ECLI:EU:C:2017:1014

Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

20 December 2017 (*)

(Reference for a preliminary ruling — Social policy — Directive 1999/70/EC — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Clause 4 — Principle of non-discrimination — Concept of 'employment conditions' — Placement on the administrative status for special service leave — National legislation providing for special leave to be granted, in case of election to public office, only to established civil servants, to the exclusion of non-established civil servants)

In Case C-158/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Contencioso-Administrativo n. 1 de Oviedo (Administrative Court No 1, Oviedo, Spain), made by decision of 1 March 2016, received at the Court on 16 March 2016, in the proceedings

Margarita Isabel Vega González

v

Consejería de Hacienda y Sector Público del Gobierno del Principado de Asturias,

THE COURT (Tenth Chamber),

composed of E. Levits, President of the Chamber, M. Berger and F. Biltgen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ms Vega González, by, S. Suárez Solis, abogada, and R. Blanco González, procurador,

– the Spanish Government, by A. Gavela Llopis and A. Rubio González, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 7 September 2017,

gives the following

Judgment

1 This request for a preliminary ruling relates to the interpretation of Clause 4 of the framework agreement on fixed-term work, concluded on 18 March 1999 ('the framework agreement'), 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).

2 The request has been made in proceedings between Ms Margarita Isabel Vega González and the Consejería de Hacienda y Sector Público del Gobierno del Principado de Asturias (Regional Ministry of Finance and the Public Sector of the Government of the Principality of Asturias, Spain) ('the Ministry') concerning the latter's refusal to grant Ms Vega González's request to take special service leave (by placing her on the 'administrative status' for special service leave) following her election as a member of Parliament.

Legal context

EU law

3 It is apparent from recital 14 of Directive 1999/70 that 'the signatory parties wished to conclude a framework agreement on fixed-term work setting out the general principles and minimum requirements for fixed-term employment contracts and employment relationships; they have demonstrated their desire to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

4 According to Article 1 of Directive 1999/70, the purpose of the directive is 'to put into effect the framework agreement ... concluded between the general cross-industry organisations [the Union of Industrial and Employers' Confederations (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trades Union Confederation (ETUC)] annexed hereto'.

5 The preamble to the framework agreement states that the agreement 'sets out the general principles and minimum requirements relating to fixed-term work, recognising that their detailed application needs to take account of the realities of specific national, sectoral and seasonal situations. 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 and for using fixed-term employment contracts on a basis acceptable to employers and workers'.

6 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, second, to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

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, entitled ‘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.’

Spanish law

9 The Ley 3/1985 de Ordenación de la Función Pública de la Administración del Principado de Asturias (Law of the Principality of Asturias 3/1985 on the organisation of the civil service of the Government of the Principality of Asturias) of 26 December 1985 (BOE No 59 of 10 March 1986, p. 9083) defines, in Article 6, non-established civil servants as those who, ‘having been legally appointed, temporarily occupy vacant posts within the workforce of the Government of the Principality of Asturias, until such time as those posts are filled by established civil servants, or who replace established civil servants in situations involving leave of absence or special service leave’.

10 As regards the forms of administrative status, these are listed in Article 59(1) of Law 3/1985, which mentions ‘special service leave’ in paragraph (e). Article 59(2) expressly provides that non-established civil servants may not be placed on special service leave.

11 Article 64(1)(g) of Law 3/1985 states that established civil servants of the Government of the Principality of Asturias are to be given special service leave if they become a member of the Junta General del Principado de Asturias (regional Parliament of the Principality of Asturias).

12 According to Article 64(2) of Law No 3/1985, civil servants on special service leave are entitled to have their status and place of employment reserved and the time spent on such leave to be included for the purposes of the calculation of three-yearly length-of-service increments and promotion in grade.

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

13 Ms Vega González has worked for the Government of the Principality of Asturias since 26 May 1989, under various forms of employment status. On 15 April 2011 she was appointed, by the same government, as an interim (non-established) civil servant among the higher category of administrative staff, in order to replace an established civil servant on secondment.

14 During the elections for the regional Parliament of Asturies, which took place on 24 May 2015, Ms Vega González stood as a candidate in the list of one of the political parties, and was elected a member of Parliament.

15 In order to be able to attend to her parliamentary duties on a full-time basis, on 13 June 2015 Ms Vega González applied to the Government of the Principality of Asturias, under Article 59 of Law 3/1985, for special service leave or, alternatively, personal leave.

16 By decision of 23 June 2015, the Dirección General de Función Pública (Directorate General for the Civil Service, Spain) refused her request on the ground that special service leave and personal leave apply only to established civil servants, to the exclusion of non-established civil servants.

