SUMMARY

ECJ 22 December 2010, cases C-444/09 and C-459/09 (Gavieiro), Fixed-term work

<p>Interim civil servants fall within the scope of Directive 1999/70, which covers length-of-service increments. The lack of a reference to the Directive in domestic law does not preclude that law from constituting a measure of transposition. