ECLI:EU:C:2018:603

Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

25 July 2018 (*)

(Reference for a preliminary ruling — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Consequences of a disciplinary dismissal found to be 'unfair' — Definition of 'working conditions' — Temporary worker with a contract of indefinite duration — Difference in treatment between permanent workers and temporary workers with a fixed-term contract or contract of indefinite duration — Reinstatement of the worker or granting of compensation)

In Case C-96/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social n.º 2 de Terrassa (Social Court No 2, Terrassa, Spain), made by decision of 26 January 2017, received at the Court on 22 February 2017, in the proceedings

Gardenia Vernaza Ayovi

v

Consorci Sanitari de Terrassa,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund, President of the Chamber, A. Arabadjiev (Rapporteur) and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 7 December 2017,

after considering the observations submitted on behalf of:

– Ms Vernaza Ayovi, by M. Sepúlveda Gutiérrez, abogado,

– the Consorci Sanitari de Terrassa, by A. Bayón Cama and D. Cubero Díaz, abogados,

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

– the European Commission, by N. Ruiz García and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 January 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Clause 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement'), which is annexed 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), and the interpretation of Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Ms Gardenia Vernaza Ayovi and the Consorci Sanitari de Terrassa (Health Consortium, Terrassa, Spain), concerning her dismissal on disciplinary grounds.

Legal context

EU law

3 Under Clause 2(1) of the Framework Agreement:

'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.'

4 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. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.'

5 Clause 4(1) of the Framework Agreement provides:

‘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.’

6 Clause 5(2) of the Framework Agreement provides:

‘Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

(a) shall be regarded as “successive”

(b) shall be deemed to be contracts or relationships of indefinite duration.’

Spanish law

7 Article 56(1) of the Real Decreto Legislativo 2/2015, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Law on the Workers’ Statute), of 23 October 2015 (BOE No 255 of 24 October 2015) (‘the Workers’ Statute’), provides:

‘Where a dismissal is declared unfair, the employer, within five days of notification of the judgment, may choose either to reinstate the worker or to pay compensation equivalent to 33 days’ salary per year of service, periods shorter than a year being calculated pro rata on a monthly basis up to a maximum of 24 monthly payments. If the employer opts to pay compensation, the employment contract shall be terminated, that termination being regarded as having occurred on the date of effective cessation of work.’

8 The Real Decreto Legislativo 5/2015, por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público (Royal Legislative Decree 5/2015 approving the consolidated text of the Law on the basic regulations relating to public servants), of 30 October 2015 (BOE No 261 of 31 October 2015; ‘the basic regulations relating to public servants’), provides in Article 2, entitled ‘Scope’:

‘1. The present regulations are applicable to public officials and, where appropriate, to contract staff in the service of the following public authorities:

...

5. The present regulations are supplementary in nature for all staff of public authorities not coming within their scope.

...’

9 Article 7 of the basic regulations relating to public servants, entitled ‘Rules applicable to contract staff’, provides:

‘The situation of contract staff in the service of the public authorities shall be governed by employment law legislation and other rules normally applicable, but also by the provisions of these regulations.’

10 Article 8 of the basic regulations relating to public servants, entitled ‘Definition and categories of public servants’, provides:

‘1. Public servants are persons who carry out duties for remuneration in the public authorities in the service of the general interest.

2. Public servants shall be classified as:

(a) Career (established) civil servants.

(b) Interim civil servants.

(c) Contract staff, whether engaged under permanent, indefinite-duration or fixed-term employment contracts.

(d) Temporary staff.’

11 Article 93 of the basic regulations relating to public servants, entitled ‘Liability to disciplinary action’, provides:

‘1. Public officials and contract staff shall be subject to the disciplinary measures set out in this title and in the rules laid down in the laws governing the public service adopted to implement these regulations.

...

4. As regards disciplinary measures applicable to contract staff, employment law legislation shall apply to situations not provided for in the present title.’

12 Paragraph 2 of Article 96 of the basic regulations relating to public servants, entitled ‘Sanctions’, provides:

‘Permanent contract agents shall be reinstated in cases where, following disciplinary proceedings for a serious dereliction of duty, their dismissal is declared wrongful.’

