Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

5 February 2015 *

(Reference for a preliminary ruling — Charter of Fundamental Rights of the European Union — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — National legislation providing for an employment contract of indefinite duration with a probationary period of one year — Implementation of EU law — None — Lack of jurisdiction of the Court)

In Case C-117/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social No 23 de Madrid (Spain), made by decision of 4 March 2014, received at the Court on 11 March 2014, in the proceedings

Grima Janet Nisttahuz Poclava

v

Jose María Ariza Toledano,

THE COURT (Tenth Chamber),

composed of C. Vajda, President of the Chamber, A. Rosas (Rapporteur), and E. Juhász, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Spanish Government, by A. Rubio González, acting as Agent,

— the Polish Government, by B. Majczyna, acting as Agent,

— the European Commission, by J. Enegren and R. Vidal Puig, acting as Agents,

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

gives the following

* Language of the case: Spanish.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 30 of the Charter of Fundamental Rights of the European Union ('the Charter') and 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 Nisttahuz Poclava and her employer, Mr Ariza Toledano, concerning Ms Nisttahuz Poclava's dismissal.

Legal context

EU law

3 Article 30 of the Charter guarantees 'Protection in the event of unjustified dismissal' in the following terms:

'Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.'

4 Under Article 1 of Directive 1999/70, 'the purpose of the Directive is to put into effect the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto'.

5 The Annex to Directive 1999/70 sets out the framework agreement on fixed-term contracts concluded by the ETUC, UNICE and CEEP ('the Framework Agreement'). Clause 1 of the Framework Agreement states:

'The purpose of this framework agreement is to:

(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.'

6 Paragraph 1 of Clause 2 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.

…'

8 Clause 5 of the Framework Agreement, relating to 'measures to prevent abuse', states:

'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.

2. 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

Employment law

9 Employment relations are governed by Royal Legislative Decree 1/1995 of 24 March 1995 approving the consolidated version of the Workers' Statute (BOE No 75 of 29 March 1995, p. 9654, 'the Workers' Statute').

10 As regards the 'probationary period', Article 14 of the Workers'Statute provides:

'1. A probationary period may be agreed in writing, subject to limits as to duration laid down, as the case may be, in collective agreements. Where no collective agreement applies, the probationary period may not exceed 6 months for a person holding a diploma of intermediate education [técnicos titulados] and 2 months for other workers. In companies with fewer than 25 workers, the probationary period may not exceed 3 months for workers other than persons who hold a diploma of intermediate education.

In the case of temporary fixed-term contracts, as referred to in Article 15 and agreed for a period not exceeding 6 months, the probationary period may not exceed one month, unless provision is made to the contrary in a collective agreement. …'

The employment contract of indefinite duration to support entrepreneurs

11 Law 3/2012 of 6 July 2012 on urgent measures for labour market reform (BOE No 162, of 7 July 2012, p. 49-113) amended the employment legislation because of the economic crisis that the Kingdom of Spain was undergoing.

12 Among the measures for 'fostering employment of indefinite duration and other measures to promote job creation', Article 4 of Law 3/2012 provided for the 'employment contract of indefinite duration to support entrepreneurs'. Under Article 4(1), (2) and (3):

'1. In order to facilitate employment stability while fostering the spirit of enterprise, undertakings with fewer than 50 workers may conclude employment contracts to support entrepreneurs governed by the present Article.

2. The contract shall be concluded for an indefinite duration and on a full-time basis and shall be set out in writing in accordance with a model to be established.

3. The legal framework for the contract and the related rights and obligations shall in general be governed by the consolidated version of the Workers' Statute approved by Royal Legislative Decree 1/1995 of 24 March and by collective agreements in the case of employment contracts of indefinite duration, with the sole exception of the probationary period referred to in Article 14 of the Workers' Statute, which shall in all circumstances be of one year's duration. A probationary period may not be fixed where the worker has already discharged the same duties within the undertaking, whatever the form of the employment contract.'

13 Under Article 4(4) and (5), the employment contract to support entrepreneurs is to be accompanied by tax and social security advantages and, where such a contract is agreed with jobseekers registered with the employment office, it is to give rise to the right to a variety of benefits.

14 Paragraphs 6, 7 and 8 of Article 4 of Law No 3/2012 provide:

'6. The employment contract of indefinite duration to support entrepreneurs referred to in the present Article may not be concluded by an undertaking which, in the six months prior to conclusion of the contract, carried out unfair dismissals. …

7. For the purposes of the benefits linked to the contract of indefinite duration to support entrepreneurs, the undertaking must employ the worker concerned for at least three years with effect from the establishment of the employment relationship. Furthermore, it must maintain the level of employment offered by [that contract] for at least one year with effect from the conclusion of the contract. In the event that those obligations are not met, the benefits must be repaid. …

8. For the purposes of the present Article, the number of workers employed by the undertaking at the time of recruitment shall be taken into account.'

