136 of the Treaty of the European Communities. In one of its very first cases[4], the Civil Service Tribunal gave a landmark decision on 26 October 2006[5] holding that EU institutions and agencies had to respect an obligation to motivate any decision to unilaterally terminate a temporary agent's contract of employment of indefinite duration. The agent in question worked for a Community agency: the European Training Foundation. This decision clarified the legal regime of termination of indefinite contracts of employment, went further into the reasoning of the CJEC long standing case law in the field and raised the level of legal certainty in the EU civil service.

B. The case law of EC courts

a. The case law of the CJEC

3. Until quite recently, the case law of the CJEC differed significantly from the precedent set by the European Civil Service Tribunal in the *Landgren* case. The latter judgment could be seen as a reversal of jurisprudence in that it no longer authorises competent authorities to unilaterally dismiss temporary agents, employed under a contract of indefinite duration, without stating reasons for their decision. Indeed, it imposes on the authority an obligation to motivate its decisions.

4. According to previous EU jurisprudence, the unilateral rescission of a temporary agent's indefinite contract, which included a notice period provision under Article 47 of the Staff Regulation, was justified by the contract of employment and did not have to be motivated[6]. Contrarily to civil servants, the employment stability of which was guaranteed by their status, temporary agents were subject to a specific regime on the

[4] Indeed, the case had originally been registered before the European Court of First Instance and then transferred to the Tribunal by order of 15 December 2005.
[5] Case F-1/05 *Landgren/Fondation Européenne pour la Formation*
[6] *Schertzer/Parliament*, 18 October 1977, 25-68, Rec.p.01729.

basis of their contract of employment concluded with the relevant institution. Indeed, the contract governed the relationship between the agent and the institution. Another element which was particular to temporary agents, in comparison with civil servants, was that the application of Article 25 Staff Regulations relating to the obligation to motivate binding decisions was excluded[7].

5. The contract explicitly provided for its unilateral rescission with no obligation to state reasons. This exemption could be seen in relation to the fact that, under Article 2(c) of the Staff Regulations, mutual trust and confidence was a central element of a temporary agent's hiring[8]. Furthermore, according to Article 47(2) Staff Regulations, putting an end to a contract of indefinite duration derived from the competent authority's freedom of appreciation, so long as it respected the contractual notice period. Moreover, the Tribunal was not competent to examine the validity of the competent authority's appreciation, unless it proved the existence of a flagrant error or an abuse of power [9].

6. Nevertheless, nothing prevented the competent authority from limiting by way of contractual provisions its power to rescind contracts in the interest of the personnel. As such, the agent in question could benefit from the fact that the contractual provisions would be respected[10]. This provided temporary agents employed under contracts of indefinite duration with some sort of safety net, but one that could only be triggered by the relevant competent authority. As such, the situation relating to the termination of temporary agents' contracts remained largely arbitrary.

7. Notwithstanding the above, the position held by the CJEC in two fairly recent judgments, the *Mangold*[11] case and the *Adeneler*[12] case, drew the path for an adjustment

[7] *Hoyer/Commission,T-51/91,* 17 March 1994, 27, Rec. p. II-341; *Smets/Commission, T-52/91,* 17 March 1994, 24, Rec. p. II-353.
[8] *Speybrouck/Parliament,* 28 January 1992, 90, 93-95, Rec.p.II-33.
[9] *Speybrouck/Parliament,* 28 January 1992, 97-98, Rec.p.II-33; *B/Parliament,* 14 July 1997, 70, Rec.p.II-697.
[10] *Schmitt/AER,T-175/03,* 7 July 1994, 56, 59, Rec.p.II-939; *Karatzoglou/AER, T-471/04,* 23 February 2006, 42-45.
[11] Case C-144/04, *Mangold,* 22 November 2005, Rec p.I-9981, especially par.64.
[12] Case C-212/04, *Adeneler,* 4 July 2006, especially par.61-64.

of the jurisprudence to modern working conditions. The Court held that contracts of indefinite duration constitute the general form of working relationships, but also recognised the fact that fixed contracts can be the norm in certain sectors, occupations and activities where they suit both employers and workers. Consequently, the benefits brought by employment stability constitute an essential element of the protection of employees, whereas fixed-term contracts rarely fulfil the needs of employers and employees. Accordingly, the Framework Agreement on Fixed-Term Work concluded by ETUC (European Trade Union Federation), UNICE (Union of Industrial and Employers' Confederations of Europe) and CEEP (European Centre of Enterprises with Public Participation and Enterprises of General Economic Interest) implemented by Council Directive 1999/70/EC dated 28 June 1999 [13] aims to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. This instrument creates minimum protective provisions to avoid employees being forced into precarious situations.

8. The European Court of Justice's reasoning in the above cases also derived its justification from various other international instruments. The Court called to mind that all persons have a right to equality before the law and to protection against discrimination, the latter constituting a universal right under the Universal Declaration of Human Rights, the United Nations Convention Against Discrimination and the European Convention on Human Rights. Moreover, Convention No 111 of the International Labour Organisation prohibits discrimination in terms of employment [and work]. In fact, the principles mentioned above are binding on Member States as they are guaranteed by Article 6 of the EU Treaty, according to which the European Union is based on the principles of liberty, democracy, of respect for human rights and fundamental liberties. Additionally, the Court based its argumentation on the European Social Charter and the European Fundamental Rights Charter. Nevertheless, a subsequent decision by the Civil Service Tribunal developed further the reasoning of the ECJ.

