Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 9 December 2021 [1]

Case C-426/20

GD,
ES
v
Luso Temp – Empresa de Trabalho Temporário SA

(Request for a preliminary ruling from the Tribunal Judicial da Comarca de Braga – Juízo do Trabalho de Barcelos (Portugal) (Braga District Court, Barcelos Labour Court, Portugal))

(Reference for a preliminary ruling – Temporary agency work – Right to paid holiday – Compensation upon termination of the employment relationship – Principle of equal treatment – Basic working and employment conditions of temporary agency workers)

1. Does the principle of equal treatment enshrined in Directive 2008/104/EC [2] preclude a national provision allowing a user undertaking of a temporary agency worker to pay, upon termination of the employment relationship, less bonus pay for unused holiday than that to which workers directly employed by the same user undertaking would be entitled?

2. That is the essence of the request for a preliminary ruling made to the Court by the Portuguese national court in the context of a national law laying down a special provision governing the rights of temporary agency workers upon termination of the employment relationship.

I. Legal framework

A. European Union law

3. Recitals 1, 10 to 12 and 15 of Directive 2008/104 state:

‘(1) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it is designed to ensure full compliance with Article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

[1] Original language: Italian.

[2] Directive of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

…

(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.

(11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

…

(15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.'

4. Article 1 of that directive, headed 'Scope', provides in paragraph 1 thereof:

'This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.'

5. Article 2 of that directive, headed 'Aim', provides:

'The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.'

6. Article 3(1)(f) of Directive 2008/104, headed 'Definitions', states:

'1. For the purposes of this Directive:

(f) "basic working and employment conditions" means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;

(ii) pay.'

7. Article 5 of Directive 2008/104, headed 'The principle of equal treatment', which is contained in Chapter II of that directive dealing with employment and working conditions, reads:

'1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

…

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

…'

B. Portuguese law

8. Pursuant to Article 185 of the Codigo do Trabalho (Labour Code) adopted by Law No 7/2009 of 12 February 2009 ('the Labour Code'), headed 'Conditions of employment of temporary agency workers':

'…

6. Workers shall be entitled, pro rata to the length of their contract, to paid holiday, to holiday pay and to Christmas bonus pay, and to other regular and periodic benefits to which workers in the user undertaking are entitled for performing the same work or work of equal value.

…'

9. Pursuant to Article 237 of the Labour Code, headed 'Holiday entitlement':

'1. For each calendar year, workers shall be entitled to a period of paid holiday, which shall accrue on 1 January.

2. As a general rule, the holiday entitlement shall reflect service during the previous calendar year, but shall not be dependent on diligence or performance.

…'

10. Article 238 of the Labour Code, headed 'Length of holiday period', lays down, in paragraph 1:

'1. The annual holiday period shall be a minimum of 22 working days.

…'

11. Article 239 of the Labour Code, headed 'Length of holiday period in specific cases', reads as follows:

'1. During the year in which the employment relationship commences, workers shall be entitled to 2 working days' holiday for each month of the contract period, up to a maximum of 20 days, which may be taken once the contract has been in operation for 6 full months.

2. In the event that the calendar year ends before completion of the period referred to in the previous paragraph, the holiday may be taken up until 30 June of the following year.

3. Where the provisions in the previous paragraphs apply, no more than 30 working days' holiday may be taken during the same calendar year, without prejudice to the terms of any collective employment agreement.'

12. Article 245 of the Labour Code, headed 'Effect of the termination of an employment contract on holiday entitlement', provides:

'1. On termination of their employment contract, workers shall be entitled to receive holiday pay and holiday bonus pay:

(a) in respect of any accrued holiday that has not been taken;

(b) pro rata to the period of service in the year in which the contract is terminated.

2. In the case referred to in subparagraph (a) of the preceding paragraph, the holiday period shall be included for the purposes of calculating length of service.

3. Where the contract is terminated during the calendar year following the calendar year in which the employment relationship commenced, or where the term of the relationship is no more than 12 months, the total amount of holiday or payment in lieu to which the worker is entitled may not exceed the annual holiday allowance determined pro rata to the length of the contract.'

II. The facts, the main proceedings and the question referred for a preliminary ruling

13. GD and ES entered into a temporary employment contract with the agency Luso Temp – Empresa de Trabalho Temporário SA on 29 October 2017 and 9 October 2017, respectively. In that context, the applicants were assigned to the company Inoveplástika – Inovação e Tecnologia em Plásticos, S.A. until 28 October 2019 (in the case of the applicant GD) and until 8 October 2019 (in the case of the applicant ES).

14. Following the termination of their employment contracts, the applicants brought an action before the Tribunal Judicial da Comarca de Braga – Juízo do Trabalho de Barcelos (Braga District Court – Barcelos Labour Court, Portugal), the referring court, to recover the amounts of holiday pay and holiday bonus pay due for the period in which they worked for the defendant under those temporary employment contracts.

15. The positions of the applicants and the defendant differ as regards the method of calculating days' holiday.

16. The applicants base their claims on the general holiday provisions in Articles 237, 238, 239 and 245 of the Labour Code. In accordance with those provisions, on 1 January of each year (2018 and 2019), the applicants became entitled to 22 days' holiday and, in addition, were entitled to 2 days' holiday for each complete month of service during the year in which the employment relationship commenced (2017) and to a number of days' holiday pro rata to the period of service during the year in which the employment relationship was terminated (2019), making a total of 67 days (in the case of GD) and 65 days (in the case of ES) of paid holiday.

17. For its part, the defendant maintains that the special provisions for temporary employment contracts contained in Article 185(6) of the Labour Code should apply, whereby each applicant is entitled to paid holiday (and the corresponding holiday bonus pay) only pro rata to the length of his or her contract, making a total of 44 days' paid holiday corresponding to 2 years' service.

18. The referring court considers that there could be a conflict between Article 185(6) of the Labour Code and Article 3(1)(f) and Article 5(1) of Directive 2008/104 on temporary agency work. Indeed, the provision of Portuguese law introduces a difference in treatment between, on the one hand, workers who have been assigned to a user undertaking and, on the other, workers who have been recruited directly by the user undertaking.

19. In essence, the temporary agency worker will be entitled to paid holiday and holiday bonus pay only pro rata to the period of service, whereas a worker recruited directly by the user undertaking will have all the holiday entitlement provided for under the general provisions in the Labour Code.

20. The difference in treatment would only concern workers who were assigned to a user undertaking in a given year and who stopped working for that undertaking only two or more years after that date, as in the present case. Otherwise, no question arises in the case of workers who worked for the user undertaking for 12 months or less or who started work in a given year and stopped in the following year.

21. In those circumstances, the Tribunal Judicial da Comarca de Braga (Portugal) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do Article 3(1)(f) and Article 5(1) of Directive [2008/104] preclude a provision of law such as that in Article 185(6) of the [Labour Code], under which temporary agency workers are, in all cases, entitled to paid holiday and the corresponding holiday bonus pay only pro rata to the period of service in the user undertaking, even where their employment relationship commences in one calendar year and ends two or more calendar years later, whereas a worker recruited directly by the user undertaking who occupies the same job for the same period of time will be subject to the general holiday provisions, meaning that he or she will be entitled to a longer period of paid holiday and more holiday bonus pay, since these are not pro rata to the period of service?'

III. Legal analysis

A. Preliminary observations

22. The legal question on which the Court must rule in response to the request for a preliminary ruling made by the Portuguese national court in the present case is, in essence, whether a national provision that, as regards bonus pay for holiday not taken, to be paid at the end of the employment relationship, allows a temporary worker to be treated differently – in this case less favourably – from a worker recruited directly by the user undertaking, is compatible with EU law and, in particular, with Articles 3 and 5 of Directive 2008/104.

23. In other words, the Court must settle the question – currently without precedent in its case-law – of whether bonus pay for holiday not taken owing to the termination of the employment relationship should be included in the concept of 'basic working and employment conditions' as referred to in Article 5 of Directive 2008/104 in relation to the obligation for temporary agency workers to be treated on an equal footing with workers recruited directly by the user undertaking.

24. To my mind, the answer to that question can be found: (a) in a systematic reading of Directive 2008/104, and particularly its *aims* and *context*; (b) in the *importance of holidays* (and the related rights involving remuneration) in European social law; (c) in the *case-law of the Court relating to the interpretation of similar provisions on equal treatment* contained in other directives for the protection of workers in precarious or atypical employment.

