ECLI:EU:C:2016:679

JUDGMENT OF THE COURT (Tenth Chamber)

14 September 2016 (*)

(Reference for a preliminary ruling — Social policy — Directive 1999/70/EC — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Clauses 3 to 5 — Successive fixed-term employment contracts within the public health service — Measures to prevent the abusive use of successive fixed-term employment relationships — Penalties — Reclassification of the employment relationship — Right to compensation)

In Case C-16/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Contencioso-Administrativo No 4 de Madrid (Administrative Court No 4, Madrid, Spain), made by decision of 16 January 2015, received at the Court on 19 January 2015,

**María Elena Pérez López**

v

**Servicio Madrileño de Salud (Comunidad de Madrid),**

THE COURT (Tenth Chamber),

composed of F. Biltgen (Rapporteur), President of the Chamber, A. Borg Barthet and M. Berger, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Pérez López, by L. García Botella, abogado,

– the Spanish Government, by A. Gavela Llopis, acting as Agent,

– the European Commission, by M. van Beek and J. Guillem Carrau, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Clauses 3 to 5 of the framework agreement on fixed-term work, concluded on 18 March 1999 ('the framework agreement') set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

2 The request has been made in proceedings between María Elena Pérez López and the Servicio Madrileño de Salud, Comunidad de Madrid (Madrid Health Service, Spain) concerning the classification of her employment relationship that took the form of successive appointments as a member of the occasional regulated staff.

**Legal context**

*EU law*

3 Article 1 of Directive 1999/70 states that the purpose of the directive is 'to put into effect the framework agreement ... concluded … between the general cross-industry organisations (ETUC, UNICE and CEEP)'.

4 Paragraphs 6, 7 and 8 of the general considerations of the framework agreement are worded as follows:

'6. Whereas employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance;

7. Whereas the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse;

8. Whereas fixed-term employment contracts are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers'.

5 According to clause 1 of the framework agreement, the purpose of that agreement is, first, to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and, secondly, to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

6 Clause 2(1) of the framework agreement, entitled 'Scope', provides:

'This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.'

7 Clause 3 of the framework agreement, entitled 'Definitions', provides:

'1. For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.

2. For the purpose of this agreement, the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills ...'

8 Clause 4 of the framework agreement, headed 'Principle of non-discrimination', provides, in paragraph 1:

'In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.'

9 Clause 5 of the framework agreement, entitled 'Measures to prevent abuse', provides, in paragraph 1:

'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.'

*The relevant provisions of Spanish law*

10 Article 9 of Ley 55/2003 del Estatuto Marco del Personal Estatutario de los Servicios de Salud (State Law 55/2003 on the framework regulations for health service staff regulated under administrative law) of 16 December (BOE No 301 of 17 December 2003, p. 44742, 'the framework regulations'), provides as follows:

'1. On grounds of need, urgency or for the development of programmes of a temporary, auxiliary or extraordinary nature, the health services may appoint temporary regulated staff.

Temporary regulated staff may be appointed on an interim, occasional or replacement basis.

2. Appointment on an interim (or 'temporary replacement') basis may be used to temporarily cover a vacant post in the healthcare institutions or services where it is necessary to ensure performance of the duties pertaining to that post.

The interim regulated staff member's service shall be terminated if a permanent staff member is appointed, through the procedure laid down in law or regulation, to the post occupied by that interim regulated staff member, or if that post is abolished.

3. Appointment on an occasional basis shall be made in the following situations:

(a) when it concerns the provision of certain services of a temporary, auxiliary or extraordinary nature;

(b) when it is necessary in order to ensure the permanent and continuous operation of the healthcare institutions;

(c) for the provision of additional services in order to compensate for a reduction of normal working hours.

The occasional regulated staff member's service shall be terminated when the purpose of the appointment has been accomplished, when the period expressly set out in his notice of appointment has expired, or when the duties for which the appointment was made are abolished.

If more than two appointments are made for the provision of the same services for a total period of 12 months or more in a period of two years, the reasons for this shall be examined, in order to assess, if necessary, whether it is appropriate to create a permanent post in the healthcare institution concerned.

…'

11 Under Article 15(3) of the Texto Refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 1/1995 (consolidated text of the Workers' Statute, adopted by Royal Legislative Decree 1/1995)) of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654), in the version applicable at the material time ('the Workers' Statute'), 'fixed-term contracts concluded in breach of the law are deemed to be concluded for an indefinite period.'