15 The period of validity of that type of employment is laid down in paragraph 2 of the ninth transitional provision of Law 3/2012, in the following terms:

'Ninth transitional provision. Conclusion of training and apprenticeship contracts and of employment contracts of indefinite duration to support entrepreneurs linked with the rate of unemployment.

…

Employment contracts of indefinite duration to support entrepreneurs, as referred to in Article 4 of the present Law, may be concluded until the unemployment rate of our country is lower than 15%.'

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

16 Ms Nisttahuz Poclava, of Bolivian nationality, worked as a cook for Taberna del Marqués, a hotel company. Her contract for full-time employment was signed on 16 January 2013. That contract fell within the category of employment contracts of indefinite duration to support entrepreneurs.

17 Clause 2 of the contract states that the probationary period for Ms Nisttahuz Poclava would, in any event, be one year. Under Clause 11, the contract may be co-financed by the European Social Fund. The collective agreement for the hotel, restaurant and catering trade is applicable in respect of all matters not covered by the employment contract.

18 By letter of 31 May 2013, Ms Nisttahuz Poclava was informed that, with effect from that date, she was no longer in the employ of the company because she had not successfully completed her probationary period.

19 On 2 July 2013, Ms Nisttahuz Poclava brought an action against her employer before the Juzgado de lo Social No 23 de Madrid (Social Court No 23, Madrid; or 'the referring court'), seeking a declaration that her dismissal was unfair and an order directing her employer either to reinstate her on the same terms as those applicable before the employment contract was terminated or to pay her compensation equivalent to 33 days' salary per year of service.

20 The referring court states that the length of the probationary period under Article 4(3) of Law 3/2012 is not the same as that normally provided for under Spanish law and is unrelated to the professional skills of the person recruited. According to the referring court, that provision establishes an atypical contract with a fixed term of one year, which may be converted into a contract of indefinite duration once that period has elapsed. Furthermore, during the probationary period, the employee has no legal protection against dismissal, notably as regards the form that dismissal may take, the reasons for which a dismissal decision may be taken and the extent to which a dismissal is subject to review by the courts.

21 The referring court also states that Law 3/2012 is intended to facilitate employment and is an example of the legislative reform in the field of employment prompted by the decisions and recommendations of the European Union on employment policy.

22 As regards the decisions and recommendations of the European Union, the referring court refers in that respect to Article 148 TFEU, laying down guidelines for employment; Article 151 TFEU; Council Decision 2008/618/EC of 15 July 2008 on guidelines for the employment policies of the Member States (OJ 2008 L 198, p.47); the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 April 2012, entitled 'Towards a job-rich recovery' (COM(2012) 173 final); Council Decision 2010/707/EU of 21 October 2010 on guidelines for the employment policies of the Member States (OJ 2010 L 308, p.46); the Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Spain and delivering a Council opinion on the updated Stability Programme of Spain, 2011-2014 (OJ 2011 C 212, p. 1); and the Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Spain and delivering a Council opinion on the Stability Programme for Spain, 2012-2015 (OJ 2012 C 219, p. 81).

23 According to the referring court, the employment contract of indefinite duration to support entrepreneurs infringes Article 30 of the Charter; Articles 2.2(b) and 4 of Convention No 158 concerning the Termination of Employment at the Initiative of the Employer, adopted on 22 June 1982 in Geneva by the International Labour Organisation; the European Social Charter signed at Turin on 18 October 1961 (an infringement which is apparent from a decision of the European Committee of Social Rights of 23 May 2012 in relation to a similar Greek contract); and Directive 1999/70.

24 As regards, more specifically, Directive 1999/70, the referring court finds that Law 3/2012 is contrary to the objectives of that directive, namely, non-discrimination as regards workers engaged under a fixed-term contract and the prevention of abuse resulting from the use of successive fixed-term contracts or employment relationships. According to the referring court, Law 3/2012 gives rise to discrimination between, on the one hand, workers who have concluded such contracts or employment relationships and, on the other, those who have an ordinary fixed-term employment contract or one of indefinite duration, that discrimination arising in relation to the first year in which those contracts or employment relationships run, in so far as, in the event of early termination of employment, no compensation is payable for workers in the former category. Additionally, Law 3/2012 introduces, in breach of Directive 1999/70 and the Framework Agreement, a new virtually fixed-term contract that imposes less favourable working conditions on the workers to whom it applies.

25 The referring court wonders whether it is contrary to EU law for national legislation to establish and regulate an employment contract which entails a one-year probationary period and, additionally, to make it impossible for the probationary period for that type of contract to be regulated by agreement through collective bargaining. The referring court also wonders whether that probationary period, during which the employer may freely terminate the contract of employment, is compatible with the fundamental right guaranteed by Article 30 of the Charter.

26 In those circumstances, the Juzgado de lo Social No 23 de Madrid decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Is national legislation under which employment contracts of indefinite duration to support entrepreneurs are made subject to a one-year probationary period, during which the employee may freely be dismissed, contrary to EU law, and is it compatible with the fundamental right guaranteed by Article 30 of the Charter?

