Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

3 June 2021 *

(Reference for a preliminary ruling – Social policy – Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP – Clause 4 – Principle of non-discrimination – Rejection of a request for leave of absence by reason of employment in the public sector provided for permanent staff regulated under administrative law – National legislation excluding entitlement to such leave when taking up temporary employment – Scope – Inapplicability of clause 4 – Lack of jurisdiction of the Court)

In Case C-942/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Aragón (High Court of Justice, Aragon, Spain), made by decision of 17 December 2019, received at the Court on 31 December 2019, in the proceedings

Servicio Aragonés de Salud

v

LB,

THE COURT (Seventh Chamber),

composed of A. Kumin (Rapporteur), President of the Chamber, P.G. Xuereb and I. Ziemele, Judges,

Advocate General: E. Tanchev,

Registrar: Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Servicio Aragonés de Salud, by J. Divassón Mendívil, acting as Agent,

– LB, by E. Ena Pérez, procuradora, and F. Romero Paricio, abogado,

– the Spanish Government, by S. Jiménez García, acting as Agent,

* Language of the case: Spanish.

– the European Commission, initially by I. Galindo Martín, N. Ruiz García and M. van Beek, and subsequently by I. Galindo Martín and N. Ruiz García, 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 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 the Servicio Aragonés de Salud (Aragon Health Service, Spain; 'the Health Service') and LB concerning its refusal to grant the latter's request to grant her leave of absence in order to take up a post on a fixed-term contract.

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 Clause 1 of the framework agreement states that the purpose of that agreement is to:

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

…'

5 Clause 2 of the framework agreement, entitled 'Scope', is worded as follows:

'1. 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.

2. Member States after consultation with the social partners and/or the social partners may provide that this agreement does not apply to:
(a) initial vocational training relationships and apprenticeship schemes;
(b) employment contracts and relationships which have been concluded within the framework of a specific public or publicly supported training, integration and vocational retraining programme.'

6 Clause 3 of the framework agreement states:

‘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.’

7 Clause 4 of the framework agreement, entitled ‘Principle of non-discrimination’, provides:

‘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.

…

3. The arrangements for the application of this clause shall be defined by the Member States after consultation with the social partners and/or the social partners, having regard to Community law and national law, collective agreements and practice.

4. Period-of-service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of-service qualifications are justified on objective grounds.’

Spanish law

8 Article 2(1) of Ley 55/2003 del Estatuto Marco del personal estatutario de los servicios de Salud (Law 55/2003 on the framework regulations for health service staff regulated under administrative law) of 16 December 2003 (BOE No 301 of 17 December 2003, p. 44742) provides that that law is applicable to staff regulated under administrative law employed in health centres or institutions of the autonomous communities or in health centres and health services of the General State Administration.

9 Article 62 of that law, entitled ‘Administrative statuses’, states:

‘Under the general scheme, permanent staff of the health services regulated under administrative law shall be placed on one of the following administrative statuses:

(a) active service;

(b) special leave;

(c) working under another legal regime;

(d) leave of absence by reason of employment in the public sector;

(e) leave on personal grounds;

(f) suspension.

…'

10 Under Article 66 of Law 55/2003, entitled 'Leave of absence by reason of employment in the public sector':

'1. A member of staff of the health services regulated under administrative law shall be granted leave of absence by reason of employment in the public sector:

(a) where he or she performs duties in another category of staff regulated under administrative law, as a civil servant or as a member of the contract staff, in a public administration, unless he or she has obtained the appropriate authorisation to overcome the incompatibility of his or her duties;

…

3. A member of staff of the health services regulated under administrative law who is on leave of absence by reason of employment in the public sector shall not receive remuneration and the duration of that administrative status shall be taken into account for the purposes of the three-yearly length-of-service increments and career progression, as the case may be, when he or she returns to active service.'

11 Article 67 of that law, entitled 'Leave on personal grounds', states:

'1. The person concerned shall be granted leave on personal grounds *ex officio* or at his or her own request, in accordance with the following rules:

(a) leave on personal grounds may be granted to a member of staff when requested for private reasons.

To be granted leave on personal grounds, it is necessary to have performed duties in a public administration during the five years immediately preceding the request.

The granting of leave on personal grounds for private reasons is subject to the needs of the service; where a request for such leave is refused, reasons must be given.

Leave on personal grounds may not be granted to a civil servant who is the subject of disciplinary proceedings.

…

2. In the scenarios provided for in points (a) and (c) of the preceding paragraph, the minimum period of leave on personal grounds shall be two years.

3. A member of staff of the health services regulated under administrative law who is on leave on personal grounds shall not be remunerated and the period of such leave shall not be taken into account for the purposes of his or her career progression or three-yearly length-of-service increments …'

12 Article 15 of the Reglamento de Situaciones Administrativas de los Funcionarios Civiles de la Administración General del Estado (rules on the administrative statuses of civil servants in the General State Administration) in the version resulting from Real decreto 365/1995 por el que se aprueba el Reglamento de Situaciones Administrativas de los Funcionarios Civiles de la Administración General del Estado (Royal Decree 365/1995 approving the rules on the administrative statuses of civil servants in the General State Administration), of 10 March 1995 (BOE No 85 of 10 April, p. 10636) ('the rules on administrative statuses'), entitled 'Leave of absence by reason of employment in the public sector', states in paragraph 1:

'Civil servants in active service in another body of a public administration, unless they have obtained the necessary authorisation to overcome that incompatibility, and those who start work as permanent staff in public sector bodies or entities and who are not entitled to be placed on active service status or special leave status must be placed on leave of absence by reason of employment in the public sector *ex officio* or on request. If that post is to be taken as a temporary civil servant or as a temporary staff member, it does not give rise to the right to leave of absence by reason of employment in the public sector. …'

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

13 LB worked as a member of staff of the health service regulated under administrative law in the category of dentists-stomatologists from 14 December 2010 to 20 December 2017.

14 By decision of 25 November 2016, the Complutense University of Madrid (Spain) proposed to appoint LB to a post as a temporary lecturer. Following the ratification of that proposal by the rectorate of that university, LB was invited to take up the duties of that post on 21 December 2017. To that end, she was given a fixed-term contract.

15 Due to the incompatibility of performing those duties and the duties of the post that she held at the health service, LB applied to the latter, on 1 December 2017, for leave of absence by reason of employment in the public sector, on the basis of Article 66(1)(a) of Law 55/2003.

16 By decision of 4 December 2017, the Health Service refused that application on the ground that the post which LB was going to hold was temporary. Article 15 of the rules on administrative statuses excludes leave of absence by reason of employment in the public sector where the new post is to be held on the basis of a fixed-term contract.

17 Following that refusal, LB submitted an application for leave on personal grounds under Article 67(1)(a) of Law 55/2003, which was granted.

18 LB also brought an administrative appeal against the decision of 4 December 2017. Following the dismissal of that action, LB brought an action before the Juzgado de lo Contencioso-Administrativo No 4 de Zaragoza (Administrative Court No 4, Zaragoza, Spain) seeking the annulment of both the decision of 4 December 2017 and the decision confirming that

decision. In support of her action, LB claimed, in essence, that those decisions were, inter alia, contrary to the principles of equality and non-discrimination, as guaranteed by clause 4 of the framework agreement.

19 By judgment of 9 May 2019, that court granted that application. That judgment stated that the refusal to grant LB leave of absence by reason of employment in the public sector, on the ground that the post she was to take up in the other administration was to be held on the basis of a fixed-term contract, constituted an infringement of the principle of non-discrimination between permanent workers and fixed-term workers, as laid down in clause 4.

20 The Health Service brought an appeal against that judgment before the referring court, the Tribunal Superior de Justicia de Aragón (High Court of Justice, Aragon, Spain). The Health Service contends that the difference in treatment between fixed-term workers and permanent workers, established in Article 15 of the rules on administrative statuses, is justified on objective grounds, in particular, the need to ensure the stability of the provision of services by the health system of Aragon.

21 The referring court has doubts as to whether Article 15 of the rules on administrative statuses is consistent with clause 4 of the framework agreement, as interpreted by the Court, in so far as Article 15 precludes the grant of leave of absence to a civil servant where he or she obtains a fixed-term post in an administration other than the administration of origin, even though that article permits the grant of leave of absence where a civil servant obtains, in the same circumstances, a permanent post. Moreover, a civil servant who is granted leave of absence, unlike a civil servant who, following the refusal of a request for such leave, is obliged to take leave on personal grounds in order to be able to take up his or her new post, is entitled to certain benefits.

22 In that regard, it is apparent from the order for reference that leave of absence by reason of employment in an administration other than the administration of origin of the staff member concerned may not be refused on account of the needs of the service and that members of staff who are granted such leave retain their status as a civil servant of the administration of origin and the right to take part in procedures for the award of posts organised by that administration. Moreover, the length of leave of absence by reason of employment in the destination administration is taken into account as active service in the administration of origin. Thus, a civil servant who, after being on such leave, returns to his or her administration of origin has the right for any promotions obtained in the destination administration to be taken into account. Furthermore, no minimum duration applies in relation to such leave.

23 By contrast, a minimum period of active service must have been completed before being entitled to leave on personal grounds. In addition, such leave may be refused on the basis of the needs of the service. Moreover, employees placed on that administrative status do not receive remuneration. Similarly, the period spent on such leave is not taken into account in the administration of origin for the purposes of promotion, three-yearly length-of-service increments or social security rights. Lastly, leave on personal grounds may be granted only for a minimum period.

24 In that context, the referring court asks, in the first place, whether the right to leave of absence by reason of employment in the public sector constitutes a ‘condition of employment’ of the fixed-term post which the staff member wishes to take up. In that regard, it states that, according to the case-law of the Court, the condition of employment to be taken into consideration is that of

the fixed-term post or employment held by the staff member. However, in the case before that court, the condition of employment to be examined is that of a fixed-term post which the staff member does not yet hold but wishes to take up. Therefore, that case-law is not applicable in the present case.

25 In the second place, the referring court asks whether the grounds relied on by the administration, namely the importance of avoiding impediments and damage resulting from staff instability in a sector as sensitive as that of health care provision, may justify a difference in treatment between fixed-term workers and permanent workers.

26 It is in that context that the Tribunal Superior de Justicia de Aragón (High Court of Justice, Aragon) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must clause 4 of the [framework agreement] be interpreted as meaning that the right, derived from obtaining a post in the public sector, to the conferral of a particular administrative status in relation to the post – also in the public sector – which was held up until then is a condition of employment in respect of which temporary workers and permanent workers may not be treated differently?

(2) Must clause 4 of the [framework agreement] be interpreted as meaning that justification on objective grounds for the different treatment between fixed-term workers and permanent workers includes the aim of preventing serious failings and harm as regards the instability of workforces in a field as sensitive as the provision of healthcare, which falls under the constitutional right to the protection of health, such that it can serve as the basis for refusal to grant a particular type of leave of absence to those who obtain a temporary post but not to those who obtain a permanent post?

(3) Does clause 4 of the [framework agreement] preclude a rule such as that laid down in Article 15 of [the rules on administrative statuses], which excludes posts held as a temporary civil servant or as a temporary staff member from being part of the posts which give entitlement to the status of on leave of absence by reason of employment in the public sector, when that status must be granted to those who take up a permanent post in the public sector and that status is more advantageous for a public servant than the other alternative administrative statuses which that public servant would have to request in order to be able to take up a new post to which he or she has been nominated?’

The jurisdiction of the Court

27 Both the Spanish Government and the European Commission submit, in essence, that, in so far as LB applied for leave of absence by reason of employment in the public sector while holding a permanent post, that situation, pursuant to clause 2(1) of the framework agreement, does not fall within the scope of that agreement and, accordingly, clause 4 of the framework agreement is not applicable to the case in the main proceedings.

28 In that regard, it should be noted at the outset that it is for the Court to examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (judgment of 7 September 2017, *Schottelius*, C-247/16, EU:C:2017:638, paragraph 24).

29 It is also apparent from settled case-law that, in principle, the Court only has jurisdiction to interpret the provisions of EU law that are actually applicable in the main proceedings (judgment of 7 September 2017, *Schottelius*, C-247/16, EU:C:2017:638, paragraph 25).

30 In order to establish whether the Court has jurisdiction to answer the questions referred by the referring court, it must be recalled that the personal scope of the framework agreement is defined in clause 2(1) thereof.

31 In that regard, it is apparent from the wording of that provision that its scope 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'. In addition, the definition of 'fixed-term workers' within the meaning of clause 3(1) of the framework agreement, 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 (judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)*, C-658/18, EU:C:2020:572, paragraph 115 and the case-law cited).

32 The framework agreement therefore applies to all workers providing remunerated services in the context of a fixed-term employment relationship linking them with their employer, provided that they are linked by an employment contract or relationship within the meaning of national law, subject to the sole provisos of the discretion conferred on Member States by clause 2(2) of the framework agreement as to the application of that agreement to certain categories of employment contracts or relationships and of the exclusion, in accordance with the fourth paragraph of the preamble to the framework agreement, of temporary agency workers (judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)*, C-658/18, EU:C:2020:572, paragraph 116 and the case-law cited).

33 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 that 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 17 March 2021, *Consulmarketing*, C-652/19, EU:C:2021:208, paragraph 48 and the case-law cited).

34 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 17 March 2021, *Consulmarketing*, C-652/19, EU:C:2021:208, paragraph 49 and the case-law cited).

35 Consequently, it follows both from the wording of clause 2(1) of the framework agreement and from the objective pursued by the framework agreement, and more specifically, by clause 4 thereof, that the principle of non-discrimination, for the purposes of the latter clause, applies only to all workers providing remunerated services in the context of a fixed-term employment relationship linking them with their employer.

36 It is apparent from the order for reference that, when LB requested leave of absence by reason of employment in the public sector in order to take up a temporary post as a lecturer at the Madrid Complutense University, she worked for the health service as a permanent member of staff regulated under administrative law. Therefore, at the time of that request, she provided remunerated services in the context of a permanent employment relationship.

37 It follows from all the foregoing considerations that clause 4 of the framework agreement, read in conjunction with clause 2(1) thereof, must be interpreted as meaning that it is not applicable to a situation in which a public administration refuses to grant a leave of absence to a worker employed under a permanent contract on the ground that the purpose of that leave is to take up a fixed-term employment relationship.

38 The Court does not therefore have jurisdiction to answer the questions put by the referring court.

Costs

39 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 (Seventh Chamber) hereby rules:

The Court of Justice of the European Union has no jurisdiction to answer the questions referred by the Tribunal Superior de Justicia de Aragón (High Court of Justice, Aragon, Spain), in its order for reference of 17 December 2019.

[Signatures]