EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

4 June 2020

Case Document No. 10

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

RESPONSE FROM THE GOVERNMENT TO THE QUESTIONS OF THE COMMITTEE

Registered at the Secretariat on 29 May 2020

REPUBBLICA ITALIANA

Ufficio dell'Agente del Governo italiano
davanti al Comitato Europeo dei Diritti Sociali
*
Avvocatura Generale dello Stato

European Committee of Social Rights (ECSR)

Collective complaint n. 144/2017
C.G.S./vs Italy

REPLIES OF THE ITALIAN GOVERNMENT

Roma, 29 maggio 2020

With the letter dated 17 februrary 2020, the Secretariat of the General Directorate of the European Social Charter, requested the Italian Government to
provide information on the subject of the repetition of forward contracts in Italy, in particular:
-the limits applicable to the use of fixed-term contracts (maximum number of fixed-term contracts and total duration) and
- the remedies available where the use of fixed-term contracts violates applicable laws, with regard to respectively: 1) private sector workers; 2) public sector workers (general provisions); 3) the public school sector : (a) the teaching staff; (b) non-teaching staff.

1. On the limits applicable to the use of fixed-term contracts and the remedies available where the use of fixed-term contracts violates applicable laws, with regard to private sector workers

With regard to employment relationships in the private sector, it should be noted that the rules on fixed-term contracts are contained in Articles 19 et seq. of Legislative Decree no. 81 of June 15, 2015, which was more recently amended by Decree Law no. 87 of July 12, 2018, converted into Law no. 96 of August 9, 2018.

With article i of the aforementioned Decree-Law no. 87/2018, the legislator intended to counteract the excessive precariousness of employment relationships, promoting their stabilization and encouraging hiring for an indefinite period.

In particular, the limit on the duration of fixed-term contracts was reduced from thirty-six to twelve months.

The application of a longer term, within the maximum limit of twenty-four months, is possible only in the presence of at least one of the following conditions - the so-called causes, not provided for by the previous regulations - (Article 19, paragraph i, Legislative Decree no. 81/2015):

a) temporary and objective needs, extraneous to the ordinary activity, or the need to replace other workers;

b) needs related to temporary, significant and non-programmable increases in ordinary activities.

If the term contract is stipulated for a duration of more than twelve months in the absence of the above-mentioned conditions, it is automatically transformed into an employment contract of indefinite duration from the date on which the twelve-month period is exceeded (article 19, paragraph 1-bis, legislative decree no. 81/2015).

As in the previous regulations, the different provisions of collective agreements are subject, with reference to the limit of twenty-four months. More specifically, the duration of fixed-term employment relationships between the same employer and the same worker, as a result of a succession of contracts, concluded for the performance of tasks of the same level and legal category and regardless of the periods of interruption between one contract and another, may not exceed twenty-four months, without prejudice to the provisions of collective agreements (article 19, paragraph 2, legislative decree no. 81/2015).

The parties may also conclude a further contract - for a maximum duration of twelve months - only with the National Labour Inspectorate competent for the territory - with the so-called assisted exemption (article 19, paragraph 3, legislative decree no. 81/2015).

The application of the term to the contract is without effect if it does not result from a written deed. In case of renewal, the written deed must specify the conditions (as per article 19, paragraph 1, legislative decree no. 81/2015) under which it is stipulated, regardless of the duration of the previous relationship.

In case of extension of the same relationship, however, the indication of the condition is mandatory only when the limit of twelve months is exceeded (article 19, paragraph 4, and article 21, paragraph 01, legislative decree no. 81/2015). The so-called dignity decree has also reduced from five to four the maximum number of possible extensions for the fixed-term contract, subject to compliance with the maximum duration limits indicated above. In the event of a fifth extension, the contract is considered to be automatically converted into an open-ended contract from the date of its commencement (article 21, paragraph 1, Legislative Decree no. 81/2015).

Moreover, again in order to limit the use of fixed-term employment and encourage the establishment of permanent employment relationships, Article 3, paragraph 2, of Legislative Decree no. 87/2018 provided, on the occasion of each renewal of the fixed-term contract, an increase of 0.5% in the additional contribution to finance the monthly

unemployment benefit, provided for by Article 2, paragraph 28, of Law no. 92 of June 28, 2012. The term contracts stipulated for the replacement of absent workers or for the performance of seasonal activities as per Presidential Decree no. 1525 of 7 October 1963 (article 2, paragraph 29, Law no. 92/2012) are excluded from the obligation to pay this amount. The law also provides that this additional contribution is reimbursed in the case of transformation of the contract into a permanent contract and in the case of employment for an indefinite period within six months of the termination of the previous temporary contract (Article 2, paragraph 30, Law no. 92/2012).

The changes introduced with regard to fixed-term employment contracts apply to contracts entered into after the date of entry into force of the aforementioned decree-law (July 14, 2018), as well as to contract renewals and extensions after October 31, 2018.

However, as specified in Article 1, paragraph 3, of Decree-Law no. 87/2017 (as last amended), the aforementioned new provisions do not apply to contracts entered into by public administrations and fixed-term employment contracts entered into by universities.

With reference to the second question posed by the European Social Rights Committee, it should be noted, finally, that, in cases of violation of the regulations described above, there is no provision for appeal procedures other than those guaranteed by the regulations currently in force on labour relations, according to which the work ritual referred to in articles 409 et seq. of the Code of Civil Procedure is applied.