2. Is the one-year probationary period to which employment contracts of indefinite duration to support entrepreneurs are made subject prejudicial to the objectives of, and to the rules laid down in, Directive 1999/70 — [and, accordingly, Clauses 1 and 3 of the Framework Agreement]?’

The jurisdiction of the Court

27 By its questions, which it is appropriate to examine together, the referring court asks the Court in essence whether, on a proper construction of Article 30 of the Charter, Directive 1999/70 and, more specifically, Clauses 1 and 3 of the Framework Agreement, national legislation such as the Spanish legislation establishing and regulating the employment contract of indefinite duration to support entrepreneurs and providing for a one-year probationary period is precluded.

28 It should be recalled that, so far as actions of the Member States are concerned, the scope of the Charter is defined in Article 51(1) thereof, under which the provisions of the Charter are addressed to the Member States only when they are implementing EU law.

29 It emerges in essence from the settled case-law of the Court that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations (judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 19 and case-law cited).

30 It is necessary, therefore, to determine whether the Spanish legislation establishing and regulating the employment contract of indefinite duration to support entrepreneurs implements EU law.

31 As the Spanish Government and the European Commission have pointed out, Directive 1999/70 and the Framework Agreement are applicable to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to their employer (judgments in *Del Cerro Alonso*, C-307/05, EU:C:2007:509, paragraph 28; *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 40; and *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 33).

32 Under Clause 2(1) of the Framework Agreement, that 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.

33 In accordance with the definitions laid down in Clause 3 of that agreement, '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'.

34 It emerges from the order for reference that, under Article 4(2) of Law 3/2012, 'the contract is to be concluded for an indefinite duration'. Article 4(3) of Law 3/2012 provides that the contract is to be governed by the provisions of the Workers' Statute and by collective agreements applicable to contracts of indefinite duration, with the sole exception of the duration of the probationary period.

35 It follows both from the definition of 'fixed-term worker' in Clause 3 of the Framework Agreement and from the national legislation applicable to the case before the referring court that an employment contract such as that under which Ms Nisttahuz Poclava was employed cannot be categorised as a fixed-term contract.

36 A probationary period essentially makes it possible for a worker's aptitude and skills to be checked, whilst a fixed-term employment contract is used if the end of the employment contract or relationship is determined by objective conditions.

37 In any event, the duration of a probationary period, such as that laid down in Law 3/2012, is not regulated by Directive 1999/70.

38 It must therefore be held that a contract such as the 'employment contract of indefinite duration to support entrepreneurs', provided for under Spanish law, is not a fixed-term contract that falls within the scope of Directive 1999/70.

39 In the grounds of the order for reference, the referring court relied on other provisions of EU law, which, in its view, support a finding that the legal situation at issue falls within the scope of EU law.

40 As regards Article 151 TFEU, which sets out the objectives of the European Union and Member States in the field of social policy, that provision does not impose any specific obligation with respect to probationary periods in employment contracts. The same is true for the guidelines and recommendations in the field of employment policy adopted by the Council under Article 148 TFEU, as referred to by the referring court.

41 In that regard, it should be borne in mind that, when examining the French 'new recruitment contract', the Court held that, even though protection for workers in the event of the termination of the employment contract is one of the means of attaining the objectives laid down in Article 151 TFEU and even though the EU legislature has competence in this field in accordance with the conditions laid down in Article 153(2) TFEU, situations that have not been covered by measures adopted on the basis of those provisions do not fall within the scope of EU law (order in *Polier*, C-361/07, EU:C:2008:16, paragraph 13).

42 In addition, the fact that the employment contract of indefinite duration to support entrepreneurs may be financed by structural funds is not sufficient, in itself, to support the conclusion that the situation at issue in the main proceedings involves the implementation of EU law for the purposes of Article 51(1) of the Charter.

43 In the grounds for its decision, the referring court also refers to Articles 2.2(b) and 4 of Convention No 158 on the Termination of Employment, adopted at Geneva on 22 June 1982 by the International Labour Organisation, and the European Social Charter signed at Turin on 18 October 1961. It must be held that the Court has no jurisdiction under Article 267 TFEU to rule on the interpretation of provisions of international law which bind Member States outside the framework of EU law (see judgments in *Vandeweghe and Others*, 130/73, EU:C:1973:131, paragraph 2 and *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraph 61; the order in *Corpul Național al Polițiștilor*, C-134/12, EU:C:2012:288, paragraph 14; and the judgment in *Qurbani*, C-481/13, EU:C:2014:2101, paragraph 22).

44 It follows from all the foregoing considerations that the situation at issue in the main proceedings does not fall within the scope of EU law. Consequently, the Court does not have jurisdiction to answer the questions put by the referring court.

Costs

45 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:

The Court of Justice of the European Union does not have jurisdiction to answer the questions referred for a preliminary ruling by the Juzgado de lo Social No 23 de Madrid (Spain) by decision of 4 March 2014.

[Signatures]