12 In accordance with Article 3 of Real Decreto 2720/1998 por el que se desarrolla el artículo 15 del Estatuto de los Trabajadores en materia de contratos de duración determinada (Royal Decree 2720/1998, implementing Article 15 of the Workers' Statute on fixed-term contracts), of 18 December 1998 (BOE No 7 of 8 January 1999, p. 568), the contract for occasional employment, included in the category of fixed-term contracts, is intended to meet auxiliary needs.

13 Article 49(1)(c) of the Workers' Statute provides that, when the employment contract is terminated, except in cases of interim contracts and training contracts, the worker is entitled to receive compensation in an amount equivalent to the proportionate part of the amount corresponding to the receipt of twelve days of salary per year of service.

**The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling**

14 Ms Pérez López was recruited as a nurse and a member of the occasional regulated staff at the University Hospital of Madrid from 5 February to 31 July 2009. In accordance with the provisions of Article 9(3) of the framework regulations, the appointment notice described the reason for that appointment as the 'provision of certain services of a temporary, auxiliary or extraordinary nature' and described the employment as 'carrying out activities in this hospital in order to ensure the provision of nursing care'.

15 After that first employment contract, the appointment of Ms. Pérez López was renewed seven times under fixed-term contracts of three, six or nine months, worded identically each time, so that Pérez López was employed without interruption during the period from 5 February 2009 until 31 March 2013.

16 During the last of the abovementioned employment contracts, from 1 January to 31 March 2013, the Consejería de Economia y Hacienda de la Comunidad de Madrid (Regional Ministry of Economic Affairs and Finance of Madrid, Spain) issued an order of 28 January 2013 imposing, with the objective of reducing public spending, the termination of the employment relationship of occasional staff at the end of the appointment period and the payment of all outstanding remuneration corresponding to the period of services provided, including those cases in which the person concerned was subsequently to be reappointed.

17 Under that order, Ms Peréz López was notified, on 8 March 2013, of the termination of the employment relationships linking her to the Madrid Health Service,

with effect from 31 March 2013. On 21 March 2013, however, she was notified of her new appointment, in terms identical to those of the previous appointments and without a break in continuity, covering the period from 1 April to 30 June 2013.

18 On 30 April 2013 Ms Peréz López brought an administrative appeal against that notice of termination of the employment relationship and against her new appointment as an occasional regulated staff member. Upon expiry of the legally prescribed period necessary to consider that the administrative appeal had been tacitly rejected by the competent administrative authority, she brought an action before the Contencioso-Administrativo No 4 de Madrid (Administrative Court No 4, Madrid, Spain) in which she argued, in essence, that her successive appointments were not intended to meet an auxiliary or extraordinary need of the health services, but corresponded in reality to a permanent activity. Accordingly, the succession of fixed-term contracts, it is claimed, constitutes a breach of the law and should result in reclassification of her employment relationship.

19 According to the referring court, the national legislation at issue, and particularly Article 9 of the framework regulations, contains no measures that effectively limit the use of successive fixed-term contracts. Although a maximum duration of the working relationship of occasional staff is retained, it is for the administration to freely assess the reasons justifying the use of fixed-term contracts and whether to create a permanent position to meet the needs of the health services. If such a position were to be created, the precarious situation of the workers would be maintained, given that the administration could fill those positions by hiring temporary replacement staff, without limitations as to the duration or number of renewals of fixed-term employment contracts for those workers.

20 The referring court also expressed doubts regarding the compatibility of the national provisions at issue with the principle of non-discrimination set out in clause 4 of the framework agreement. It notes that occasional regulated staff of the health services who are subject to the framework regulations and employees bound by a contract for occasional employment, which is governed by the Workers' Statute, constitute comparable fixed-term working relationships. However, unlike the provisions applicable to occasional regulated staff, the Workers' Statute, it is claimed, not only provides that fixed-term workers are to receive compensation equivalent to twelve days of salary for each year of service or fraction thereof, but also includes a guarantee clause favouring employment stability, consisting of the presumption that temporary contracts concluded in breach of the law are deemed to be concluded for an indefinite period.