[13] JO L175, p.43.

b. New decision of Civil Service Tribunal

9. On 20 October 2006, the European Civil Service Tribunal delivered, in the case of *Landgren v European Training Foundation* [14], a judgment to the effect that a decision to unilaterally terminate the indefinite contract of a temporary agent must be sufficiently motivated. Indeed, if an employer could rescind an indefinite contract without having to give reasons, his only restriction being his obligation to respect the notice period, this would firstly ignore the very nature of contracts of indefinite period which guarantee relative security of employment and secondly blur the difference between indefinite and fixed-term contracts.

10. Even though employment security which flows from contracts of indefinite period is not comparable to that guaranteed by civil servant positions, contracts of indefinite period offer better employment security than fixed-term contracts. As such, it is clearly visible that this case sets a precedent for future case law: it imposes on employers the obligation to adequately motivate *all* decisions to repudiate contracts of employment. This goes hand in hand with Article 4 of Convention No 158 of the International Labour Organisation, according to which a worker cannot be dismissed without an adequate reason for the dismissal being given either linked to the worker's aptitude or behaviour or based on the running necessities of the company, the establishment or the service.

11. In an appeal dated 22 December 2006 brought by the European Training Foundation against the *Landgren v European Training Foundation* judgment of the Civil Service Tribunal, the Foundation questioned the scope given to the obligation to motivate decisions by the Tribunal. Indeed, the applicant argued this point by saying (1) that there was no legal basis obliging the Foundation to motivate its decision to dismiss a temporary agent, (2) that the attacked judgment erroneously relied on international agreements and conventions which do not apply to relations between the European institutions and its personnel and (3) that the attacked judgment created a contradiction between the formal obligation to motivate a decision and the legality of the knowledge which the interested

[14] Case F-1/05 *Landgren v Foundation Européenne pour la Formation*

party had of the motives which led to the dismissal. Furthermore, the Foundation argued that the contested judgment contained an error in law due to a distortion of facts and to the ignorance of the general interest.

C. Reversal of previous case law or, rather, adaptation of it to some sort of "legal orthodoxy"?

12. There is a basic obligation for all Community acts to be motivated, in line with general principles of Member States. At community level not only individual acts but, as well, regulatory decisions must be motivated. Indeed, there is a real need for transparency and for a suitable reasoning to be given before a decision is rendered at regulatory level. These requirements form the "raison d'être" of the subsidiarity principle, i.e. the legitimization of the Community's intervention.

13. Subsequently, at Community level, the general principle which imposes an obligation to state reasons goes beyond the extent of this principle at national level. Accordingly, Article 253 of the EC Treaty imposes an obligation to state reasons for decisions and the Staff Regulations of Officials of the European Communities contain a general interpretative clause imposing an obligation to motivate decisions regarding the appointment, establishment, promotion, transfer, determination of administrative status and termination of service of an official: Article 25 Staff Regulations, according to which *'(…) Any decision adversely affecting an official shall state the grounds on which it is based (…)'*.

14. From a more substantial point of view, as underlined by the European Civil Service Tribunal, the most common way for employers to contract with employees is to offer contracts of unlimited duration. This type of contract corresponds to positions of permanent need. In other words, in this context contracts of indefinite duration are the norm and fixed-term contract are the exception. If it was not the case and the Administration was allowed to dismiss employees without stating reasons for their decision, it would defeat the purpose of these contracts. As such, it is fair to say that the

recent *Landgren* decision is an adaptation towards some sort of "legal orthodoxy" in the light of Article 253 of the EC Treaty and could lead the way towards sustainable case law in this field.

15. At the time of the CJEC rulings on the subject, the EU was still in a developing phase, albeit at an advanced stage. Therefore the CJEC wanted its Administration to attain its objectives with minimum constraints. Moreover, the Commission was the leading institution that achieved EU integration; therefore it was very respected and reliable. Today the image of the Commission has changed, the EU has achieved a lot and it is a step away from an EU Constitution. In addition, the Commission is criticized for not being as reliable as it was, merely because of unconsidered censure carried out by the European Parliament and a set of devastating administrative reforms. New types of posts and employment contracts have been created within the institutions, such as for example contractual agents' posts, in order to reflect the ever increasing competition which exists in acceding to posts within the European institutions and their agencies, especially since the fifth enlargement of the European Union dated 1 st May 2004. Interpretation of the law must now be seen in the context of today's concrete circumstances and thus adapt to modern employment requirements .

16. Consequently, the *Landgren* judgment was a welcomed and "expected" surprise which confirmed a shift in the case law, making it more adapted to modern employment realities. However, a more careful reading of the evolution of the case law shows that the CJEC had already built a passageway for the Civil Service Tribunal's courageous decision with both the *Mangold*[15] and the *Adeneler*[16] decisions, which preceded the *Landgren*[17] decision. Finally, the latter decision could be seen as a logical step in light of the recent creation of the European Union Fundamental Rights' Agency at the beginning of March 2007, which aims among other things to stamp out discrimination altogether, including in the workplace.

[15] Case C-144/04, *Mangold*, 22 November 2005 , Rec p.I-9981
[16] Case C- 212/04, *Adeneler*, 4 July 2006,
[17] Case F-1/05 *Landgren v Foundation Européenne pour la Formation*