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

13 Ms Vernaza Ayovi was engaged as a nurse by the Fundació Sant Llàtzer (Saint Lazare Private Foundation, Spain) on 30 May 2006 under an ‘*interinidad*’ contract (fixed-term temporary replacement contract), namely a contract for the temporary replacement of a member of staff or the temporary cover of a vacant post. That contract ended on 14 August 2006. On 15 August 2006 the parties entered into a new *interinidad* contract which became a non-permanent employment contract of indefinite duration on 28 December 2006. The rights and obligations resulting from the employment relationship were transferred to the Health Consortium, Terrassa.

14 Ms Vernaza Ayovi was granted leave on personal grounds for the period from 19 July 2011 to 19 July 2012, which was twice renewed for a period of one year. On 19 June 2014, Ms Vernaza Ayovi asked to be reinstated. The Health Consortium, Terrassa informed her that there was no post available corresponding to her qualification. On 29 April 2016 she again asked to be reinstated.

15 On 6 May 2016, the Health Consortium, Terrassa sent her a schedule of working hours based on a part-time role. Refusing to accept any job that was not a full-time position, Ms Vernaza Ayovi did not turn up for work and was dismissed on that ground on 15 July 2016.

16 On 26 August 2016, the applicant in the main proceedings brought an action before the Juzgado de lo Social n.º 2 de Terrassa (Social Court No 2, Terrassa, Spain) seeking a declaration that her dismissal was wrongful and an order requiring her employer either to reinstate her under employment conditions identical to those that were applicable prior to her dismissal and pay in full the arrears of salary owed to her from the time of her dismissal, or to pay her the maximum amount of compensation available in law for wrongful dismissal.

17 That court considers that Ms Vernaza Ayovi comes within the scope of the Framework Agreement since, first, her employment contract became indefinite only after the conclusion of two temporary fixed-term contracts, with the result that a misuse of fixed-term contracts is not excluded and, second, she does not have the status of a member of the permanent contract staff.

18 In those circumstances, the Juzgado de lo Social No 2 de Terrassa (Social Court No 2, Terrassa) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘In the context of a challenge to a disciplinary dismissal of a worker considered to be employed under a contract that is of indefinite duration but not permanent in the service of the public authorities,

(1) Is the remedy provided by the legal system when a disciplinary dismissal is held to be unlawful and, in particular, the remedy under Article 96(2) of the [basic regulations relating to public servants], to be regarded as covered by the concept of “employment conditions” under Clause 4(1) of [the Framework Agreement]?

(2) Would a situation, such as that provided for in Article 96(2) of the [basic regulations relating to public servants], in which the disciplinary dismissal of a permanent worker, when that dismissal is held to be wrongful, that is to say unlawful, always requires the reinstatement of the worker, but, when the worker is subject to an indefinite or temporary contract performing the same duties as a permanent worker, permits that worker not to be reinstated in return for compensation, be discriminatory under Clause 4(1) of [the Framework Agreement]?

(3) Would unequal treatment be justified in the same situation as in the question above, not in the light of the Directive but of Article 20 of the Charter ...?’

Consideration of the questions referred

19 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Clause 4(1) of the Framework Agreement must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, when the disciplinary dismissal of a permanent worker in the service of a public authority is declared wrongful, the worker in question must be reinstated, whereas, in the same situation, a worker employed under a temporary contract or a temporary contract of indefinite duration performing the same duties as that permanent worker need not be reinstated but instead may receive compensation.

20 It must be noted, as a preliminary remark, that, inasmuch as the principle of equality before the law established in Article 20 of the Charter has, as regards fixed-term workers, been

implemented at EU level by Directive 1999/70, and in particular by Clause 4 of the Framework Agreement which is annexed to that directive, the situation at issue in the main proceedings must be examined in the light of that directive and the Framework Agreement.

21 According to Clause 1(a) of the Framework Agreement, one of the objectives of that agreement is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination. Similarly, the third paragraph in the preamble to the Framework Agreement states that it 'illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination'. Recital 14 of Directive 1999/70 states, to that effect, that the aim of the Framework Agreement is, in particular, to improve the quality of fixed-term work by setting out minimum requirements in order to ensure the application of the principle of non-discrimination (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 36 and the case-law cited).

22 The Framework Agreement, in particular its Clause 4, seeks to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer using such an employment relationship to deny those workers rights which are recognised for permanent workers (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 37 and the case-law cited).