21 In those circumstances, the Juzgado de la Contencioso-Administrativo No 4 de Madrid (Administrative Court No 4, Madrid) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Does Article 9.3 of the framework regulations infringe the framework agreement, and is it therefore inapplicable, because it encourages abuse arising from the use of successive appointments of occasional regulated staff, in that it:

(a) does not fix a maximum total duration of successive appointments of occasional regulated staff, nor a maximum number of renewals of those appointments;

(b) leaves to the discretion of the authorities the decision whether to create permanent posts where more than two appointments are made for the provision of the same services for a total period of 12 months or more in a period of two years; and

(c) allows appointments of occasional regulated staff to be made without requiring that the notices of appointment indicate the specific objective reasons of a temporary, auxiliary or extraordinary nature justifying those appointments?

2. Does Article 11.7 of the order of the Regional Ministry of Economic Affairs and Finance of Madrid of 28 January 2013 infringe the framework agreement, and is it therefore inapplicable, in so far as it provides that, 'at the end of the appointment period, there must be termination of service and payment of all outstanding remuneration corresponding to the period of services provided in all cases, including those in which the person concerned is subsequently to be reappointed', irrespective, therefore, of whether or not the specific, objective reasons justifying the appointment have come to an end, as required under clause 3.1 of the framework agreement?

3. Does an interpretation of the third subparagraph of Article 9.3 of the framework regulations, to the effect that, if more than two appointments are made for the provision of the same services for a total period of 12 months or more in a period of two years, a permanent post must be created in the heath-care institution, so that the worker appointed on an occasional basis becomes appointed to cover that post on a replacement basis, comply with the intended purpose of the framework agreement?

4. Does the application to occasional regulated staff of the same compensation provided for workers employed under contracts for occasional employment comply with the principle of non-discrimination provided for in the framework agreement, given that the two situations are substantially identical, since it would not make sense for workers in the same occupational category, providing services in the same entity (the Madrid Health Service), carrying out the same tasks and meeting the same auxiliary needs, to be treated differently upon the termination of their employment relationship, in the absence of any apparent reason that would prevent comparisons being made between fixed-term contracts in order to avoid discriminatory situations?'

22 The referring court also requested the Court of Justice to apply the expedited procedure to the case pursuant to Article 105(1) of the Rules of Procedure of the Court of Justice. That application was dismissed by order of the President of the Court of 24 April 2015.

**Consideration of the questions referred**

*The first and third questions*

23 By its first and third questions, which must be considered together, the referring court asks, in essence, whether clause 5 of the framework agreement must be interpreted as precluding the application of national legislation, such as that at issue in the main proceedings, by the authorities of the Member State concerned in such a way that the renewal of successive fixed-term employment contracts in the public health sector is deemed to be justified by 'objective grounds', within the meaning of that clause, on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to meet certain temporary, auxiliary or extraordinary needs and that the authorities have a certain discretion in the decision whether to create permanent posts that bring an end to the employment of occasional regulated staff.

The scope of the framework agreement

24 At the outset, it should be recalled that it is apparent from the wording of clause 2(1) of the framework agreement that the scope of that agreement is conceived in broad terms, as it covers generally 'fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State'. Furthermore, the definition of the concept of 'fixed-term workers' within the meaning of the framework agreement, set out in clause 3(1) thereof, encompasses all workers without drawing a distinction according to whether their employer is in the public or private sector and regardless of the classification of their contract under domestic law (judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 56; of 13 March 2014, *Márquez Samohano*, C-190/13, EU:C:2014:146, paragraph 38; of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraphs 28 and 29, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 67).

25 In so far as the framework agreement does not exclude any particular sector, a worker such as the applicant in the main proceedings, who is employed as a nurse as part of the occasional regulated staff of the public health service, falls within the scope of the framework agreement.

The interpretation of clause 5(1) of the framework agreement

26 As regards the interpretation of clause 5 of the framework agreement, it should be noted that the purpose of that agreement is to implement one of the objectives of that agreement, namely to place limits on successive recourse to fixed-term employment contracts or relationships, regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure (judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 63; of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 73; of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 25; of 13 March 2014, *Márquez Samohano*, C-190/13, EU:C:2014:146, paragraph 41; of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 54, and of 26 November

2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 72).

27 As is apparent from the second paragraph of the preamble to the framework agreement and from paragraphs 6 and 8 of its general considerations, the benefit of stable employment is viewed as a major element in the protection of workers, whereas it is only in certain circumstances that fixed-term employment contracts can respond to the needs of both employers and workers (judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 62; of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 55, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 73).