25. Conversely, the *wording* of Directive 2008/104 is completely neutral for the purposes of our analysis, since it neither includes in nor excludes from the rights that make up the 'basic working and employment conditions' the bonus pay claimed in the main proceedings. Indeed, Article 3 of that directive – in a list that cannot be exhaustive – only refers to working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay.

26. Therefore, no specific reference is made to particular types of bonus pay, or to sums due upon the termination of the employment relationship. The only relevant reference is to 'holidays'. However, as will be seen, the case-law of the Court, albeit with reference to other legal provisions, has already offered a broad interpretation covering rights involving remuneration relating to holidays.

27. Nevertheless, I note that the present case, which forms the background to the request for a preliminary ruling, has the peculiarity of what appears to me – from reading the order of the national court and the observations of the Portuguese Government – to be a conflict concerning the interpretation of the domestic provisions of a Member State; if that were the case, obviously the Court would be unable to resolve that conflict without exceeding its remit.

28. In the reasoning on which the request for a preliminary ruling is based, the national court seems inclined towards an interpretation of Article 185(6) of the Labour Code as a specific rule that, by derogating from the general rules, would, in certain circumstances, allow, with regard to bonus pay for holidays not taken at the end of the employment relationship, less favourable treatment for temporary agency workers compared to workers recruited directly by the user undertaking (including with regard to temporary agency workers on short-term contracts).

29. By contrast, the Portuguese Government appears to favour a systematic interpretation in which the provision contained in Article 185(6) of the Labour Code does not derogate from those contained in the subsequent Article 237 et seq. of that code, but should be read in conjunction with the latter provisions, so as to avoid any discrimination between temporary agency workers and workers recruited directly by the user undertaking.

30. In my view, the Court should simply reiterate its approach as regards the scope of the principle of equal treatment in temporary agency work – an issue that has not been addressed before – by clarifying the extent of this in relation to the right to holidays and holiday bonus pay, and providing the national court with guidance on the basis of which disputes such as the one before it can be settled by means of an interpretation in conformity with EU law.

B. Question referred for a preliminary ruling

1. Aim of Directive 2008/104, 'flexicurity' and the importance of the right to holiday (and related rights involving remuneration) in EU social law

31. According to settled case-law, 'in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part'. [3]

32. Article 2 of Directive 2008/104 states that the *purpose* of that directive is to 'ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied'.

33. Regarding its *context*, Directive 2008/104 – the legal basis of which is the former Article 137(1) and (2) EC (now Article 153 TFEU) [4] – was adopted, after a lengthy and complex procedure, to integrate two earlier directives into the system of European social law concerning atypical work, which address part-time work and temporary work relationships respectively. [5]

[3] See, inter alia, judgments of 6 October 2020, *Jobcenter Krefeld* (C-181/19, EU:C:2020:794, paragraph 64 and the case-law cited), and of 12 May 2021, *Hauptzollamt B (Sturgeon caviar)* (C-87/20, EU:C:2021:382, paragraph 25 and the case-law cited).

[4] It empowered the institutions to 'adopt, … by means of directives, minimum requirements for gradual implementation', relating, inter alia, to 'working conditions'.

[5] Namely Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9) 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). See, to that effect, Opinion of Advocate General Sharpston in *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:300, point 36).

34. That directive thus forms part of a broader legislative framework the aim of which is to make the envisaged forms of protection applicable in general to all categories of workers in atypical employment. [6]

35. The overall objective of the European Union's action in the field of social policies has been to develop flexible forms of work, while seeking a greater degree of harmonisation of the social law applicable to it. The regulatory model behind such action is designed to achieve a balance between flexibility and security in the job market and has been named 'flexicurity'. [7]

36. Directive 2008/104, which represents the final outcome of the debate on 'flexicurity' led by the Commission in the years immediately preceding it, [8] aims to reach a fair balance between improving the protection of temporary agency workers and supporting the positive role that agency work can play by providing sufficient flexibility in the labour market. [9]

37. The aim of harmonising working conditions is 'to bring the conditions of temporary agency work closer to "normal" employment relationships' [10] and is pursued by Directive 2008/104 precisely by affirming the principle of equal treatment.

