EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

4 April 2020

Case Document No. 9

***Confederazione generale sindacale* (CGS) v. Italy**
Complaint No.144/2017

RESPONSE FROM CGS
TO THE QUESTIONS OF THE COMMITTEE

Registered at the Secretariat on 14 March 2020

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SUBJECT: response to the Committee's request for information of 17 February 2020

Collective complaint n.144 / 2017 General Trade Union Confederation (CGS)

On the request for information of February 17th, 2020 in view of the examination of the collective complaint No. 144 / 2017 General Trade Union Confederation (CGS) against Italy, the CGS provides the following answers, indicating the significant changes that occurred after the introduction of the collective complaint for regarding the limits of application to the use of fixed-term contracts (maximum number of contracts and maximum overall duration) and the remedies to be applied in the event that the use of fixed-term contracts violates the applicable laws, distinguishing the responses according to the three areas indicated in the communication of this Committee:

1) private sector workers;

2) public administration workers (general provisions);

3) public school sector: a) teaching staff; b) non-teaching staff (ATA).

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Temporary workers in the private sector

After the filing of the collective complaint No. 144 / 2017, significant changes were made to the regulation of fixed-term contracts in the private sector, modifying article 19 of the legislative decree No. 81 / 2015 with the decree law 12 July 2008, n. 87, converted by law 9 August 2018, No. 96.

The most significant changes concern all three of the preventive measures provided for in clause 5, point 1, of the EU framework agreement on fixed-term work, implemented by Directive 1999/70/EC.

The fixed-term contract without objective reasons can have a maximum duration of 12 months (art.19§1, first period) and can reach a maximum total duration of 24 months, even non-consecutive, with tasks of the same level and category professional, only in the presence of two specific reasons or objective reasons:

a) temporary and objective needs, unrelated to ordinary activities, or needs to replace other workers;

b) needs related to temporary, significant and non-programmable increases in ordinary activities (art. 19§1, second sentence, and art. 19§2).

Only fixed-term contracts for carrying out seasonal activities are not subject to the limitation of the maximum overall duration of 24 months (art. 19§2).

Within the maximum overall duration of 24 months, up to a maximum number of four extensions are provided (art.21§1, legislative decree No. 81 / 2015).

The sanction of the indefinite transformation of the single contract or of the succession of fixed-term contracts is envisaged when:

1- the fixed-term contract without objective reasons has exceeded the maximum duration of one year and is devoid of the only two objective reasons allowed (art. 19§1-bis);

2- the fixed-term contract has exceeded the maximum overall duration of 24 months, unless the collective agreements provide otherwise or a procedure has been activated before the territorial directorate of labor to extend the contract up to a maximum of another 12 months (art.19§2-3);

3- the fixed-term contract has not been entered into in writing, if lasting more than 12 days, or is devoid of objective reasons after the first 12 months of work (art.19§4);

4- after the four extensions allowed within a single fixed-term relationship lasting no more than 24 months (art. 21§1, Legislative Decree No. 81/2015).

It should be noted that, with effect from 24 June 2017, in the private sector, article 54-bis of Law Decree No. 50/2017, converted by Law No. 96/2017, introduced a specific regulation of temporary work determined for occasional services, which provides that, if the occasional service contracts activated with the same user exceed the total value of 2,500 euros per year or the total number of 280 hours worked per year (within a calendar year) , the relationship is transformed into a full-time and indefinite subordinate employment contract (art.54-bis§, law decree No. 50 / 2017). This sanction does not apply to public administrations that use occasional work.

After the filing of the collective complaint, the article 29 of the legislative decree No. 81 / 2015 has undergone changes that concern only the general discipline of temporary workers employed by public administrations, which will therefore be treated below.

The same law decree No. 87 / 2018 specifies that the new regulation of the fixed-term contract in private employment does not apply to contracts stipulated by public administrations as well as fixed-term employment contracts concluded by public research institutes.

Article 55 of Legislative Decree No. 81/2015 has not undergone changes since the presentation of the collective complaint, which may be relevant for the Committee's decision.

Finally, article 2§1, of legislative decree 81/2015 has been modified by legislative decree 3 September 2019, No.101, substantially providing for the equalization of fixed-term subordinate employment,

with the consequent sanction of the transformation for an indefinite period, of the collaborations organized by the client even if the methods of performance of the service are organized through digital platforms, such as riders, for which a specific discipline was introduced by the same law decree No. 101 / 2019 of protection with articles from 47-bis to 47-octies of the legislative decree No. 81 / 2015. The Supreme Court of Cassation with the sentence No. 1663 / 2020 (Extender Mr. Guido Raimondi, former President of the European Court of Human Rights) confirmed the existence of an enhanced protection in the private sector, with the retraining in the employment relationship subordinate and the transformation into full-time and indefinite contract, for workers used through digital platforms before the new protection regulation introduced by the law decree No.101 / 2019.

