

SUMMARY

**ECJ 8 September 2011, case C-177/10
(Francisco Javier Rosado Santana - v -
Consejería de Justicia y
Administración Pública
de la Junta de Andalucía),
Fixed-term work**

Facts

Mr Rosado Santana was employed by the provincial Ministry of Justice as an ‘interim civil servant’, i.e. on a fixed-term basis for 16 years (1989-2005). In 2005 he became a ‘career’ (i.e. permanent) civil servant under a contract of indefinite duration. In December 2007 the Ministry announced that selection tests would be held under the internal promotion system (the ‘competition notice’). The competition notice stated that candidates were to meet certain requirements, one of which - the only one relevant in this case - was to have ten years’ service as a career civil servant at a certain level (the ‘disputed criterion’). Despite not satisfying this requirement (Mr Rosado Santana had only been a career civil servant for two years, not ten), he was allowed to sit for the exam. He passed it and his name was included on the list of successful candidates for promotion. However, when he applied for a promotion, his classification as a successful candidate was annulled (the ‘decision at issue’) on the ground that he did not satisfy the disputed criterion, given that his period as a fixed-term worker was not taken into account in determining whether that criterion had been met. Mr Rosado Santana brought proceedings, challenging the disputed criterion. The decision at issue was handed down in March 2009 and Mr Rosado Santana brought proceedings in June 2009.

National proceedings

The court to which Mr Rosado Santana applied referred five questions to the ECJ. Questions 2, 3 and 4 essentially ask the ECJ to rule on the applicability to the facts of this case, and the interpretation of Clause 4 of the Framework Agreement on Fixed-Term Work annexed to Directive 1999/70 (the 'Framework Agreement'), which 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.' Question 1 relates to the interaction of national and EU law. Question 5 raises issues relating to the availability of remedies under national law where EU law is infringed.

ECJ's findings

1. Clause 4(1) of the Framework Agreement provides that fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers. Given that Mr Rosado Santana was no longer a fixed-term worker at the time of the alleged discrimination, the Spanish government and the Commission argue that clause 4 does not apply to the dispute. The ECJ rejects this argument, as it would effectively reduce the scope of the protection envisaged by Directive 1999/70 (§ 37-44).
2. Rules concerning periods of service to be completed in order to qualify for a promotion constitute 'employment conditions' within the meaning of Clause 4 (§ 45-47).
3. Questions 1 and 2 were whether national courts may interpret Clause 4 so as to exclude it being applied to civil servants. The ECJ replies in the negative. Clause 4 has direct effect and applies equally to the public and private sectors (§ 49-62).
4. Questions 3 and 4 ask whether Clause 4 allows periods of service completed by an interim civil servant to be discounted when considering promotion, if that person has subsequently become a career civil servant (§ 63).
5. It is for the national court to determine whether Mr Rosado Santana was in a situation 'comparable' to that of persons with ten years seniority as a career civil servant, in the light of factors such as the nature of the work, training requirements and working conditions. The nature of his duties and the quality of the experience he thereby acquired are not merely factors which could objectively justify different treatment, they are among the criteria determining comparability. If this work and experience are not comparable, there is no discrimination. If they are comparable, then the issue of objective justification arises (§ 64-71).
6. Clause 4 does not permit a difference in treatment between fixed-term workers and permanent workers to be justified on the basis of a general abstract norm. The concept of

‘objective grounds’ in Clause 4 requires unequal treatment to be justified by precise and specific factors, characterising the employment condition to which it relates, in the particular context in which it occurs and on the basis of objective and transparent criteria in order to ensure that unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. The mere fact that employment is temporary is not, in itself, capable of constituting an ‘objective ground’ (§ 72-74).

7. The Spanish government argues (i) that less stringent requirements are imposed on interim civil servants as regards entry into the civil service and proof of merits and capacities, (ii) that interim civil servants are tied to their posts, contrary to career civil servants, who are mobile and (iii) that certain duties are reserved for career civil servants, which implies that there is a difference in the quality of their experience and training. Some of these differences could, in principle, justify the different treatment at issue (§ 75-78).

8. Where, in a selection procedure, a difference in treatment flows from the need to take account of objective requirements relating to the relevant post which are unrelated to the fixed-term nature of the interim civil servant’s employment relationship, it is capable of being justified. On the other hand, a general and abstract condition that a certain period of service must have been entirely completed as a career civil servant without taking account of the specific nature of the tasks to be performed or their inherent characteristics, does not meet the requirements for justification (§ 78-80).

9. Question 5 was whether EU law precludes national legislation requiring a challenge to the rejection of a candidature to be brought within two months of the competition notice (§ 85-86).

10. Although it is for the national legal system to lay down procedural rules, the Member States must ensure that the rights conferred on individuals by EU law are effectively protected, the rules may not be less favourable than those governing similar domestic actions (principle of equivalence) and they must not render the exercise of rights conferred by EU law excessively difficult (principle of effectiveness) (§ 87-89).

11. It is for the national court to ascertain whether the two month time-limit is a general rule laid down for all actions challenging administrative measures and, hence, whether it meets the principle of equivalence (§ 90-91).

12. The two month time-limit at issue is not, in principle, liable to render excessively difficult the exercise of Mr Rosado Sanata’s rights under the Framework Agreement. However, in the circumstances of this case, it was not until March 2009 that it became clear to Mr Rosado Santana that the competition notice was being applied in a way which could adversely affect

his rights under the Framework Agreement. It is for the national court to determine whether this circumstance made it practically impossible or excessively difficult for Mr Rosado Santana to exercise his rights.

Ruling

Council Directive 1999/70/EC [...] must be interpreted, on the one hand, as applying to contracts and relationships concluded with the public authorities and other public-sector bodies and, on the other, as precluding any difference in treatment as between career civil servants and comparable interim civil servants of a Member State, based solely on the ground that the latter are employed for a fixed term, unless different treatment is justified on objective grounds for the purposes of Clause 4(1) of the Framework Agreement.

Clause 4 of the Framework Agreement on fixed-term work must be interpreted as prohibiting employers from not taking into account periods of service completed as an interim civil servant in a public administration for the purposes of permitting such a person, who has subsequently become a career civil servant, to obtain an internal promotion available only to career civil servants, unless this is justified by objective grounds for the purposes of Clause 4(1) of that Agreement. The mere fact that the interim civil servant completed those periods of service under a fixed-term employment contract or relationship does not constitute such an objective ground.

The primary law of the European Union, Directive 1999/70 and the Framework Agreement are to be interpreted as not precluding, in principle, national legislation which provides that, where an action brought by a career civil servant challenging a decision rejecting his candidature for a competition is based on the fact that the promotion procedure was contrary to Clause 4 of the Framework Agreement, that action must be brought within two months of the publication of the competition notice. Nevertheless, such a time-limit could not be relied upon against a career civil servant who has been a candidate in that competition, who has been admitted to the tests and whose name was placed on the definitive list of successful candidates for that competition, if that were liable to render practically impossible or excessively difficult the exercise of the rights conferred by the Framework Agreement. In those circumstances, time for the purposes of the two month time-limit, could run only from notification of the decision annulling the civil servant's admission to the competition and his appointment as a career civil servant in the higher group.

Creator: European Court of Justice (ECJ)

Verdict at: 2011-09-08

Case number: C-177/10