38. As is clear from the wording of Directive 2008/104, [11] the guarantees underpinning the 'flexicurity' model, and hence the particular importance of the principle of equal treatment, must also be considered in the light of the residual nature of those employment relationships compared with the general form of employment relationship represented by employment contracts of indefinite duration (concluded with the employer using the services).

39. The concept of 'flexicurity' – in other words, the model based on a balancing exercise between increasing employment and security in the job market [12] – is only feasible if the principle of equal treatment, as set out in Article 5(1) of Directive 2008/104, is fully respected, since this is the cornerstone of the 'flexicurity' system in all the directives contributing to its formation.

40. As has been keenly observed, the compromise that governs Directive 2008/104 and that enabled it to be adopted is the trade-off between the affirmation of the principle of equal treatment between temporary agency workers and the user and the removal of restrictions on and obstacles to the activities of agencies. [13]

6 See, to that effect, Peers, S., 'Equal treatment of atypical workers', *Yearbook of European Law*, Vol. 32, No 1 (2013), p. 43 et seq.

7 See, to that effect, Opinion of Advocate General Szpunar in *AKT* (C-533/13, EU:C:2014:2392, point 33).

8 Robin-Olivier, S., 'A French reading of Directive 2008/104 on temporary agency work', *European Labour Law Journal*, Vol. 1, No 3, 2010, p. 398 et seq.

9 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final, p. 19. To the same effect, see recital 11 of Directive 2008/104.

10 See judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 51).

11 See recital 15 of Directive 2008/104.

12 See Opinion of Advocate General Sharpston in *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:300, point 36).

13 Countouris, N. and Horton, R., 'The temporary agency work directive: Another broken promise?', *Industrial Law Journal*, 2009, p. 329 et seq.

41. In other words, the national legislature is shifting the focus of protection from the question of access to that of the relationship with the user, leveraging the principle of equal treatment as a safeguard to prevent increased room for manoeuvre in accessing employment from leading to an erosion of the level of protection. [14]

42. The aims of Directive 2008/104 and the context in which it is set thus call for a broad interpretation of the principle of equal treatment. [15] This therefore also includes bonus pay for unused holiday, which is one of the aspects to be guaranteed to workers on an equal footing with workers recruited directly by the user undertaking.

43. On the other hand, a restrictive interpretation would mean that the principle of equal treatment would not apply when the temporary agency worker's contract was terminated, thus favouring the termination of temporary contracts instead of implementing one of the aims pursued by Directive 2008/104, which is to facilitate access to permanent employment for temporary agency workers.

44. To that end, it also shows the importance in European social law of holidays and the related rights involving remuneration.

45. The Court has already affirmed that the right to paid annual leave represents 'an essential and mandatory principle of EU social law, laid down in Article 31(2) of the Charter' [16] and is, as an essential principle of EU social law, mandatory in nature; that essential principle includes 'the right to "paid" annual leave as such and the right, inherent in the former, to an allowance in lieu of annual leave not taken upon termination of the employment relationship'. [17]

2. A broad interpretation of the principle of equal treatment in relation to 'basic working and employment conditions'

46. Under Article 5 of Directive 2008/104, temporary agency workers must, from the first day of their employment, enjoy 'basic working and employment conditions' which are at least those that would apply if they had been recruited directly by the user undertaking to occupy the same job. [18]

47. Alongside the points made earlier regarding the aims and objectives of Directive 2008/104 and its context within European social law, in addition to the importance of the right to holidays and bonus holiday pay already affirmed clearly by the Court, several precedents of the Court on

[14] See, to that effect, Quaranta, M., 'La somministrazione di lavoro: le nuove regole del decreto dignità ed i vincoli europei', in Calcaterra, L. (ed.), *La somministrazione di lavoro*, Editoriale Scientifica, Naples, 2019, p. 407.

[15] See also, to that effect, paragraph 22 of the Commission's observations.

[16] See, most recently, judgment of 8 September 2020, *Commission* v *Carreras Sequeros and Others* (C-119/19 P, EU:C:2020:676, paragraph 113).

[17] See judgments of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 72), and of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 83).

[18] Those conditions, by express provision of Article 3 of that directive, cover, as mentioned above, the most important aspects of the employment relationship (pay, the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays) and must be applied to agency workers to the extent that they constitute binding general provisions in force in the user undertaking (see Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final, p. 5).