Temporary workers of the public administration (general predictions)

In general, after the presentation of the collective complaint, there have been no significant legislative changes that have eliminated the alleged violations of the European Social Charter, if the new stabilization procedure for fixed-term public staff that has matured for 36 months is excluded of service employed by the same public employer, introduced by article 20 of legislative decree No. 75 / 2017 (so-called "Madia reform"). This procedure provides for the possession of certain conditions and does not allow the right to permanent employment, but it is at the option of the public administration.

Article 36 of Legislative Decree No. 165/2001 has been amended by Legislative Decree No. 75/2017 with effect from 22 June 2017 and by the various amendments to Article 4 of Legislative Decree No. 101/2013, confirming however, the absolute lack of both clear limits in the use of fixed-term contracts in public employment and effective sanctions, therefore, whether the public employer hires for a fixed-term through legitimate bankruptcy procedures or outside the bankruptcy procedures, in case there will never be an indefinite transformation or effective compensation for abusive use of forward contracts.

Indeed, it can be said that the relevant legislative changes introduced after the presentation of the collective complaint, which are briefly examined, have aggravated the situation of public precariousness and the reported violations of the Charter.

In fact, as a consequence of the judgments of the Court of Justice of 25 October 2018 in "Sciotto case" C-331/17 (see attached No. 1) on fixed-term public workers of the lyrical-symphonic public foundations and of 8 May 2019 in " Rossato case" C- 494/17 (see attached No. 2) on fixed-term public workers of the music conservatories of "Afam sector", **on 25th July 2019 the European Commission started the infringement procedure No. 2014/4231 with a letter of formal notice against Italy concerning both the lack of safeguards against abusive recourse to the succession**

of fixed-term contracts and the violation of the principle of non-discrimination with respect to comparable open-ended workers, who are interested in public employment:

• the staff employed in the Italian opera-symphonic foundations;

• **fixed-term contracts entered into with teaching staff and ATAs for the supply of substitutes**;

• fixed-term contracts entered into with health personnel, including managers, of the National Health Service;

• fixed-term contracts entered into with workers from institutions of advanced artistic, musical and choreutic training ("AFAM"), subject to the supervision of the Ministry of Education, University and Research ("MIUR");

• fixed-term contracts entered into pursuant to law No. 240/2010, which contains rules on the organization of universities, academic staff and recruitment;

• the employment relationships of fixed-term forestry workers;

• calls to service of voluntary staff of the National Fire Brigade.

The relevant modification of article 29 of legislative decree No. 81 / 2015 after the presentation of the collective complaint took place with the introduction of paragraphs 3-bis and 3-ter of the same article, following the law decree 28 June 2019, No. 59 (converted from the law 8 August 2019, No. 81), which concerns the artistic and technical staff hired for a fixed term of the lyric-symphonic public Foundations. This staff was deprived of the sanction of the transformation indefinitely even in the event of exceeding 36 months of non-continuous service, in total contrast with the decision of the Court of Justice with " Sciotto ruling", thus forcing the European Commission to immediately activate the procedure of infringement 2014/4231 with the formal notice of July 25, 2019, which also concerns the AFAM sector.

To confirm the validity of the position of the European Commission with the opening of the infringement procedure No. 2014 / 4231, on the total lack of anti-abusive measures for fixed-term university researchers, preliminary questions have been raised by the Regional Administrative Court for Lazio with an decision of 28 November 2018 in case C-326/19 Ministry of Education, University and Research - MIUR and others (see attached No. 3).

Finally, General Lawyer Kokott on 23rd January 2020 filed his written conclusions (see attached No. 4) in case C-648/18 UX (Statut des juges de paix italiens), pointing out to the Court of Justice that the honorary magistrates how the judges of peace are to be equated, with regard to working conditions (in this case, paid holidays), to permanent professional magistrates. Case C-648/18 UX (Statut des juges de paix italiens) was filed by the Justice of the Peace of Bologna with an order of October 16, 2018 (see attached No. 5) which, among the preliminary questions, asked two of them to detect the violation by the European Commission of the obligations enshrined in the Treaties to activate

infringement procedures against States in the event of a fragrant violation of EU law, as in the case of public precariousness as regards Italy.