28 Accordingly, clause 5(1) of the framework agreement requires, with a view to preventing abuse of successive fixed-term employment contracts or relationships, the effective and binding adoption by Member States of at least one of the measures listed in that provision, where their domestic law does not already include equivalent legal measures. The measures listed in clause 5(1)(a) to (c), of which there are three, relate, respectively, to objective reasons justifying the renewal of such contracts or relationships, the maximum total duration of successive fixed-term employment contracts or relationships, and the number of renewals of such contracts or relationships (see, inter alia, judgments of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 74; 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 26; of 13 March 2014, *Márquez Samohano*, C-190/13, EU:C:2014:146, paragraph 42, of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 56, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 74).

29 The Member States enjoy a certain discretion in that regard since they have the choice of relying on one or more of the measures listed in clause 5(1)(a) to (c) of the framework agreement, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers (judgments of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 59 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 75).

30 In that way, clause 5(1) of the framework agreement assigns to the Member States the general objective of preventing such abuse, while leaving to them the choice as to how to achieve it, provided that they do not compromise the objective or the practical effect of the framework agreement (judgments of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 60, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 76).

31 Furthermore, where, as in the present case, EU law does not lay down any specific penalties in the event that instances of abuse are nevertheless established, it is incumbent

on the national authorities to adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the measures taken pursuant to the framework agreement are fully effective (judgments of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 62 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 77).

32 Whereas, in the absence of relevant EU rules, the detailed rules for implementing such measures are a matter for the domestic legal order of the Member States under the principle of their procedural autonomy, they must not, however, be less favourable than those governing similar domestic situations (principle of equivalence) or render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgments of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 63 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 78).

33 Therefore, where abusive use of successive fixed-term contracts or relationships has taken place, a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to penalise that abuse and nullify the consequences of the breach of EU law (judgments of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 64 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 79).

34 Moreover, it must be pointed out that it is not for the Court to rule on the interpretation of provisions of national law, that being exclusively for the referring court or, as the case may be, the national courts having jurisdiction, which must determine whether the requirements set out in clause 5 of the framework agreement are met by the provisions of the applicable national legislation (judgments of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 66 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 81).

35 It is therefore, in principle, for the referring court to determine to what extent the conditions for application and the actual implementation of the relevant provisions of national law render the latter an appropriate measure for preventing and, where necessary, penalising the abusive use of successive fixed-term employment contracts or relationships (judgments of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 67 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 82).

36 However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the referring court guidance in its assessment (judgments of 3 July 2014, *Fiamingo and Others*, C-362/13, C-363/13 and C-407/13,

EU:C:2014:2044, paragraph 68 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 83).

37 It is in this context that it is necessary to determine whether the provisions of the national legislation at issue in the main proceedings, that allow the renewal of fixed-term employment contracts in the field of health services, may constitute the measures set out in clause 5(1) of the framework agreement, and, more specifically, objective grounds justifying the renewal of fixed-term contracts or employment relationships.

38 As regards the existence of an 'objective ground', it follows from the case-law that that concept must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social policy objective of a Member State (judgments of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 96 and the case-law cited; of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 27, and of 13 March 2014, *Márquez Samohano*, C-190/13, EU:C:2014:146, paragraph 45).

39 On the other hand, a national provision which merely authorises recourse to successive fixed-term contracts, in a general and abstract manner, by a rule of statute or secondary legislation, does not accord with the requirements stated in the previous paragraph of the present judgment (judgments of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 97 and the case-law cited; of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 28, and of 13 March 2014, *Márquez Samohano*, C-190/13, EU:C:2014:146, paragraph 46).

40 Such a purely formal provision does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose. That provision therefore carries a real risk that it will result in abusive use of that type of contract and, accordingly, is not compatible with the objective of the framework agreement and the requirement that it have practical effect (see, to that effect, judgments of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraphs 98 and 100 and the case-law cited; of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 29, and of 13 March 2014, *Márquez Samohano*, C-190/13, EU:C:2014:146, paragraph 47).