Directive 2008/104 and the other directives that together form a safety net for workers in atypical or precarious employment in European social law[19] also support a broad and extensive interpretation of the principle of equal treatment.

48. An extensive interpretation of the concept of 'basic working and employment conditions', which also includes bonus pay for holiday that has not been taken owing to the termination of the employment relationship, stems, in my view, not only from a systematic overview of the objectives of Directive 2008/104 and the importance of holidays in the employment relationship, but also from a careful analysis of several precedents of the Court, even if not specifically found in Articles 3 and 5 of Directive 2008/104.

49. With regard to Directive 2008/104, the Court recently clarified that 'it is apparent from recital 1 of that directive that the directive is designed to ensure full compliance with Article 31 of the Charter of Fundamental Rights of the European Union, paragraph 1 of which establishes in general terms the right of every worker to working conditions that respect his or her health, safety and dignity. The Explanations relating to the Charter of Fundamental Rights … indicate, in that regard, that the expression "working conditions" is to be understood in accordance with Article 156 TFEU. However, that provision merely refers, without any further definition, to "working conditions" as being one of the areas of the European Union's social policy in which the Commission may intervene to encourage cooperation between Member States and facilitate the coordination of their action. In the light of the objective of Directive 2008/104 to protect the rights of temporary agency workers, that lack of precision supports a *broad interpretation*[20] of the concept of "working conditions".'[21]

50. To this clear statement of principle it must be added that, regarding the principle of equal treatment, the Court has been clear in outlining that principle in relation to the other employment relationships that deviate from the 'normal' employment relationship of indefinite duration, which, as the legislature has explicitly confirmed, represents 'the general form of employment'.[22] To that end, it has described in detail the scope of the term 'working conditions', albeit in relation to legal provisions other than Directive 2008/104, although in similar contexts.

51. Since, as mentioned earlier, Directive 2008/104 was adopted to supplement the existing legal framework for EU social policy, consideration must be given, as the Commission suggests,[23] to that previously established by the case-law of the Court on the interpretation of the concept of 'working conditions' in relation to the framework agreement on fixed-term work.[24]

[19] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

[20] Emphasis added.

[21] See judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 54), which reproduces point 44 of the Opinion of Advocate General Sharpston.

[22] See judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)* (C-681/18, EU:C:2020:823, paragraph 51), in relation to recital 15 of Directive 2008/104.

[23] See paragraph 35 of the Commission's observations.

[24] In addition to the common objectives underpinning those provisions, that interpretation is, by analogy, supported by the same scope as Directive 2008/104, since, under Article 3(2), it applies to all fixed-term employment relationships.

52. By reference to Clause 4(1) of the framework agreement on fixed-term work,[25] the Court has already held that 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,[26] and that that expression also covers the compensation that the employer must pay to an employee on account of the termination of his or her fixed-term employment contract.[27]

53. In that respect, the criterion seems to be confirmed according to which the entire employment relationship between a worker and his or her employer must be taken into account when determining whether a measure falls within the scope of the concept of 'working conditions'.

54. Those considerations, as affirmed by the Court, are fully transferable to any compensation paid to the worker on account of the termination of his or her contract of employment with his or her employer. Therefore, the abovementioned provision must be interpreted as meaning that the concept of 'working conditions' includes the compensation that the employer must pay to an employee at the time of the termination of his or her fixed-term employment contract.[28]

55. Recently – albeit in relation to another type of compensation not linked to holidays in a fixed-term employment relationship – the Court also affirmed that 'compensation granted to a worker owing to the termination of the contract of employment between him or her and the employer … falls within the definition of "employment conditions", within the meaning [of] Clause 4(1) of that agreement'.[29]

56. Next, with regard to part-time workers, interpreting the provisions of the Framework Agreement on part-time work, the Court has held that, with regard to a worker who has not been able, for reasons beyond his or her control, to exercise his or her right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he or she is entitled must be calculated so that the worker is put in a position comparable to that he or she would have been in had he or she exercised that right during his or her employment relationship.[30]

57. In general, then, as regards the right to compensation in the event of unused holiday, the Court, in interpreting Article 7(2) of Directive 2003/88,[31] has ruled that on termination of the employment relationship and when therefore it is no longer possible to take paid annual leave, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu in order to prevent a situation in which the worker loses all possibility of enjoying that right, even in pecuniary form.[32]

[25] According to which, '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.'