17 Ms Vega González's internal appeal was dismissed by the Ministry's decision of 22 October 2015.

18 Ms Vega González brought an appeal against that decision before the referring court, the Juzgado de lo Contencioso-Administrativo n. 1 de Oviedo (Administrative Court No 1, Oviedo, Spain).

19 Before the referring court, the Ministry claims that Directive 1999/70 does not apply since it concerns only working conditions and not forms of administrative status.

20 The Ministry explains that if Ms Vega González was an established civil servant she would have been granted the special service leave referred to in Article 59 of Law 3/1985, the employer authorities having no discretion in that regard. Thus, the only way for Ms Vega González to carry out her political duties full time would be to resign from her post permanently.

21 The referring court notes that, in accordance with the Court's settled case-law, a difference in treatment with regard to employment conditions as between fixed-term workers and permanent workers is not compatible with the requirements of Directive 1999/70, unless it is justified by objective reasons.

22 In that regard, the referring court maintains that, even if it is theoretically possible to argue that the difference in treatment is justified by objective reasons relating to the necessity and urgency for making the temporary appointment, that argument does not, however, apply in a situation in which the post has been occupied by a temporary worker for more than four years. In addition, the referring court notes the particular importance of the right in question, namely the right of access to public office, which is guaranteed by the Spanish constitution.

23 According to the referring court, the temporary nature of the activity carried out by a non-established civil servant is not, in itself, an objective reason justifying a difference in treatment that deprives him of the right to return to his post at the end of his parliamentary term of office. Even though, during that term of office, the possibility of reinstatement might de facto be lost on the grounds that the post that the temporary agent occupied was, in the intervening period, filled by an established civil servant or was simply abolished, it also cannot be ruled out that the situation which justified the appointment of that non-established civil servant might still exist at the end of his parliamentary term of office.

24 Therefore, the referring court's doubts mainly concern the concept of 'working conditions' for the purpose of Clause 4(1) of the framework agreement. It states that, as it stands, the Court has

examined the scope of this concept only with regard to matters of remuneration to be received, working time, the working day, the calendar or holidays, or indeed, more generally, leave that may be given for absence from work. It is therefore necessary, first, to determine whether the concept of 'working conditions' also covers the obligation to place a fixed-term worker, in the present case a non-established civil servant, onto an administrative status which allows him, as it does a permanent worker, namely an established civil servant, to suspend the employment contract in order, specifically, to fulfil a political mandate for which he has been elected. Second, the referring court is uncertain whether the difference in treatment, made by Article 59 of Law 3/1985, between non-established civil servants and established civil servants is compatible with the principle of non-discrimination established in Clause 4(1) of the framework agreement.

25 It is in those circumstances that the Juzgado de lo Contencioso-Administrativo n.1 de Oviedo (Administrative Court No 1, Oviedo) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must the term "employment conditions" in Clause 4 of the framework agreement be interpreted as including a legal situation in which a fixed-term worker who has been elected to political office as a member of Parliament may, in the same way as a permanent member of staff, apply for and be granted a break in the service relationship with the employer so as to be reinstated in the same post once the relevant parliamentary term of office has expired?

(2) Must the principle of non-discrimination referred to in Clause 4 of the framework agreement be interpreted as precluding national legislation such as Article 59(2) of Law 3/1985, which totally and absolutely precludes giving a "non-established" civil servant special service leave in the event of being elected a member of Parliament, when that right is given to "established" civil servants?'

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether Clause 4(1) of the framework agreement must be interpreted as meaning that the concept of 'employment conditions', referred to in that provision, includes the right for a worker who has been elected to a parliamentary role to benefit from special service leave, provided for by national legislation, under which the employment relationship is suspended such that the worker's job and his entitlement to promotion are guaranteed until the end of his parliamentary term of office.

27 As a preliminary remark, it must be borne in mind that, as provided in Clause 1(a) of the framework agreement, one of the agreement's objectives is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination. In addition, the third paragraph of the preamble to the framework agreement states that the agreement '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 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 25 and the case-law cited).

28 The framework agreement, in particular Clause 4, aims 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

14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 26 and the case-law cited).

29 Having regard to the objectives pursued by the framework agreement, Clause 4 of that agreement must be understood as expressing a principle of EU social law which cannot be interpreted restrictively (judgment of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 27 and the case-law cited).

30 With regard to the concept of 'employment conditions' within the meaning of Clause 4(1) of the framework agreement, the Court has already held that the decisive criterion for determining whether a measure falls 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 (judgments of 12 December 2013, *Carratù*, C-361/12, EU:C:2013:830, paragraph 35; of 13 March 2014, *Nierodzik*, C-38/13, EU:C:2014:152, paragraph 25; of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 26; and order of 9 February 2017, *Rodrigo Sanz*, C-443/16, EU:C:2017:109, paragraph 32).

