

SUMMARY

ECJ 9 July 2015, case C-177/14 (María José Regojo Dans -v- Consejo de Estado), Fixed-term work

Facts

Spanish law distinguishes four types of public servant: (i) career civil servants; (ii) interim civil servants; (iii) staff engaged under employment contracts (either fixed-term or permanent); and (iv) '*personal eventual*' (i.e. staff appointed on a non-permanent basis to perform duties in positions of trust or in special advisory positions). Pursuant to the law relating to public servants (the LEBEP), public servants within categories (i), (ii) and (iii) are entitled to three-yearly length-of-service increments, i.e. their salary is raised by a certain amount once every three years. *Personal eventual* are not eligible for three-yearly increments: their remuneration is governed by different legislation. Moreover, the law provides that their appointment and termination shall be discretionary and their contract terminates automatically upon termination of the appointment of the individual for whom they perform trust or advisory duties.

Ms Regojo Dans worked for the Council of State (*Consejo de Estado*). She had been employed there since 1980. Her position was that of Head of the Secretariat of the President of the Second Division. This was a personal eventual position. In 2012 she applied for a three-yearly increment. Her request was denied on the ground that she was not a public servant within one of the categories (i), (ii) or (iii).

National proceedings

Ms Regojo Dans appealed to the *Tribunal Supremo*, claiming, inter alia, that the refusal to recognise her right to the increments constituted a difference of treatment contrary to clause 4

of the Framework Agreement on fixed-term work annexed to Directive 1999/70. This clause 4 consists of several paragraphs. Paragraph 1 provides that “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”. Paragraph 4 states that “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”. The *Tribunal Supremo* referred three questions to the ECJ.

ECJ’s findings

The definition of “fixed-term workers” in 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 (§ 29-33).

An employment contract, such as that of Ms Regojo Dans, which automatically terminates when the person to whom the duties are discharged ceases to hold the post, is a fixed-term contract within the meaning of the Framework Agreement (§ 34).

Clause 4 of the Framework Agreement must be understood as expressing a principle of EU social law which cannot be interpreted restrictively (§ 40-42).

The three-yearly length-of-service increments are covered by the concept of ‘employment conditions’ referred to in clause 4(1) of the Framework Agreement (§ 43).

In order to assess whether workers are engaged in the same or similar work for the purposes of the Framework Agreement, account must be taken of a number of factors, such as the nature of their work, their qualifications and abilities, the training requirements and the working conditions. The Spanish Government observes that non-permanent staff constitute a professional category distinct from the other categories of civil servant provided for under Spanish law, as regards their employment relations and the functions or duties they perform, as well as recruitment criteria or the rules governing their remuneration. In other words, that the differences in treatment between non-permanent staff and other national civil servants are not limited solely to the length-of-service increment at issue in the main proceedings. In addition, the Spanish Government states that, unlike career civil servants who are selected under procedures guaranteeing observance of the constitutional principles of equality, merit and ability, non-permanent staff are appointed on a discretionary basis in order to carry out specific, non-permanent duties entailing trust or special advice. Termination of their appointment is also discretionary and occurs automatically on termination of the appointment

of the postholder for whom the duties are discharged. However, the order for reference indicates that the functions performed by Ms Regojo Dans do not consist in the performance of a specific duty linked to a public authority, but relate more to the carrying out of tasks involving assistance with administrative activities (§ 44-49).

It is for the referring court to determine whether, as regards the receipt of the three-yearly length-of-service increments at issue in the main proceedings, career civil servants and nonpermanent staff, in respect of which a difference in treatment in terms of employment conditions is alleged, are in a comparable situation. If the referring court finds that the duties performed by Ms Regojo Dans in her capacity as a non-permanent member of staff of the Consejo de Estado are not identical or similar to those performed by a career official within that administration or other public entities in which she previously worked in that same capacity, it would follow that she is not in a comparable situation to that of a career civil servant. If, on the other hand, the referring court holds that Ms Regojo Dans performed, in her capacity as a non-permanent staff member, identical or similar duties to those performed by a career civil servant of the Consejo de Estado or other similar institution, the only fact that could distinguish her situation from that of a career civil servant would appear to be the temporary nature of the employment relationship which linked her to her employer when carrying out the periods of service as a non-permanent member of staff. In such a case, she would be in a comparable situation to that of a career civil servant and it would be necessary to ascertain whether there was an objective ground justifying the difference in treatment between those two workers (§ 50-53).

According to the settled case-law of the Court, the concept of ‘objective grounds’ in clause 4(1) of the Framework Agreement must be understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general, abstract national norm, such as a law or collective agreement. The concept requires the unequal treatment found to exist to be justified by the existence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria, in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those factors may result, in particular, from the specific nature of the tasks for the performance of which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State. By contrast, reliance on the mere fact of the temporary nature of the employment of staff in the public administration does not meet those requirements and is therefore not capable of constituting an ‘objective ground’ within the meaning of clause 4(1) of the Framework Agreement (§ 54-56).

Career civil servants on active duty or on secondment who hold posts reserved for non-permanent staff receive the threeyearly length-of-service increments. The fact that such career civil servants may benefit from those increments, including during the period when they perform the duties assigned to the non-permanent staff, is at variance with the argument that the particular nature of the duties entailing trust and special advice that non-permanent staff undertake distinguishes those two types of staff and justifies a difference in treatment between them as regards the grant of those increments (§ 61).

Ruling

The concept of a 'fixed-term worker', within the meaning of clause 3(1) of the Framework Agreement [.....] must be interpreted as applying to a worker such as the applicant in the main proceedings.

Clause 4(1) of the Framework Agreement [.....] must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which excludes, without justification on objective grounds, non-permanent staff from the right to receive a three-yearly length-of-service increment granted, inter alia, to career civil servants when, as regards, the receipt of that increment, those two categories of workers are in comparable situations, a matter which is for the referring court to ascertain.

Creator: European Court of Justice (ECJ)

Verdict at: 2015-07-09

Case number: C-177/14