23 Having regard to the objectives which the Framework Agreement pursues, Clause 4 thereof must be understood as expressing a principle of EU social law which cannot be interpreted restrictively (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 38 and the case-law cited).

24 It is important to bear in mind that Clause 4(1) of the Framework Agreement prohibits, with regard to employment conditions, less favourable treatment of fixed-term workers than that of comparable permanent workers on the sole ground that they work on a fixed-term basis, unless different treatment is justified on objective grounds.

25 In the present case, it must be noted, first, that the referring court states that, by the criteria laid down in national law, an employment contract such as that of Ms Vernaza Ayovi must be regarded as a fixed-term employment contract.

26 A worker such as Ms Vernaza Ayovi must, therefore, be regarded as a 'fixed-term worker' within the meaning of Clause 3(1) of the Framework Agreement and, consequently, comes within the scope of that agreement.

27 With regard, second, to the concept of 'employment conditions' within the meaning of Clause 4(1) of the Framework Agreement, the decisive criterion for determining whether a measure comes within the scope of that concept is, precisely, the criterion of employment, that is to say, the employment relationship between a worker and his employer (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 41 and the case-law cited).

28 In that regard, the Court has held that, inter alia, rules for determining the notice period applicable in the event of termination of fixed-term employment contracts and the compensation paid to a worker on account of the termination of his contract of employment with his employer, such compensation being paid on account of the employment relationship that has been established between them, come within that concept (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraphs 42, 44 and 45).

29 An interpretation of Clause 4(1) of the Framework Agreement which excludes from the definition of that concept conditions relating to termination of a fixed-term employment contract would limit the scope of the protection afforded to fixed-term workers against discrimination, contrary to the objective assigned to that provision (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 43 and the case-law cited).

30 Those considerations are fully transferable to the reinstatement regime at issue in the main proceedings, which benefits permanent workers in the event that their disciplinary dismissal is held to be 'wrongful', since the logical reason for that regime's existence is the employment relationship that has been established between such a worker and his employer.

31 It follows that a national measure such as that at issue in the main proceedings comes within the concept of 'employment conditions' within the meaning of Clause 4(1) of the Framework Agreement.

32 It must be noted, third, that, according to the Court's settled case-law, the principle of non-discrimination, of which Clause 4(1) of the Framework Agreement is a specific expression, requires that comparable situations should not be treated differently and that different situations should not be treated alike, unless such treatment is objectively justified (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 46 and the case-law cited).

33 In that regard, the principle of non-discrimination has been implemented and specifically applied by the Framework Agreement solely as regards differences in treatment as between fixed-term workers and permanent workers in comparable situations (judgments of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 37, and of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 47).

34 According to the Court's settled case-law, in order to assess whether the persons concerned are engaged in the same or similar work for the purposes of the Framework Agreement, it is necessary to determine, in accordance with Clause 3(2) and Clause 4(1) of the Framework Agreement, whether, in the light of a number of factors such as the nature of the work, training requirements and working conditions, those persons can be regarded as being in a comparable situation (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 48 and the case-law cited).

35 In the present case it is for the referring court, which alone has jurisdiction to assess the facts, to determine whether Ms Vernaza Ayovi was in a situation comparable to that of permanent workers taken on by the same employer during the same period (see, by analogy, judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 49 and the case-law cited).

36 In addition, it is not disputed that there is a difference between the treatment of permanent workers and non-permanent workers, such as Ms Vernaza Ayovi, with regard to the consequences arising from possible wrongful dismissal.

37 Accordingly, subject to the referring court's definitive assessment of the comparability of the situation of a non-permanent worker, such as Ms Vernaza Ayovi, and that of a permanent worker, in the light of all the relevant factors, it is necessary to ascertain whether there is an objective reason justifying that difference in treatment.

38 In that regard, it should be noted that, according to the Court's settled case-law, the concept of 'objective grounds', within the meaning of Clause 4(1) of the Framework Agreement, must be

understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general and abstract measure, such as a law or a collective agreement (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 53 and the case-law cited).

39 According to equally settled case-law, that concept requires the unequal treatment found to exist to be justified by the presence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs, and on the basis of objective and transparent criteria, in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for the purpose of attaining the objective pursued and is necessary for that purpose. Those factors may be apparent, in particular, from the specific nature of the tasks for the performance of which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from the pursuit of a legitimate social-policy objective of a Member State (judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 54 and the case-law cited).