Temporary public school workers: a) teaching staff; b) ATA staff

Preliminarily, the numerous changes regarding the school recruitment of teaching staff and ATA, which were introduced after the filing of the complaint and which are reported in the communication of the Committee of 17 February 2020, have aggravated the reported violation of the Charter also in the school public sector.

The statistical data relating to the 2018/2019 school year (i.e. until 31 August 2019), collected by the Court of Auditors in the 2019 report on the coordination of public finance (see attached No. 6), attest to table 5 on page 273 that there was an increase in non-permanent staff in the state school in the 2018/2019 school year, for No. 35.863 teachers with annual substitutes until 31 August 2019, for No. 127.913 teachers with substitutes until the end of the teaching activities (30 June 2019) and for No. 30.3007 of alternate ATA staff until 31 August 2019.

So now, it should be noted the modification, made by article 1§792 of the budget law n.145 / 2018, of the unitary system and initial training and access to the roles provided for by Legislative Decree No. 59 of 2017 and divided into a national public competition and a subsequent three-year training course, the conclusion of which was to proceed with the entry into the role and assignment to the territorial area where he had served in the last year with assignment annual.

Article 1§792 of law No. 145/2018 dictated, in this regard, a substantial revision of the system for the recruitment of teachers of first and second grade secondary schools, in particular: the end of the three-year initial post-competition training course, possession of the specific qualification on the class of competition as a requirement for access to competitions as an alternative to possession of the degree and specific educational credits, the simplification of the competition rules, the abandonment of the territorial areas introduced by law No. 107 / 2015 in favor of the appointment at the educational institutions where the trial period took place and the introduction of a four-year bond to mobility.

After the extraordinary hiring plan in the school year 2015/2016, law No. 107 / 2015 and, in particular, paragraphs 95, 109, 131 and 132 of article 1 of the law in question were effectively depleted also to limit the abusive use of fixed-term contracts.

The article 1§131 of law No. 107 / 2015 has been repealed by law decree No. 87 / 2018, thus allowing unlimited reiteration of the substitutions of teaching staff.

The article 1§132 of Law No. 107 / 2015 has not been changed, and therefore no additional resources have been provided for compensation for damages in the event of abusive use of annual substitutions for the years following 2016.

The Article 1§109 of Law No. 107 / 2015 has not been changed, has in fact remained unimplemented.

In fact, with the decree law 29th October 2019, No. 126, converted by the law No. 159 / 2019, measures of extraordinary necessity and urgency have been introduced regarding the recruitment of school staff and research bodies and the qualification of teachers, which provide an extraordinary and qualifying competition aimed at those who have gained 3 years of teaching, even if not continuous, for the permanent hiring of 24,000 non-qualified teachers starting from 1 September 2020, and an ordinary competition for graduates, aimed at another 24,000 stable hires. The competitions have been postponed until a later date due to the well-known Coronavirus events.

The article 1, paragraphs 605 and 607, of law n.296 / 2006 has not been changed.

The article 399 of Legislative Decree No. 299/1994 was amended by Law Decree No. 126 of 29 October 2019, with the modification of paragraph 3 and the introduction of paragraph 3-bis. These changes have no bearing on this complaint.

The article 400 of Legislative Decree No. 297/1994 has not been modified to a significant extent for the purposes of the decision.

The article 401 of Legislative Decree No. 297/1994 has not been changed.

The article 485 of Legislative Decree No. 297/1994 has not been changed.

The article 554 of Legislative Decree No. 297/1994 has not been changed.

The article 4 of Law No. 124/1999 has been amended by Law Decree No. 126 of 29 October 2019, introducing paragraph 6-bis, with which they are established for annual substitutes or until the end of specific provincial ranking educational activities. distinguished by place and class of competition. However, these rankings cannot be used for entry into the role, pursuant to art. 399, paragraphs 1 and 2, of Legislative Decree no. 297/1994.