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2. On the limits applicable to the use of fixed-term contracts and the remedies available where the use of fixed-term contracts violates applicable laws, with regard to public sector workers

Public administrations can also make use of the flexible contractual forms provided for by the Civil Code and the laws on employment relationships within the company "to respond to temporary and exceptional needs" (art. 36, paragraph 2, D.L.). vo 165/2001); but the penalties for abuse in the use of a fixed-term contract - or for the stipulation of a fixed-term contract in the absence of the conditions that legitimize the application of the term, or in the terms of articles 4 and 5, D. L.vo 368/2001 - are different: transformation into an open-ended contract (in the private sector), or compensation for

damages and liability under article 36, paragraph 5, D.L.vo 165/2001 for public employment.

The controversial issue, thus delimited, calls into question the regulations on fixed-term employment employed by non-economic public bodies in the context of contractual public employment, which, although articulated in various provisions that have changed over time, has constantly moved along a fundamental guideline marked by the constitutional requirement of compliance with the canon expressed by the last paragraph of Article 97 of the Constitution, which prescribes that employment in public administrations is accessed through competition, except in the cases established by law. This canon is a projection of the principle of equality that wants everyone, according to ability and merit assessed through a competition procedure, can access public employment and that, on the contrary, does not allow access in a stable role by other means, especially if marked by illegality.

Having always had to deal with this principle, the discipline of fixed-term work employed by public administrations, albeit within a framework of tendential unity, has been characterized by this differential element compared to that of private work where there is no symmetrical principle of access to stable private employment through a competition procedure.

Already Article 36, paragraph 4, of Legislative Decree no. 29 of 29 March 1993, in the text amended by Article 7 of Legislative Decree no. 546 of 23 December 1993 - on the occasion of the Board of Directors' meeting of the European Parliament and of the Council of 23 December 1993 - has been amended by Article 36, paragraph 4, of Legislative Decree no. 29 of 29 March 1993. first privatization of public employment - even in a context of radical reform aimed at bringing the discipline of public employment closer to that of private employment, it laid down a very strict rule: it prohibited public administrations from establishing fixed-term employment relationships for services exceeding three months, except for special provisions for particular sectors (such as that of school staff), and established that recruitment in violation of this prohibition was automatically null and void and also determined personal, financial and disciplinary responsibilities for those who had ordered them.

Subsequently, Article 22, paragraph 8, of Legislative Decree no. 80 of 31 March 1998 - on the occasion of the second privatisation of public employment, reiterated that

the violation of mandatory provisions concerning the hiring or employment of workers by public administrations cannot lead to the establishment of employment relationships of indefinite duration with the same public administrations, without prejudice to any liability and sanction.

On the other hand, by classifying illegality as a case of illegality, thus going beyond the invalidity for nullity sanctioned by Article 36, paragraph 4, Legislative Decree no. 29/1993, cit. - has provided that the worker concerned has the right to compensation for damages arising from the work performance in violation of mandatory provisions; this occurs because he has been unlawfully employed for a fixed period of time. And he added, as a side effect in terms of sanctions, that the administrations are obliged to recover the sums paid in that capacity from the responsible managers, if the violation is due to intent or gross negligence.

A similar discipline can be found in Article 36 of Legislative Decree no. 165 of 30 March 2001, which had various formulations - having been replaced first by Article 3, paragraph 79, Law no. 244 of 24 December 2007 and then by Article 49 of Law no. 133 of 6 August 2008 - but which remained unchanged in two aspects that are fundamental for deciding the issue in question and which were already found in Article 22 of Legislative Decree no. 80/1998, cited above. On the one hand, the violation of mandatory provisions concerning the hiring or employment of workers by public administrations cannot lead to the establishment of employment relationships of indefinite duration with the same public administrations; on the other hand, the worker concerned has the right to compensation for damages resulting from the performance of work in violation of mandatory provisions.

The legitimate prerequisite for the use of flexible forms of work, such as those of fixed-term contracts, which Article 4 of Law no. 80 of 9 March 2006 had already anchored to “temporary and exceptional needs” of public administrations, is confirmed in the same terms by the second paragraph of Article 36, as replaced by Article 49 1. no. 80/2006: only in order to meet temporary and exceptional needs can public administrations make use of flexible contractual forms of recruitment and employment. And indeed - specifies the third paragraph of the same art. 36 thus reformulated - in order to avoid abuse in the use of flexible work, public administrations cannot resort to

the use of the same worker with more than one type of contract for periods of service exceeding three years in the last five years.

The prevailing interpretation has ruled out the possibility that that provision (Article 36 cit.), precisely because it is special, was repealed by the enactment of Legislative Decree No 368 of 6 September 2001 implementing Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by the general cross-industry organisations UNICE (Union of Industrial and Employers' Confederations of Europe), CEEP (European Centre of Enterprises with Public Participation) and ETUC (European Trade Union Confederation). And lastly, this interpretation received textual confirmation in Article 29, paragraph 4, of Legislative Decree no. 81 of 15 June 2015, which, as part of the reorganisation of the rules governing fixed-term employment contracts, expressly stated that the provisions of Article 36 of Legislative Decree no. 165 of 2001 remain unchanged.

Repeated, therefore, is the principle affirmed by the jurisprudence (ex plurimis Cass, 15 June 2010, no. 14350) according to which a fixed-term employment relationship in the civil service in violation of the law is not subject to conversion into an open-ended relationship, given the prohibition imposed by Article 36 of Legislative Decree no. 165 of 2001, the provisions of which were not amended by Legislative Decree no. 165 of 2001. It follows that, in the event of violation of the rules protecting the rights of the worker, the latter, being precluded from converting the relationship, has only the right to compensation for damages suffered.

In the context of these two principles - on the one hand, the breach of mandatory provisions concerning the recruitment or employment of temporary workers by public administrations cannot lead to the establishment of employment relationships of indefinite duration with the same public administrations and, on the other hand, the worker concerned has the right to compensation for the damage resulting from the performance of work in breach of mandatory provisions (art. 36, paragraph 5, cited above) are various rules that mark the context in which these principles operate and which contain various types of prescriptions aimed at ensuring the exact observance of the provisions on fixed-term contracts in public administrations.

First of all - prescribes the same fifth paragraph of Article 36 of Legislative Decree no. 165/2001 - the administrations are obliged to recover the sums paid in this regard from the managers responsible, if the violation is due to intent or gross negligence.

Article 3, paragraph 79, of Law no. 244 of 24 December 2007 (2008 Finance Act), in reformulating Article 36 cited above, added, in the sixth paragraph, the requirement that public administrations operating in violation of the provisions of the same provision could not recruit for any reason for the three years following such violation.

Subsequently, Article 49 of Law no. 133 of 6 August 2008, converting into law Decree Law no. 1 12 of 25 June 2008, in further reformulating Article 36 cit. added that managers who operate in violation of the provisions of the same provision are also liable under Article 21 of the same Decree Law and that such violations would be taken into account when assessing the manager's actions under Article 5 of Legislative Decree no. 286 of 30 July 1999.

More recently, Article 36 of Legislative Decree no. 165 of 2001 introduced two paragraphs (5-ter and 5-quater) of Article 4, paragraph l, letter b), of Legislative Decree no. 101 of 31 August 2013, converted into Law no. 125 of 30 October 2013, which - while reaffirming that the provisions of Legislative Decree no. 125 of 30 October 2013, which are not applicable to the Company's business activities - have been amended by Article 4, paragraph l, letter b), of Legislative Decree no. 101 of 31 August 2013, converted into Law no. 125 of 30 October 2013. 368/2001 apply to public administrations, without prejudice to the prohibition to transform the employment contract from fixed-term to open-ended and to the right to compensation for the employee, have established that fixed-term employment contracts entered into in violation of the same provision are null and void and give rise to liability of the Treasury; and have confirmed the liability of managers who operate in violation of the provisions of the law by adding that the manager responsible for irregularities in the use of flexible work cannot be paid the result pay.

In summary, on the one hand, the prohibition for public administrations to transform the employment contract from a fixed-term to an open-ended contract has remained as a constant, repeatedly reiterated by the legislator, so that the conversion of the relationship as a "sanction" of the illegitimate application of the term to the employment relationship or, in any case, of the illegitimate recourse to this type of

contract, cannot be predicted. On the other hand, compliance with the regulations on fixed-term employment contracts has been monitored - in addition to the obligation to pay damages to the employee - also by provisions that focus mainly on the liability, including financial liability, of the manager who is responsible for the unlawful use of the fixed-term contract.

Thus it can be said that the legal system provides, on the whole, for "energetic measures" (as requested by the Court of Justice, judgment of 26 November 2014 C-22/13 ff., Mascolo), which are highly dissuasive, to counteract the unlawful recourse to fixed-term employment contracts; this ensures full Community compatibility, in this respect, of the national rules.

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3. On the limits applicable to the use of fixed-term contracts and the remedies available where the use of fixed-term contracts violates applicable laws, with regard to the public school sector : (a) the teaching staff; b) non-teaching staff)

As far as the stipulation of fixed-term contracts in the school sector is concerned, it must be said that the use of school substitutes is governed by a detailed set of rules that identify the legal requirements for recourse to them; the same rules that govern the recruitment of school staff enjoy a special regime with respect to the entire public service, this is expressly provided for in art. 70, paragraph 8, of the Decree Law 165/2001, which states that "the provisions of this decree apply to school staff", without prejudice to "the procedures for the recruitment of school staff as per Law Decree 297/94 and subsequent amendments".

The reference rules for school staff are the specific rules governing the recruitment of school staff and provide for the use of substitutes.

Fundamental in this regard is Article 4 of Law 124/1999, which provides for a complex mechanism for the filling of professorships and teaching posts that are actually vacant within certain time limits, regulating in an analytical manner the possible replacements to be conferred

("1. *Chairs and teaching posts which are actually vacant and available by 31 December and which are expected to remain vacant for the entire school year, where it is not possible to fill them with permanent teaching staff from the province or by using*

surplus staff, and provided that such posts have not already been filled by permanent staff in any capacity, shall be filled by annual replacements, pending completion of the competitive procedures for the recruitment of permanent teaching staff.

2. Non vacant professorships and teaching posts which become available by 31 December and until the end of the school year shall be filled by temporary replacements until the end of the teaching activities. Temporary replacements shall also be provided until the end of teaching activities to cover teaching hours which do not contribute to the creation of chairs or hourly posts.

3. In cases other than those provided for in paragraphs 1 and 2, temporary replacements shall be provided.

4. The posts of provincial staff may under no circumstances be filled by hiring non-statutory teaching staff.

5. By decree to be adopted in accordance with the procedure provided for in Article 17, paragraphs 3 and 4, of Law No 400 of 23 August 1988, the Minister of Education shall issue regulations governing the conferment of annual and temporary substitutes in compliance with the criteria set out in the following paragraphs.

6. For the conferment of annual and temporary substitutes until the end of the teaching activities, the permanent rankings referred to in Article 401 of the consolidated text shall be used, as replaced by paragraph 6 of Article 1 of this Law.

7. For the conferment of temporary substitutes as per paragraph 3, the club or institute rankings shall be used. The criteria, methods and terms for the formation of such rankings shall be based on the principles of simplification and streamlining of procedures, also with regard to the burden of documentation on applicants.

8. Those who are included in the permanent rankings referred to in Article 401 of the Consolidation Act, as substituted by paragraph 6 of Article 1 of the present law, with the exception of the provisions of Article 40, paragraph 2, of Law no. 449 of 27 December 1997, have the right, in that order, to absolute priority in the awarding of temporary substitutes in the educational institutions where they have submitted the relative applications. For secondary and artistic education institutions, absolute priority is given only to the competition classes in whose permanent ranking they have been placed.

9. Candidates who, in competitions for examinations and qualifications for admission to primary school education, have been included in the merit list and have passed the optional test to ascertain their knowledge of one or more foreign languages, shall have priority in awarding alternates to posts whose holders teach a corresponding foreign language.

10. Temporary replacements may be granted only for the period of effective permanence of the service requirements. Remuneration shall be limited to the actual duration of the alternates.

11. The provisions of the preceding paragraphs also apply to administrative, technical and auxiliary staff (ATA). For the conferment of replacements to staff of the third qualification referred to in article 51 of the national collective bargaining agreement of the "School" sector, published in the ordinary supplement no. 109 in Official Journal No 207 of 5 September 1995, the lists of provincial competitions on the basis of qualifications referred to in Article 554 of the Consolidation Act shall be used)."

With D.M. May 25, 2000, no. 201 and June 13, 2007, no. 131, the Ministry of education has implemented art. 4, paragraph 5, now reported, providing for a system of assignment of substitutes based on predetermined and objective criteria; finally, pursuant to art. 22, paragraph 6, Law no. 448/2001, the use of substitutes, for teaching staff, is even imposed when the holiday exceeds 15 days.

The reference regulatory framework is completed by the prohibition, addressed to all public administrations, including the defendants, to hire staff in the absence of the governmental authorization referred to in Article 39, paragraphs 3 and 3-bis, Law 449/97 and the rules governing the so-called de jure and de facto staff, the numerical consistency of individual school classes and the organic plan of each school.

Pursuant to art. 4 of Law Decree 255/2001: "*Recruitment for an indefinite period of time, the measures of use, provisional assignment and, in any case, those of annual duration concerning permanent staff, must be completed by 31 August of each year. Contracts of indefinite duration stipulated by managers with territorial jurisdiction after that date result in the postponement of recruitment to 1 September of the following year, without prejudice to the legal effects from the beginning of the school year in which the appointment was made. When fully operational by the same deadline of 31*

August, the positions of President of the educational institutions must be conferred. By the same date, the territorially competent managers shall also appoint the annual substitutes, and until the end of the teaching activity, drawing on the permanent provincial rankings.

2. After the deadline of 31 August, the school heads shall make the appointments of the annual substitutes and until the end of the teaching activities from the permanent provincial rankings. For appointments relating to short and occasional substitutes, as referred to in Article 4, paragraph 3, of Law 124 of 3 May 1999, the director shall use the school rankings, prepared for the first bracket, in accordance with the new criteria defined for the permanent rankings by Articles 1 and 2".

Consequently, from the regulatory framework outlined above, it emerges that the recruitment of non-statutory school staff for the assignment of substitutes is part of an articulated and complex system that must necessarily take into account both budgetary needs and policies and the need to ensure, at all times, the continuity of school and teaching activities, in compliance with the principle of equality under Article 3 of the Constitution and of good performance and impartiality of the action of the public administration under Article 97 of the Constitution.

It is a general principle, now definitively codified by Legislative Decree 165/2001, for which, in order to determine the organic endowment of the staff of institutions and schools of all levels and educational institutions, "in public administrations, the organization and discipline of the offices, as well as the consistency and variation of the organic endowments are determined in function", among other things, of "rationalizing the cost of public work, containing the total expenditure for personnel, direct and indirect, within the constraints of public finance" (thus art. 1, paragraph 1, letter c, of Legislative Decree no. 165/2001, referred to in art. 6).

On this basis is based, therefore, the rationale of the impossibility of resorting to indiscriminate and full-time hiring of teachers and school staff, given the need to always keep well in view of the real needs arising from the actual holidays that may occur by December 31 of each year and/or during the school year.

The complex system of primary and secondary sources that regulates the subject matter allows the public administration to have at its disposal negotiating tools that, in compliance with budgetary policies and containment of public spending, and in

compliance with the principles set forth in Articles 3 and 97 of the Constitution, guarantee the continuity of the school service through the assignment of substitutes, and therefore through fixed-term contracts, to personnel identified through predetermined and objective criteria.

Recent provisions in this specific area confirm the above. Decree Law no. 134 of 25.9.2009, in fact, art. 4 of Law no. 124/99, cit. 4, paragraph 14-bis was inserted, which reads as follows: "*The fixed-term contracts stipulated for the conferment of substitutes provided for by paragraphs 1, 2 and 3, since they are necessary to guarantee the constant supply of the school and educational service, can be transformed into permanent employment relationships only in the case of entry into service, in accordance with the provisions of this Law and Article 1(605)(c) of Law No 296 of 27 December 2006, as amended*".

Article 10 of Decree Law no. 368/2001 was then amended by Decree Law no. 70/2011, providing for paragraph 4 bis ("*In accordance with the provisions of Article 40, paragraph 1, of Law no. 449 of 27 December 1997, as amended, Article 4, paragraph 14-bis, of Law no. 124 of 3 May 1999, and Article 6, paragraph 5, of Legislative Decree no. 165, are also excluded from the application of the present decree the fixed-term contracts stipulated for the conferment of substitute teaching staff and ATA, considering the need to guarantee the constant supply of the school and educational service also in case of temporary absence of teaching staff and ATA with permanent or fixed-term employment relationship. In any case, article 5, paragraph 4-bis of this decree does not apply*").

Therefore, taking into account that, in the school sector, the use of fixed-term contracts is the instrument made available by the legislator to meet the publicity requirements mentioned above; that these requirements enjoy constitutional protection within our internal legal system; that compliance with them is guaranteed by the analytical identification of the legal requirements, on the basis of which it is possible to identify the individual worker, in the light of predetermined and objective criteria that prevent the p. a. any discretion in the choice; in the simple recourse to such term contracts in the school environment, there can be no abuse by the administration that can be sanctioned with the request for conversion, or with compensation for the damage suffered.

On the other hand, it would be absurd for the legislator, on the one hand, to sanction, with the cited art. 10, paragraph 4 bis D.L. 368/2001, as last amended, the prohibition to apply art. 5 D.L. 368/2001 to fixed-term contracts stipulated for the conferment of substitute teaching staff and ATA, and on the other hand, to identify the same factual circumstance (the repetition of fixed-term contracts for a certain period of time) as a prerequisite for stabilization pursuant to art. 1 paragraph 605 Law 296/2006.

As is well known, in its judgment of 26 November 2014, the Court of Justice of the European Union affirmed the principle that "*Clause 5(1) of the Framework Agreement [...] must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which authorises, pending the completion of insolvency proceedings for the recruitment of permanent staff of State schools, the renewal of fixed-term employment contracts to fill vacant and available posts for lecturers and administrative, technical and auxiliary staff, without specifying a fixed period for the completion of those competitive procedures and excluding any possibility for those lecturers and those staff to obtain compensation for any damage suffered as a result of such renewal. It appears, in fact, that, subject to the necessary checks by the referring courts, that legislation does not allow objective and transparent criteria to be defined in order to ascertain whether the renewal of such contracts actually meets a real need, is suitable for achieving the objective pursued and is necessary for that purpose and, secondly, does not provide for any other measure designed to prevent and penalise the abusive use of successive fixed-term employment contracts.*"

As can be seen from a careful reading of that judgment, the ECJ's ruling of interest appears to relate exclusively (paragraph 108) to *'fixed-term employment contracts to provide annual replacements for vacant and available posts'*, the repetition of which raises problems of compatibility with Community law, without prejudice to the analysis of the specific case.

In particular, the decision stated that there is a problem of contradiction with Community law, and therefore of abuse, with regard to the system for recruiting temporary teachers, where it is a question of providing for the systematic filling of posts on staff governed by law; it is not an abstract judgment but one to be carried out in practice on a case-by-case basis by the judges ('subject to the necessary checks by the

referring courts'), who must find 'whether the renewal of those contracts actually meets a real need'.

Otherwise, also in the light of what the Court itself states in paragraphs 90 et seq. of the grounds, it seems possible to infer the lawfulness of the further hypotheses set out in Article 4 of Law No 124/99, that is to say, temporary replacements for 'de facto' posts which are not vacant but are available, the time-limit for which corresponds to that for teaching activities, that is to say, 30 June, and temporary replacements.

In order to fully understand the pronunciation here, a brief reconstruction of the internal regulatory reference data is allowed.

The national legislation, as set out in Article 4 of Law No 124/1999, read in conjunction with Article 1 of Decree No 131/2007, provides for three types of substitute teaching:

(a) annual replacements for 'de jure' staff, pending the completion of competitive procedures for the recruitment of permanent staff, for vacant and available posts, as they do not have a holder, the deadline for which corresponds to the school year, August the 31;

(b) temporary replacements on the 'de facto' establishment plan, for posts which are not vacant but are available, the deadline for which corresponds to the school year, June the 30;

(c) temporary substitutes, or short substitutes, in other cases, for which the deadline corresponds to the end of the needs for which they were appointed.

The Court of Justice - with its judgment of 26 November 2014 - found that only national legislation governing annual replacements for vacant and available posts, i.e. the legal staff, can lead in practice (but not necessarily) to an abusive recourse to a succession of fixed-term employment contracts, since there is no certainty as to the date for the organization of competitive procedures for the future entry of replacements.

To complete the arguments aimed at reaffirming the ontological diversity between replacements on legal staff (potentially a source of abuse) and replacements on de facto and temporary staff (not abusive) and to refute any attempt to assimilate between replacements on legal staff and replacements on de facto staff, the following further observations may be submitted to the attention of this Court.

Wanting to observe the system of recruiting non-statutory school staff for the assignment of substitutes in the light of the values enshrined in the Italian Constitutional Charter, it cannot but be noted that this is part of an articulated and complex system that must necessarily take into account both the needs and budgetary policies, and the need to ensure, at all times, the continuity of school activities, in compliance with the principle of equality under Article 3 of the Italian Constitution and good performance and impartiality of the action of the public administration under Article 97 of the Italian Constitution.

It is a principle of general order, today definitively codified by art. 6, D.L. 165/2001, for which, without prejudice to the provisions in force for the determination of the organic endowment of the staff of schools and institutes of all levels and educational institutions, "in public administrations the organization and discipline of the offices, as well as the consistency and variation of the organic endowment are determined in function", among other things, of "rationalizing the cost of public labour, containing the total expenditure for personnel, direct and indirect, within the constraints of public finance" (thus art. 1, paragraph 1, letter c, Decree Law 165/2001, referred to in art. 6).

On this basis is based, therefore, the rationale of the impossibility of resorting to indiscriminate and full-time hiring of school staff, given the need to always keep in mind the real needs arising from the actual holidays that may occur by 31 December of each year and/or during the school year.

The complex system of primary and secondary sources that regulates the subject matter allows the public administration to have at its disposal negotiating tools that, in compliance with budgetary policies and containment of public expenditure, and in compliance with the principles set forth in articles 3 and 97 of the Constitution, guarantee the continuity of the school service through the assignment of substitutes, therefore through fixed-term contracts, to personnel identified through predetermined and objective criteria.

The reasons for the use of fixed-term contracts are not limited to mere economic reasons, but are based on objective technical reasons consisting of the incalculable need to deal with possible staff shortages in the pursuit of the objective of continuity of the school service.

The Italian Constitutional Court itself, in its judgment of 20 June 2012 n. 10127, expresses a positive value judgement of the system of substitutes in that it represents a selective path, aimed at guaranteeing the best school training, through which the school's staff is placed in a position by virtue of an alternative system to that of the competition for qualifications and examinations; it responds to the need to balance in-school incoming flexibility, which entails a precarious situation, with a substantial and guaranteed, even if future, placement in a position that, for other civil servants, can only be obtained through the competition, and for private employees may in fact be an unreachable landing place; satisfies unavoidable economic needs that require - in a situation of general economic crisis and budget deficits that are part of the notorious - substantial savings where, as the judge of the law has observed, the policy of recruiting personnel in the State administrations is dictated in conformity with the containment of public expenditure because the hiring of new personnel and the financial resources of the State must comply with the "principle of coordination of public finance" (Constitutional Court, sentence no. 17 December 2004). It is functional to the need to fill teaching posts that are actually vacant and available by 31 December (Law no. 124 of 1999, art. 4, paragraph 1), or to fill teaching posts that are not vacant and that become available by 31 December (Law no. 124 of 1999, art. 4, paragraph 2), or to other needs such as that of replacing absent staff with the right to keep their jobs (Law no. 124 of 199, art. 4, paragraph 2). 4, paragraph 3), taking into account the physiological dyscrasia that always exists between the de facto staff -that is, the staff that is formed within the school at the beginning of the school year and following the school population that is enrolled- and the legal staff -that is, the totality of the teaching staff and auxiliary personnel (ATA) that the Ministry assigns to a given school on the basis of the school population that should be institutionally enrolled at that school.

Given the above in general terms, the groundlessness of the claim derives from the analysis of the factual situation brought to the attention of the Court.

It is clear from the factual reconstruction contained in the application concerning the types of contracts adopted and the periods worked that the present claim is unfounded.

The work carried out by the applicant falls within the case of temporary replacement under Article 4(3) of Law No 124 of 1999 or, in any event, de facto replacement of staff.

As the Court of Justice of the European Union pointed out in the judgment cited above, 'No abuse can be assumed in the case of recruitment to replace teachers absent due to illness or other reasons, with the right to retain their posts, or in the case of de facto staff replacements, since the requirements they meet are in fact contingent and unforeseeable, and such as to rule out, in themselves, abusive conduct.

On this point, it will be sufficient to reiterate what has been said above with regard to the speciality of the school recruitment system which has led the Court of Justice of the European Union (as well as, as said, the jurisprudence of internal legitimacy) to exclude from the ruling of opposition to the Community law the hypotheses of recruitment with a fixed-term contract on de facto staff and for temporary replacements: in the aforementioned hypotheses, there are those objective reasons that justify the use of fixed-term contracts and can exclude an abuse of Community relevance.

It is clear that similar considerations can also be made in order to assess the compatibility of the hypotheses of fixed-term contracts with the principle of non-discrimination: the arguments put forward above concern Clause 5 of the Framework Agreement, but the arguments put forward seem to extend also to Clause 4 of the Framework Agreement; in fact, as mentioned above, Clauses 5 and 4 of the Framework Agreement ETUC, UNICE and CEE both refer to the concept of "objective reasons" as a valid benchmark to exclude both the recurrence of an abuse and the violation of the principle of non-discrimination.

A further aspect that should be highlighted - confirming the fact that the different treatment, also from the point of view of remuneration, provided by the Italian legislator for non-permanent teachers is justified by the existence of objective reasons - is that relating to the duties that tenured teachers perform during the break from teaching activities: these tasks are obviously not carried out by temporary teachers whose contract - as in the present case - ends on 30 June; the activity carried out by tenured teachers in the period between the end of the lesson and the beginning of the new year has very precise connotations and the activity carried out for this purpose will

have to be evaluated for the purposes of comparing situations and therefore of judging whether there is a difference in treatment.

It should be specified, in this regard, that the duties of the tenured teacher do not include only those strictly related to teaching activities, as all other activities functional to the provision of teaching must also be considered relevant; or rather, these activities are mostly carried out during the break from teaching activities, in the period from June to September.

A necessary regulatory premise with respect to what is stated is represented by the provisions of Article 395 of the Consolidated Law on Education (Legislative Decree no. 297 of 16 April 1994), which states that "*Teachers of schools of all levels and levels, in addition to carrying out their normal teaching hours, shall carry out the other activities connected with the teaching function, taking into account the relationships inherent in the nature of the teaching activity and participation in the governance of the school community.*

In particular they: a) take care of their own cultural and professional updating, also within the framework of the initiatives promoted by the competent bodies; b) take part in the meetings of the collegiate bodies of which they are part; c) take part in the realization of the educational initiatives of the school, deliberated by the competent bodies; d) take care of the relations with the parents of the pupils of the respective classes; e) take part in the work of the examination and competition committees of which they have been appointed members.

On the other hand, the same National Collective Labour Contract relating to the staff of the School Department for the four-year period 2006-2009 and the two-year period 2006-2007 further specifies the above about the bipartition of the duties of the teachers in teaching activities and activities functional to teaching, providing, in art. 28, par. 4 that "*Before the beginning of the lessons, the school manager shall prepare, on the basis of any proposals of the collegial bodies, the annual plan of activities and the consequent commitments of the teaching staff, which are given in writing and may provide for additional activities. The plan, including the work commitments, shall be decided by the board of teachers within the framework of the didactic-educational action planner(...)".*

The art. 29, in paragraph 3 of this article "Activities functional to teaching" also provides that "*The activities of a collegial nature concerning all teachers are: a) participation in the meetings of the Board of Teachers, including the planning and verification activities at the beginning and end of the year and information to families on the results of the quarterly, quarterly and final examinations and on the progress of educational activities in nursery schools and educational institutions, up to 40 hours per year; b) participation in the collegial activities of the class councils, interclass, intersection. (...); c) the conduct of the examinations and examinations, including the compilation of the acts relating to the evaluation*".

Furthermore, Articles 5 and 6 of the Ministerial Decree Ministry of education no. 80 of 3/10/2007 provide that, at the end of the lessons, for the pupils with a postponement of the final judgment, the teachers shall provide for didactic interventions aimed at the recovery of training debts and that, by 31 August of the school year, at the end of the above mentioned interventions, the teachers shall proceed to the verification of the results.

Having said this necessary premise, what we intend to underline here is that it is clear that the circumstance that the teacher in charge until the end of the teaching activities, whose contract of employment ends on June 30, will certainly not participate in the activities listed above - by way of example and in summary only - these are meetings of the Board of teachers for planning and verification, any State examinations, remedial courses, etc. ... - so it is wrong to claim that there is a perfect identity between tenured and non-permanent teachers with regard to the tasks actually performed.

The existence of those differences therefore certainly constitutes an objective reason for the difference in treatment and remuneration between the two different categories of teacher.

Therefore, the exclusion of any abuse, in view of the fact that recourse to forward bargaining appears to be supported by objective reasons, must rule out the possibility of any difference in treatment, since they are completely different work situations.

In other words, the Administration legitimately makes repeated recourse to fixed-term contracts; fixed-term employment contracts employed by the Public Administration, and in particular in the school sector, have peculiar connotations - highlighted above and summarized in the divergent methods of access (public

competition and probationary period), in the diversity of rights and duties - which must lead to the exclusion that the two types of workers can be placed on the same level, with the consequent exclusion of any unequal treatment (which presupposes the comparison between similar positions) with regard to economic profiles.

And indeed, the lack of "objective reasons". The only way to justify unequal treatment is when the fixed-term teacher has worked under several fixed-term contracts in succession, without any significant break in continuity, and for a duration of at least one year or in any case such as to cover almost all of each school year.

Only in this case, the duration and frequency of the services do not differ, in fact, from those of the teaching staff hired on fixed-term contracts, resulting in substantially identical situations.

The same does not happen when the fixed-term teacher has been hired for only a few days and with significant continuity between one hiring and another.

In this regard, it should be considered that, pursuant to art. 11, paragraph 14, of Law 124/99, "*the non-statutory teaching service provided starting from the 1974-1975 school year is considered as a whole school year if it lasted at least 180 days or if the service was provided uninterruptedly from 1 February until the end of the final examinations*".

The right to equal treatment, which in the present case is identified in the right to be remunerated also on the basis of length of service, as is the case for regular workers, cannot be confused with the right of a merely compensatory nature deriving from the illegality of the period which is the source of the abuse of that instrument, prohibited by EU legislation.

Although the complaint submitted described the normative and jurisprudential development of the subject matter examined in detail and in depth, it should be noted that this analysis has some shortcomings. Indeed, in order to assert the existence of the alleged violations, the complainants should have looked more closely at the regulatory framework currently governing the matter under review, instead of dwelling on an already outdated regulatory framework.

From this point of view, therefore, it is essential to complete the regulatory framework set out in the preceding points with the rules recently introduced by Law n. 107 of 13 July 2015, "Reform of the National System of Instruction and Training and

delegation of power for the reorganisation of the legislative provisions in force" and, secondly, to formulate the necessary considerations regarding the effectiveness of the measures adopted by the Italian State in that law with a view to limiting the use of fixed-term contracts in the school sector.

In fact, those measures deprive the claim under consideration of any foundation.

Specifically, the reform called "Good School" provided for by Law n. 107/ 2015, as well as the implementing decrees, provides for :

- the new rules on recruitment, based on safe deadlines for the holding of competitive examinations to fill vacant and available posts (art. 1, paragraph 113 of Law n. 107/2015 and art. 3, paragraph 2, of Legislative Decree n. 59/2017) ;

- the access to posts of teaching staff in public schools for an indefinite period of time, subject to the extraordinary recruitment plan, by means of national public competitions on the basis of qualifications and tests organised at regional level, as provided for by art. 400 of Legislative Decree n. 297 of 1997 and subsequent amendments (art. 1, para. 109) ;

- a maximum duration of 36 months for fixed-term contracts aimed at filling vacant and available positions (Art. 1, paragraph 3, of Law n. 107/2015) ;

- the sanction of compensation for damages suffered in case of repetition of fixed-term contracts for a total duration of more than six months (Art. 1, paragraph 132, of Law n. 107/2015).

Moreover, in addition to the provisions cited here, the law provides for a series of other transitional provisions. In fact, Art. 1, paragraph 95 of the Law establishes that: "For the year 2015/2016, the Ministry of Education, University and Research is authorized to implement an extraordinary plan for the recruitment of teaching staff for an indefinite period of time for public schools of all levels and levels to fill any common and supporting posts in the legal organization chart which may have remained vacant and available at the end of the tenure operations carried out for the same school year, as provided for by article 399 of the Single Text referred to in Legislative Decree n. Legislative Decree No. 297 of 16 April 1994, which abolishes the ranking lists for competitions on the basis of qualifications and tests held before 2012. Paragraph 109, letter c) further provides that art. 399 of Legislative Decree 297/1994, under which

recruitment can also be obtained through access to the permanent ranking lists, will be applied until such time as these lists are exhausted.

The adoption of all the above measures has basically eliminated any risk of incompatibility between national and Community law.

The Constitutional Court, in judgment n. 187/2016, affirmed that the measures provided for by this law, aimed at solving the problem of precarious work in the school sector, have the effect of eliminating the irregularities contested to the Italian State with regard to the above-mentioned European normative. The Court specified that the stabilization, provided for by Law n. 107/2015 with the extraordinary recruitment plan or other selection and competition mechanisms, is a sufficient and proportionate measure to sanction abuses. In the judgment, the Court stated that: "The plurality of measures authorised by the relevant Community legislation has already been mentioned; it must now be made clear that these measures are alternative to each other and that it is therefore sufficient to apply only one of them. This is clear in particular from paragraph 79 of the grounds, according to which "in the event of abuse of successive fixed-term employment contracts, it must be possible to apply a measure offering effective and equivalent guarantees of protection for workers, in order to penalise abuses adequately and to remove the effects of the infringement of Union law"; it is therefore sufficient to apply only one measure, provided that it offers effective and equivalent guarantees of protection. The EU Court of Justice takes the same approach to clause 5(1) of the Framework Agreement when it states that it is for the Member States, in order to prevent the abuse of successive fixed-term employment contracts, to decide on the application of one or more of the measures set out in that clause, or of equivalent provisions in force, provided that the latter take account of the requirements of specific branches or categories of workers (Judgment of 15 April 2008, Case C-268/06, Impact of the Framework Agreement on the employment situation of workers in the European Union); Judgment 23 April 2009, Cases C-378/07 to C-380/07, Angelidaki and others). The alternative is moreover implicit in the identical effectiveness of the two measures identified by the Court, both of which "remove the effects of the breach" (paragraph 79). That effectiveness is a constant feature of the general penalty of compensation, deriving from the principles of Community law, and does not require any further investigation; the effectiveness of the other measure is no less obvious, however, since

it is also compensation, but in a specific form. This would be all the more obvious if the alternative sanction consisted in transforming the fixed-term employment contract into an open-ended contract, but the Court of Justice of the EU, having taken note of the principle of open competition, also referred to in Order No. 207 of 2013, considers that it is sufficient to resort to provisions ensuring real opportunities for stabilising the employment relationship. The various measures introduced by the legislator in 2015, both transitional and permanent, are always accompanied by one of the measures in accordance with the criteria laid down by the Court of Justice (...) It must therefore be concluded that the Italian State was responsible for an infringement of EU law, but that the irregularity was "eliminated" by the adoption of compensatory measures for the staff concerned".

With regard to the stabilisation of teachers with professional qualifications obtained under the so-called "PAS and TFA" mechanisms, for which the complaint repeatedly highlights the lack of stabilisation measures, it should be noted that Law n. 107/2015, paragraph 181, letter b) establishes the criteria for the exercise of a legislative delegation aimed at determining the initial training and recruitment of secondary school teachers, including among these criteria: "the introduction of transitional measures relating to the different training paths in force for the professional qualification and recruitment of teachers, as well as the evaluation of the competences of the personnel having obtained the qualification before the entry into force of the legislative decree referred to in this letter".

The D. Lgs. n. 59 of 13 April 2017, implementing the delegation referred to in paragraph 181, letter b), introduced specific measures aimed at making teachers with PAS and TFA certificates of competence permanent; This essentially involves the holding of competitions reserved exclusively for such staff, with posts reserved in decreasing percentages over the years (100% of the vacant and available teaching posts identified annually for the 2018/2019 and 2019/2020 school years, 80% for the school years 2020/2021 and 2021/2022, 60% for 2022/2023 and 2023/2024, 40% in 2024/2025 and 2025/2026, 30% in 2026/2027 and 2027/2028 and 20% for the following periods - Article 17(2)(b), D. Lgs. n. 59/2017). The prospects for stabilisation are therefore concrete and effective, since the competition provides for a particularly simplified structure, with an oral test of a didactic and methodological nature and the evaluation of

qualifications, without minimum scores, aimed at drawing up a regional order of merit including all those who submit an application to participate (Article 17, paragraph 4, D. Lgs. n. 59 of 2017).

The grievance relied on is unfounded in the light of the foregoing considerations and, more specifically, in view of the fact that recruitment in schools with precarious working conditions is not recruitment for a period of time in the technical sense. In fact, most fixed-term workers in the school sector are in a physiological process leading to permanent employment and, since they always work for the same employer (the Italian State), periods of fixed-term service can be counted for the purposes of permanent employment. At the same time, participation in competitions speeds up the path to stable employment. Through this recruitment system, among other things, the distinction for teaching staff between fixed-term and open-ended contracts is less clear-cut than in other sectors. The condition of precariousness and, consequently, the risks that the European provisions on fixed-term contracts wish to prevent, are clearly mitigated, since they are part of a pathway to tenure within a relatively predictable timeframe.

That framework must be interpreted in the light of the new rules on recruitment laid down by Law No 107/2015 and, more specifically, of an examination of the measures adopted by the Italian State in that law to limit the use of fixed-term contracts in the education sector. **Those measures clearly show the legislature's intention to introduce provisions designed, on the one hand, to limit the use of fixed-term contracts in education and to resolve the problem of 'historically precarious work' in that sector** and, on the other, to direct the system towards forms of recruitment based primarily on open-ended contracts and, to a lesser extent, on fixed-term contracts.

Furthermore, it should be pointed out that the infringement procedure (n. 2010/2124) opened by the European Commission against Italy for non-compliant application of Directive 1999/70/EC concerning the Framework Agreement on fixed-term work for teaching staff in public schools has been closed without sanctions, also because of the above-mentioned provisions. It should be pointed out that the challenges raised by the European Commission concerned precisely the two profiles of less favourable legal and economic treatment provided for fixed-term teaching staff as

compared to permanent staff and of rules on employment in the education system which allegedly lacked effective measures to combat the abuse of fixed-term contracts.

In the light of the above, it is clear that the complaint is unfounded.

Roma, 29 maggio 2020

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