40 In that regard, it is clear from the documents before the Court and from the answers to the Court's questions during the hearing that the general rule applicable in the event of 'wrongful' or 'unlawful' dismissal provides that the employer may choose between reinstatement of the worker in question and granting that worker compensation.

41 In addition, it is only by way of exception to that general rule that permanent workers in the service of the public authorities whose disciplinary dismissal is declared wrongful must be reinstated.

42 The Spanish Government claims that such a difference in treatment is justified having regard to the way in which the latter category of workers is recruited and the particular context in which their recruitment occurs. The guarantee of reinstatement at issue is, therefore, inextricably linked to the system for access to permanent jobs. The basic regulations relating to public servants provide that the system for recruitment of permanent contract agents is selective in nature and, in order to respect the principles of equality and of recognition of merit and competence in access to public employment, must include one or more tests that are designed to evaluate the competence of the candidates and to establish a classification, or be the result of a process of assessment of the merits of the candidates. By means of automatic reinstatement in the event that a dismissal is found to be wrongful, the Spanish legislature seeks to protect permanent workers in the public service in accordance with the principles of equality, recognition of merit and competence and right of access.

43 The Spanish Government claims in this regard that retention in post is an imperative arising from passing a competition for recruitment to the public service, and that passing such a competition justifies granting more security to permanent staff, such as the right to remain in their jobs, than to temporary staff or staff on indefinite contracts.

44 According to that government, for permanent staff, mandatory reinstatement thus ensures job stability, having regard to the principles set out in the Spanish Constitution, whereas, for non-permanent staff, retention in post is not a defining feature of the employment relationship, with the result that the Spanish legislature did not consider it appropriate, in that case, to deprive the employing administration of the power to choose between reinstatement of the worker whose disciplinary dismissal has been found to be wrongful, and granting that worker compensation.

45 According to the Spanish Government's explanations, that inherent difference in the methods of recruitment has the effect that the permanent contract agent, who is not an official, but who has

nevertheless passed a selection procedure in accordance with the principles of equality and of recognition of merit and competence, may benefit from that guarantee of permanence which is an exception to the normal rules of employment law.

46 It must be held that, while the difference in treatment at issue cannot be justified by the public interest which attaches, in itself, to the methods of recruitment of permanent workers, the fact remains that considerations based on the characteristics of the law governing the national civil service, such as those referred to in paragraphs 42 to 44 of the present judgment, are capable of justifying such a difference in treatment. In that regard, the conditions of impartiality, efficiency and independence of the administration imply a certain permanence and stability of employment. Those considerations, which have no counterpart in standard employment law, explain and justify the limitations on the power of public employers unilaterally to terminate employment contracts and, as a consequence, the national legislature's decision not to grant them the right to choose between reinstatement and compensation for harm suffered owing to wrongful dismissal.

47 Consequently, it must be found that the automatic reinstatement of permanent workers takes place in a significantly different context, from a factual and legal point of view, to that in which non-permanent workers find themselves (see, by analogy, judgment of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 56).

48 In those circumstances, it must be held that the unequal treatment found to exist is justified by the existence of precise and specific factors, characterising the employment condition to which it relates, in the particular context in which it occurs, and on the basis of objective and transparent criteria within the meaning of the case-law referred to in paragraph 39 of this judgment.

49 In the light of all of the foregoing, the answer to the questions is that Clause 4(1) of the Framework Agreement must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, according to which, when the disciplinary dismissal of a permanent worker in the service of a public authority is declared wrongful, the worker in question must be reinstated, whereas, in the same situation, a worker employed under a temporary contract or a temporary contract of indefinite duration performing the same duties as that permanent worker need not be reinstated but instead may receive compensation.

Costs

50 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 (Sixth Chamber) hereby rules:

Clause 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999, which is annexed 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 not precluding national legislation, such as that at issue in the main proceedings, according to which, when the disciplinary dismissal of a permanent worker in the service of a public authority is declared wrongful, the worker in question must be reinstated, whereas, in the same situation, a worker employed under a temporary contract or a temporary contract of indefinite duration performing the same duties as that permanent worker need not be reinstated but instead may receive compensation.

[Signatures]

* Language of the case: Spanish.