41 In relation to the case at issue in the main proceedings, it should be noted that the relevant national legislation determines precisely the conditions under which successive fixed-term contracts or employment relationships may be entered. The use of such contracts is permitted, under Article 9(3) of the framework regulations, as appropriate, when it concerns the provision of certain services of a temporary, auxiliary or

extraordinary nature, when it is necessary in order to ensure the permanent and continuous operation of the healthcare institutions or when it concerns the provision of additional services in order to compensate for a reduction of normal working hours.

42 That provision also provides that, where more than two appointments are made for the provision of the same services for a total period of 12 months or more in a period of two years, the competent authority shall examine the reasons for those appointments and decide whether to create an additional permanent post.

43 It follows that the national legislation at issue in the main proceedings does not lay down a general and abstract obligation to have recourse to successive fixed-term employment contracts, but limits the conclusion of such contracts for the purposes of satisfying, in essence, temporary requirements.

44 In that regard, it should be noted that a temporary replacement of a worker in order to satisfy the employer's temporary staffing requirements may, in principle, constitute an 'objective ground' within the meaning of clause 5(1)(a) of the framework agreement (see, to that effect, judgments of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraphs 101 and 102; of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 30, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 91).

45 It should be pointed out that, in a sector of the public services with a large workforce, such as the public health sector, it is inevitable that temporary replacements will be necessary due, inter alia, to the unavailability of members of staff on sick, maternity, parental or other leave. The temporary replacement of workers in those circumstances may constitute an objective ground within the meaning of clause 5(1)(a) of the framework agreement, justifying fixed-term contracts being concluded with the replacement staff and the renewal of those contracts as new needs arise, subject to compliance with the relevant requirements laid down in the framework agreement (see, to that effect, judgments of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 31, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 92).

46 Furthermore, it must be pointed out that the obligation to organise the health services in such a way as to ensure that healthcare worker-patient ratios are constantly appropriate rests with the public authorities and is dependent on many factors that may reflect a particular need for flexibility which, in accordance with the case-law recalled in paragraph 40 of the present judgment, is capable, in that specific sector, of providing an objective justification, under clause 5(1)(a) of the framework agreement, for recourse to successive fixed-term employment contracts.

47 By contrast, it cannot be accepted that fixed-term employment contracts may be renewed for the purpose of the performance, in a fixed and permanent manner, of tasks in the health service which normally come under the activity of the ordinary hospital staff

(see, by analogy, judgment of 13 March 2014, *Márquez Samohano*, C-190/13, EU:C:2014:146, paragraph 58).

48 The renewal of fixed-term employment contracts or relationships in order to cover needs which, in fact, are not temporary in nature but, on the contrary, fixed and permanent is not justified for the purposes of clause 5(1)(a) of the framework agreement, in so far as such use of fixed-term employment contracts or relationships conflicts directly with the premise on which the framework agreement is founded, namely that employment contracts of indefinite duration are the general form of employment relationship, even though fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities (see, to that effect, judgments of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraphs 36 and 37, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 100).

49 In order for clause 5(1)(a) of the framework agreement to be complied with, it must therefore be specifically verified that the renewal of successive fixed-term employment contracts or relationships is intended to cover temporary needs and that a national provision such as that at issue in the main proceedings is not, in fact, being used to meet fixed and permanent staffing needs of the employer (see, to that effect, judgments of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 39 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 101).

50 In that regard, it follows from the situation of the applicant in the main proceedings, as described in the decision to refer, that the successive appointments of Ms Pérez López to ensure hospital health services did not appear to be covered by the simple temporary needs of the employer.

51 That is corroborated by the assessment of the referring court, which describes the coverage of posts in the healthcare sector by means of temporary regulated staff appointments as ‘endemic’ and which estimates that approximately 25% of the 50 000 medical and healthcare staff posts in the Madrid region are occupied by staff employed on a temporary basis for an average period of between five and six years, some of whom, however, have been providing services continuously for over 15 years.

52 In those circumstances, clause 5(1)(a) of the framework agreement on fixed-term work must be interpreted as precluding the application of national legislation, such as that at issue in the main proceedings, by the authorities of the Member State concerned in such a way that the renewal of successive fixed-term employment contracts in the public health sector is deemed to be justified by ‘objective grounds’ within the meaning of that clause on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to ensure the provision of certain services of a temporary, auxiliary or extraordinary nature when, in fact, those needs are fixed and permanent.

53 As regards, moreover, the discretion of the administration concerning the creation of permanent posts, it should be noted that the existence of such a procedure, allowing the creation of a fixed post, like that consisting of converting a fixed-term contract into a permanent employment relationship, may constitute an effective remedy against the abusive use of temporary contracts (see, to that effect, judgment of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 170).

54 Even if national legislation permitting the renewal of successive fixed-term contracts to replace staff while waiting to fill permanent posts that have been created can, in principle, be justified by an objective ground, the actual application of that ground must, however, comply with the requirements of the framework agreement, having regard to the particular features of the activity concerned and to the conditions under which it is carried out (see, to that effect, judgments of 26 January 2012, *Kücük*, C-586/10, EU:C:2012:39, paragraph 34 and the case-law cited, and of 26 November 2014, *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 99).

55 In the present case, it should be noted that the national legislation at issue in the main proceedings includes no obligation for the competent authority to create additional permanent posts in order to bring an end to the employment of occasional regulated staff. However, it appears from the findings made by the referring court that the permanent posts created are filled by the appointment of 'temporary' replacement staff, without there being any limitation as to the duration of the replacement contracts or the number of renewals thereof, so that the precarious situation of workers is, in fact, perpetuated. Legislation of that kind is such as to permit, in breach of clause 5(1)(a) of the framework agreement, the renewal of fixed-term employment contracts in order to cover needs which are fixed and permanent, whereas it is clear from the findings made in paragraph 52 of the present judgment that there is a structural deficit of regulated staff posts in the Member State concerned.

56 In the light of all the foregoing considerations, the answer to the first and third questions raised is that clause 5(1)(a) of the framework agreement must be interpreted as precluding the application of national legislation, such as that at issue in the main proceedings, by the authorities of the Member State concerned in such a way that:

– the renewal of successive fixed-term employment contracts in the public health sector is deemed to be justified by 'objective grounds', within the meaning of that clause, on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to ensure the provision of certain services of a temporary, auxiliary or extraordinary nature when, in fact, those needs are fixed and permanent;

– there is no obligation on the competent authority to create additional permanent posts in order to bring an end to the employment of occasional regulated staff and it is permitted to fill the permanent posts created by hiring 'temporary' staff, so that the precarious situation of workers is perpetuated, whereas there is a structural deficit of regulated staff posts in that sector in the Member State concerned.

*The second question*

57 By its second question, the referring court asks, in essence, whether clause 5 of the framework agreement must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which requires that contractual relationship to terminate on the date provided by the fixed-term contract and that all outstanding remuneration is to be paid, without prejudice to a possible reappointment.

58 In that regard, it should be borne in mind that the framework agreement does not specify the conditions under which employment contracts of indefinite duration may be used and is not intended to harmonise all national rules relating to fixed-term employment contracts. That framework agreement simply aims, by determining general principles and minimum requirements, to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and to prevent abuse arising from the use of successive fixed-term work agreements or contracts (judgment of 18 October 2012, *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 63 and the case-law cited, and order of 7 March 2013, *Bertazzi and Others*, C-393/11, not published, EU:C:2013:143, paragraph 48).

59 However, the power of the Member States to determine the content of their national laws relating to employment contracts cannot go so far as to allow them to compromise the objective or the practical effect of the framework agreement (judgment of 18 October 2012, *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 64 and the case-law cited, and order of 7 March 2013, *Bertazzi and Others*, C-393/11, not published, EU:C:2013:143C-393/11, paragraph 49).

60 The objective pursued by clause 5 of the framework agreement, which consists of placing limits on successive recourse to fixed-term employment contracts or relationships, would be devoid of all content if, under national law, the new nature of an employment relationship, in itself, were able to constitute an ‘objective ground’ for the purposes of that clause, capable of authorising a renewal of a fixed-term employment contract.

61 Consequently, the answer to the second question is that clause 5 of the framework agreement must be interpreted as meaning that it does not preclude, in principle, national legislation which requires that the contractual relationship is to terminate on the date provided by the fixed-term contract and that all outstanding remuneration is to be paid, without prejudice to a possible reappointment, provided that that legislation is not such as to compromise the objective and the practical effect of the framework agreement, which is a matter to be determined by the referring court.

*The fourth question*

62 By its fourth question, the referring court asks, in essence, whether clause 4 of the framework agreement is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which fails to provide any compensation for termination

of a contract of employment to occasional regulated staff while such compensation is granted to comparable workers employed under contracts for occasional employment.