The provisions of article 4, Legislative Decree n. 87/2018, in the text converted into law, seek to remedy "temporary", in terms of didactic continuity and continuation of the service of graduate graduates who, having obtained a favorable precautionary measure from the administrative judiciary which was then modified (or will be modified) on the merits with the rejection of the application for inclusion in the provincial rankings until exhaustion following sentence No. 11/2017 of the plenary meeting of the Council of State, i.e. on the issue being dealt with by the Committee in the context of the collective complaint No. 158 / 2018 proposed by ANIEF

In addition to granting long notice in the execution of unfavorable decisions to graduates, the legislator also remodels the final duration of the employment relationship, as required by paragraph 1 bis of the article in comment, a) transforming employment contracts to open-ended contracts entered into with teachers on fixed-term employment contracts with a final deadline of 30 June 2019; b) stipulating with the teachers, instead of the annual substitute previously conferred, a fixed-term contract with a final term not later than 30 June 2019 or, now, 30 June 2020.

Basically, after the unexpected change of orientation of the Council of State on graduate magistrates, even the permanent contracts already entered with reservations have been terminated and the employment relationships precarious, despite the evident structural need of teachers of childhood and primary school, laid off with years of service after receiving a stable employment contract.

Finally, to confirm the validity of the position of the European Commission with the opening of the infringement procedure No. 2014/4231, on the total lack of anti-abusive measures for teachers of Catholic religion on a fixed-term basis, preliminary questions were raised by the Court of Naples with decision of 13 February 2019 in case C-282/19 Gilda-Unams (see attached No. 7), Federation of the School Division adhering to the complainant CGS.

The Court of Naples contested the Constitutional Court's ruling No. 248 / 2018, which reaffirmed the absolute prohibition of conversion for an indefinite period for all fixed-term employment relationships in the public sector, even if of a duration equal to or greater than 36 months, considering it to be in contrast with the decision of the Court of Justice with the Sciotto judgment. With the written observations of July 31, 2019, the European Commission has adhered to the interpretation of the Court of Naples in case C-282/19 Gilda-Unams on precarious teachers of the Catholic religion.

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Summary of information provided

In the private sector with the law decree No.87 / 2018 the directive 1999/70/CE on fixed-term work has been transposed in a satisfactory way, so in Italy in the private sector only the permanent employment contract is actually the common and general form of employment contracts (art.1 legislative decree n.81 / 2015), with extension of the protections provided, including the legislation on illegal layoffs, to all atypical forms, such as the fixed-term contract (articles 19-29 legislative decree No. 81 / 2015), the administration of fixed-term work (articles 30-40 of the legislative decree No. 81 / 2015), the collaborations organized by the client (article 2 of the legislative decree No. 81 / 2015), occasional work (article 54-bis of law decree No. 50 / 2017), work through digital platforms (from article 47-bis to article 47-octies legislative decree No. 81 / 2015), when there has been an abusive use of the aforementioned flexible forms or atypical work.

In fixed-term work employed by the public administration, including that of the school sector, the regulatory situation remained unchanged, indeed worsened after the presentation of the collective complaint.

There are no legislative limits to the use of fixed-term contracts in public work, even in public schools with the repeal of article 1§131, of Law No. 107/2015.

There are no effective sanctions such as the permanent transformation of the employment contract in the private sector nor the compensation for damage - applicable to the extent of 2.5 to 12 monthly

salaries in the case of exceeding 36 months of service, even if not continuous according to what established by the Cassation with Sections united in the judgment No. 5072 / 2016 and endorsed by the Constitutional Court with the judgment No. 248 / 2018 -, according to the Court of Justice, constitutes the effective sanction.

In the public school sector, compensation for damages is not even due, since the Court of Cassation (most recently, judgment of 12 February 2020, No. 3473), even after the Rossato judgment of the Court of Justice, continues to believe that the stabilization of the alternates of the school, even potential and possible, fully satisfy the damage.

The non-application of Directive 1999/70 against many categories of fixed-term workers employed by public administrations is endorsed by the (late) opening of infringement procedure n° 2014 / 4231 on 25 July 2019 by the European Commission.

Confident to have responded exhaustively to the information requested by the Committee, cordial greetings are sent.

Attached:

1- Sciotto judgment of the Court of Justice;

2- Rossato judgment of the Court of Justice;

3- Decision of Regional Administrative Court for Lazio of 28 November 2018 in case C-326/19 Ministry of Education, University and Research - MIUR and others;

4- Opinion of Advocate General Kokott of 23 January 2020 in case C-648/18 UX (Statut des juges de paix italiens);

5- Decision of the Justice of the Peace of Bologna of 16 October 2018 in case C-658/18 UX (Statut des juges de paix italiens);

6- Extract from the 2019 report on the coordination of public finance of the Court of Auditors, pages 273-275, in italian (original) language;

7- Decision of the Naples' Court of 13 February 2019 in case C-282/19 Gilda-Unams.

Rome, March 15th 2020

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