31 The concept of 'employment conditions', within the meaning of Clause 4(1) of the framework agreement, thus covers three-yearly length-of-service increments (see, to that effect, judgment of 13 September 2007, *Del Cerro Alonso*, C-307/05, EU:C:2007:509, paragraph 47; of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres*, C-444/09 and C-456/09, EU:C:2010:819, paragraphs 50 to 58; and of 9 July 2015, *Regojo Dans*, C-177/14, EU:C:2015:450, paragraph 43), six-yearly continuing professional education increments (see, to that effect, order of 9 February 2012, *Lorenzo Martínez*, C-556/11, not published, EU:C:2012:67, paragraph 38), rules concerning periods of service to be completed in order to be classified in a higher salary grade or calculation of the periods required to have performance assessed each year (see, to that effect, judgment of 8 September 2011, *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 46 and the case-law cited), the right to participate in a teaching evaluation plan and the ensuing financial incentive (order of the Court of 21 September 2016, *Álvarez Santirso*, C-631/15, EU:C:2016:725, paragraph 36), as well as the reduction of working hours by half and the consequent reduction in wages (order of 9 February 2017, *Rodrigo Sanz*, C-443/16, EU:C:2017:109, paragraph 33).

32 The Court has also held that rules for determining the notice period applicable in the event of termination of fixed-term employment contracts form part of 'employment conditions' within the meaning of Clause 4(1) of the framework agreement (see, to that effect, judgment of 13 March 2014, *Nierodzik*, C-38/13, EU:C:2014:152, paragraphs 27 and 29).

33 This is also the case with the compensation that the employer must pay to an employee on account of the unlawful insertion of a fixed-term clause into his employment contract (see, to that effect, judgment of 12 December 2013, *Carratù*, C-361/12, EU:C:2013:830, paragraph 37) or following termination of fixed-term employment contracts (see, to that effect, judgment of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 31).

34 As was noted by the Advocate General in point 22 of her Opinion, the expression 'employment conditions' should be understood to mean the rights, entitlements and obligations that define a given employment relationship, including both the conditions under which a person takes up employment and those concerning the termination of that relationship.

35 A decision granting special service leave, such as that at issue in the main proceedings, which leads to the suspension of certain elements of the employment relationship whilst others are maintained, must, therefore, be deemed to satisfy the criterion set out in paragraph 30 of the present

judgment and accordingly to fall within the concept of ‘employment conditions’ within the meaning of Clause 4 of the framework agreement.

36 Indeed, it is not disputed that the decision to grant such leave to a worker is necessarily taken on the basis of the employment relationship which connects him to the employer. Moreover, it must be noted that, in the present case, the special service leave provided for by Law 3/1985 not only leads to the suspension of the employment relationship but also allows for the worker’s place of employment to be reserved until his reinstatement at the end of his parliamentary term of office, ensuring that it is included for the purposes of calculating three-yearly length-of-service increments and promotion in grade — matters which have already been expressly recognised, as is clear from the case-law cited in paragraph 31 of the present judgment and as the Advocate General notes in point 25 of her Opinion, as falling within the definition of ‘employment conditions’.

37 The argument that, in the context of the dispute in the main proceedings, the need to be granted such special service leave is a result of the deliberate and unilateral decision of the fixed-term worker to take part in the elections is not decisive in this respect, since a permanent worker in the same situation would have been faced with the same need. Furthermore, a person who puts themselves forwards for a parliamentary role is not guaranteed to be elected, such that merely the fact, in itself, of putting themselves forward does not require them to request special service leave.

38 In any case, it should be added that an interpretation of Clause 4(1) of the framework agreement which excludes from the definition of ‘employment conditions’ the right to special service leave would limit the scope of the protection granted to fixed-term workers against discrimination, in disregard of the objective pursued by that provision (see, to that effect, judgments of 13 March 2014, *Nierodzik*, C-38/13, EU:C:2014:152, paragraphs 27 and 29 and of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 30; as well as order of the Court of 21 September 2016, *Álvarez Santirso*, C-631/15, EU:C:2016:725, paragraph 39).

39 Therefore, the answer to the first question must be that Clause 4(1) of the framework agreement must be interpreted as meaning that the concept of ‘employment conditions’, referred to in that provision, includes the right for a worker who has been elected to a parliamentary role to benefit from special service leave, provided for by national legislation, under which the employment relationship is suspended such that the worker’s job and his entitlement to promotion are guaranteed until the end of his parliamentary term of office.

The second question

40 By its second question, the referring court asks, in essence, whether Clause 4 of the framework agreement must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that absolutely excludes fixed-term workers from the right to be granted leave, so that they may hold political office, during which the employment relationship is suspended until the worker’s reinstatement at the end of the term of office, when that right is conferred on permanent workers.