63 In that regard, it should be borne in mind that clause 4(1) of the framework agreement prohibits, with regard to employment conditions, less favourable treatment of fixed-term workers as compared with permanent workers, solely because they are employed for a fixed term, unless different treatment is justified on objective grounds.

64 According to settled case-law, the principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified (judgment of 8 September 2011, *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 65 and the case-law cited).

65 In that regard, it is important to note that the principle of non-discrimination has been implemented and put into effect by the framework agreement solely as regards differences in treatment as between fixed-term workers and permanent workers in a comparable situation (orders of 11 November 2010, *Vino*, C-20/10, not published, EU:C:2010:677, paragraph 56; of 22 June 2011, *Vino*, C-161/11, not published, EU:C:2011:420, paragraph 28, and of 7 March 2013, *Rivas Montes*, C-178/12, not published, EU:C:2013:150, paragraph 43).

66 However, any differences in treatment between specific categories of fixed-term workers, such as that reported by the referring court, which is not based on the fixed-term or permanent nature of the employment relationship, but on whether it is statutory or contractual, is not covered by the principle of non-discrimination established by the framework agreement (see, to that effect, orders of 11 November 2010, *Vino*, C-20/10, not published, EU:C:2010:677, paragraph 57, and of 7 March 2013, *Rivas Montes*, C-178/12, not published, EU:C:2013:150, paragraphs 44 and 45).

67 It is only in the event that the referring court should find that workers employed under an employment contract of indefinite duration and doing comparable work are paid compensation for termination of a contract of employment, whereas such compensation is not provided for occasional regulated staff, that that difference of treatment could be covered by the principle of non-discrimination established in clause 4 of the framework agreement (see, to that effect, judgment of same date, *De Diego Porras*, paragraphs 37 and 38).

68 However, in so far as it is not apparent from any of the documents in the file submitted to the Court that there is, in the main proceedings, a difference in treatment between the occasional regulated staff and the permanent staff, the difference of treatment which is the subject of the fourth question referred by the referring court is not a matter of EU law (orders of 11 November 2010, *Vino*, C-20/10, not published, EU:C:2010:677, paragraph 64; of 22 June 2011, *Vino*, C-161/11, not published, EU:C:2011:420, paragraph 30, and of 7 March 2013, *Rivas Montes*, C-178/12, not published, EU:C:2013:150, paragraph 52). Accordingly, that difference of treatment is exclusively a matter of national law, the interpretation of which is the exclusive role of

the referring court (orders of 22 June 2011, *Vino*, C-161/11, not published, EU:C:2011:420, paragraph 35, and of 7 March 2013, *Rivas Montes*, C-178/12, not published, EU:C:2013:150, paragraph 53).

69 In those circumstances, it should be held that the Court clearly has no jurisdiction to rule on the fourth question referred.

**Costs**

70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

1. **Clause 5(1)(a) of the framework agreement on fixed-term work, concluded on 18 March 1999, set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as precluding the application of national legislation, such as that at issue in the main proceedings, by the authorities of the Member State concerned in such a way that:**

– **the renewal of successive fixed-term employment contracts in the public health sector is deemed to be justified by 'objective grounds', within the meaning of that clause, on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to ensure the provision of certain services of a temporary, auxiliary or extraordinary nature when, in fact, those needs are fixed and permanent;**

– **there is no obligation on the competent authority to create additional permanent posts in order to bring an end to the employment of occasional regulated staff and it is permitted to fill the permanent posts created by hiring 'temporary' staff, so that the precarious situation of workers is perpetuated, where there is a structural deficit of regulated staff posts in that sector in the Member State concerned.**

2. **Clause 5 of the framework agreement on fixed-term work set out in the Annex to Directive 1999/70 must be interpreted as meaning that it does not preclude, in principle, national legislation which requires that the contractual relationship is to terminate on the date provided by the fixed-term contract and that all outstanding remuneration is to be paid, without prejudice to a possible reappointment, provided that that legislation does not compromise the objective and practical effect of that framework agreement, which is a matter to be determined by the referring court.**

3. **The Court of Justice of the European Union manifestly lacks jurisdiction to answer the fourth question referred for a preliminary ruling by the Juzgado de lo Contencioso-Administrativo No 4 de Madrid (Administrative Court No 4, Madrid, Spain).**

[Signatures]

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* Language of the case: Spanish.