[26] See judgment of 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014, paragraph 34).

[27] See, to that effect, judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683, paragraph 32).

[28] See, to that effect, judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683, paragraphs 28 and 30 to 32 and the case-law cited).

[29] See judgment of 22 January 2020, *Baldonedo Martín* (C-177/18, EU:C:2020:26, paragraph 36).

[30] See judgment of 11 November 2015, *Greenfield* (C-219/14, EU:C:2015:745, paragraph 51 and the case-law cited).

[31] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

[32] See judgment of 20 July 2016, *Maschek* (C-341/15, EU:C:2016:576, paragraph 26 and the case-law cited).

58. Therefore, in my view, the combined provisions of Articles 3 and 5 of Directive 2008/104, which govern the scope and extent of the principle of equal treatment for temporary agency workers, must be interpreted broadly, particularly considering what the Court has stated in relation to the 'conditions of employment', which constitute the principle of equal treatment applicable to fixed-term and part-time workers.

59. I should point out that, although the same reasons exist for protecting workers in atypical or precarious employment, the expressions used by the legislature in Directive 2008/104 are aimed more at effective protection and the need to avoid the proliferation of different types of legal status for workers in precarious employment.

60. First, unlike its precedents in the directives on fixed-term work and part-time work, I note the decision to define the principle as 'equal treatment' rather than 'non-discrimination'. Second, the expression 'at least' is used instead of 'no less favourable' when comparing the working conditions of comparable persons. Third, the scope of working conditions refers expressly to almost all aspects of the employment relationship, leaving virtually no room for any reductive interpretation. Fourth, given the specific nature of agency employment contracts, the possibility of a 'hypothetical comparison' was chosen instead of a comparison with 'comparable' full-time or permanent workers. Accordingly, it will always be possible to make a comparison in the case of temporary agency workers, since the comparison will be made with the treatment to which a worker recruited directly for the same job would be entitled, even if that worker is not actually present in the workforce. [33]

61. A final note on the derogations permitted by Article 5(2), (3) and (4) of Directive 2008/104: it is clear from the file that the Portuguese legislature has not made use of the possibility allowed by the directive to derogate from the principle of equal treatment. Indeed, in its observations, the Portuguese Government states that the implementation of the directive has removed some of the previous ambiguities that existed in national legislation. [34]

62. On this point, therefore, I shall confine myself to a brief incidental remark: I have some doubts as to whether compensation for unused holiday (which cannot be regarded as 'pay' in the true sense) [35] may be derogated from, given the link to the fundamental right to holiday. In any event, in the light of the overall scheme of Directive 2008/104, I am convinced of the need for a strict interpretation of any possibility of derogation from the principle of equal treatment granted by the EU legislature.

63. To gather together the various strands of the analysis – the aims of Directive 2008/104 and its objectives for the protection of workers in precarious employment, together with the background to that directive and its context within European social law, the nature of the fundamental right to holidays and related financial compensation, and the Court's interpretation of similar provisions on the equal treatment of workers in precarious employment – these are all elements that unequivocally call for a broad interpretation of the expression 'basic working and employment conditions' to include compensation due to temporary agency workers for holiday that has not been taken during the employment relationship upon termination of their employment contract.

[33] See, to that effect, Zappalà, L., 'Il lavoro somministrato e gli incerti confini della parità di trattamento', in Calcaterra, L. (ed.), *La somministrazione di lavoro*, Editoriale Scientifica, Naples, 2019, p. 417.

[34] See, to that effect, paragraph 52 of the observations of the Portuguese Government.

[35] An aspect that, in certain conditions, may be derogated from under Article 5(2) of Directive 2008/104.

64. Therefore, such compensation must be calculated using the same methodology as that used for workers recruited directly by the user undertaking, so that the final calculation is, pro rata to the period of service, the same.

3. The consequences for the referring court

65. According to the settled case-law of the Court, the system of cooperation established by Article 267 TFEU is based on a clear division of responsibilities between the national courts and the Court of Justice. It is for the courts of the Member States to reconstruct the facts and interpret the national rules.

66. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law and guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment. [36]

67. As already stated above, the referring court takes the view that in Portugal, temporary agency workers whose employment relationship with a user undertaking commences in one calendar year and ends two or more calendar years later are subject to the specific rules laid down in Article 185(6) of the Labour Code, according to which temporary agency workers are entitled to paid holiday and the corresponding holiday bonus pay only pro rata to their period of service. This calculation method differs from the one used for workers recruited directly by the user undertaking, to whom the more advantageous general provisions for calculating paid holiday apply, as laid down in Articles 237 to 239 and 245 of the Labour Code.

68. The observations submitted by the Portuguese Government appear to call for a different interpretation of the provisions of the Labour Code from that taken into account by the referring court. [37]

69. It is not for the Court to enter into the substance of national law: according to settled case-law, the Court is authorised to rule solely on the interpretation or validity of an EU law, on the basis of the facts provided to it by the national court, whereas it is for the national court alone to interpret national legislation. [38]

70. It should also be borne in mind that, according to the Court's settled case-law, national courts must, as far as possible, interpret national law in the light of EU law. [39]

[36] Order of the President of the Court of 28 January 2015, *Gimnasio Deportivo San Andrés* (C-688/13, EU:C:2015:46, paragraphs 30 to 32 and the case-law cited). See, more recently, for example, judgment of 3 October 2019, *Fonds du Logement de la Région de Bruxelles Capitale* (C-632/18, EU:C:2019:833, paragraphs 48 and 49 and the case-law cited).

[37] As mentioned in the preliminary observations of my legal analysis, the Portuguese Government seems to favour a systematic interpretation in which the provision contained in Article 185(6) of the Labour Code does not derogate from those contained in the subsequent Article 237 et seq. of that code, but should be read in conjunction with it, so as to avoid any discrimination between agency workers and workers recruited directly by the user undertaking.

[38] See, in particular, judgment of 10 June 2021, *Ultimo Portfolio Investment (Luxembourg)* (C-303/20, EU:C:2021:479, paragraph 25 and the case-law cited).

[39] See judgments of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 32); of 14 October 2020, *KG (Successive assignments in the context of temporary work)* (C-681/18, EU:C:2020:823, paragraph 66); and of 19 September 2019, *Rayonna prokuratura Lom* (C-467/18, EU:C:2019:765, paragraph 60 and the case-law cited).

71. The principle of interpretation in conformity with EU law requires the national authorities to do everything within their power, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, to ensure that EU law is fully effective and to achieve an outcome consistent with the objective pursued by it.

72. However, the principle of interpretation of national law in conformity with EU law has certain limits. More specifically, the obligation on a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law that is *contra legem*.

73. Nevertheless, as already pointed out above, the Court cannot substitute its judgment for that of the national court as to whether domestic law may be interpreted in such a way as to be in conformity with the provisions of EU law.

74. It is for the national court to determine whether, in Portugal, temporary agency workers enjoy, during their assignment to a user undertaking, basic working and employment conditions at least equal to those which would have been applied to them if they had been recruited directly by the user undertaking. [40]

75. Therefore, the national court will have to determine whether, as the Portuguese Government submits with regard to the calculation of holiday and bonus holiday pay in the event of termination of the contract, the general provisions of Articles 237 to 239 and 245 of the Labour Code apply to temporary agency workers, notwithstanding the specific rule laid down in Article 185(6) of the Labour Code. If so, the national court would have to conclude that temporary agency workers do not enjoy less favourable basic working and employment conditions than those that would apply to them had they been recruited directly by the user undertaking for the same position and would be unable to reach the finding that Article 5(1) of Directive 2008/104 had been infringed.

IV. Conclusion

76. Article 3(1)(f) and Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work preclude a legislative provision of a Member State which provides that a temporary agency worker is entitled to paid holiday and the corresponding holiday bonus pay in the event of termination of the employment relationship pro rata to his or her period of service in the user undertaking, if different arrangements apply to a worker recruited directly by the user undertaking who performs the same duties for the same period of time, which would entitle the latter to a longer period of paid holiday and more holiday bonus pay. According to the principle of equal treatment, including with regard to bonus pay for holiday that has not been taken owing to the termination of the employment relationship, a temporary worker must receive, during the period of service in the user undertaking, the same treatment as a worker recruited directly by the user undertaking to perform the same duties.

[40] See, by analogy, judgment of 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014, paragraph 46 and the case-law cited).