41 With regard to Clause 4 of the framework agreement, it must be noted that its first paragraph lays down, in respect of employment conditions, a prohibition on treating fixed-term workers in a less favourable manner than permanent workers in a comparable situation solely because they have a fixed-term contract, unless different treatment is justified on objective grounds.

42 According to the Court’s settled case-law, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be

treated alike unless such treatment is objectively justified (judgments of 8 September 2011, *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 65 and the case-law cited, and of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 35).

43 In the present case, it must be held that there is a difference of treatment between fixed-term workers and permanent workers, since a permanent worker, elected to political office, may be granted special service leave under which the employment relationship is suspended until the worker's reinstatement at the end of the term of office, whilst a fixed-term worker must resign from his post in order to hold the same office.

44 Thus, it is only if the work carried out by a worker such as Ms Vega González within the context of her fixed-term contract is not identical or comparable to the work carried out by permanent workers that the alleged difference in treatment with respect to the right to be granted special service leave may be justified, notwithstanding the prohibition set out in Clause 4 of the framework agreement, as that difference in treatment would relate to different situations (see, by analogy, judgments of 18 October 2012, *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 48 and the case-law cited, and of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 41).

45 In order to assess whether the persons concerned are engaged in the same or similar work for the purposes of the framework agreement, it must first be determined, in accordance with clauses 3(2) and 4(1) of that 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 (judgments of 18 October 2012, *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 42 and the case-law cited; of 13 March 2014, *Nierodzik*, C-38/13, EU:C:2014:152, paragraph 31; and of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 40).

46 It is therefore for the referring court to determine whether Ms Vega González is in a situation comparable to that of workers employed on a permanent basis by the same authority for the same period (see, by analogy, judgments of 18 October 2012, *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 43 and the case-law cited; of 13 March 2014, *Nierodzik*, C-38/13, EU:C:2014:152, paragraph 32; and of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 42). If, on completion of that assessment, the referring court finds inequality of treatment, it would then have to ascertain whether it may be justified on 'objective grounds' within the meaning of Clause 4(1) of the framework agreement, that is to say, by precise, specific factors, characterising the employment condition in question, in the particular context in which it occurs and on the basis of objective, transparent criteria that enable it to be ascertained whether that unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose (see, to that effect, judgment of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 45 and the case-law cited).

47 In that regard, the Court has already held that 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, abstract national norm (judgment of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 46 and the case-law cited).

48 Moreover, it is also clear from the Court's established case-law that reliance on the mere temporary nature of the employment of staff of the public authorities does not meet those

requirements and cannot constitute an ‘objective ground’ for the purposes of Clause 4(1) of the framework agreement (judgment of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 47 and the case-law cited).

49 In the present case, even if the referring court does not rule out that the necessity and urgency of making a temporary appointment, like the predictability of the end of the employment relationship, could, in principle, constitute precise and concrete factors capable of justifying inequality of treatment as regards the granting of special service leave, it states, however, that such arguments do not apply in a situation such as that giving rise to the dispute in the main proceedings where the post has been occupied for more than four years by the same temporary worker.

50 In any case, the absolute refusal to grant fixed-term workers special service leave does not prima facie appear to be indispensable to the objective pursued by Law 3/1985, namely the maintenance of jobs and the entitlement to promotion of permanent workers — and more specifically established civil servants holding political office — in as much as the referring court itself considers it entirely feasible that fixed-term workers holding a similar office could be granted special service leave that suspends the employment relationship until the end of that term of office at which time they would be guaranteed reinstatement to their post, provided it had not, in the meantime, been abolished or filled by an established civil servant.

51 In view of the above, the answer to the second question must be that Clause 4 of the framework agreement must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that absolutely precludes granting a fixed-term worker, so that they may carry out a political mandate, a leave during which the employment relationship is suspended until the worker’s reinstatement at the end of the term of office, when that right is conferred on permanent workers.

Costs

52 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 4(1) of the framework agreement on fixed-term work concluded on 18 March 1999, 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 meaning that the concept of ‘employment conditions’, referred to in that provision, includes the right for a worker who has been elected to a parliamentary role to benefit from special service leave, provided for by national legislation, under which the employment relationship is suspended such that the worker’s job and his entitlement to promotion are guaranteed until the end of that parliamentary term of office.**

2. **Clause 4 of the framework agreement on fixed-term work concluded on 18 March 1999, annexed to Council Directive 1999/70 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that absolutely precludes granting a fixed-term worker, so that he may hold political office, leave during which the employment relationship is suspended until reinstatement of that worker at the end of the term of office, when that right is conferred on permanent workers.**

[Signatures]

* Language of the case: Spanish.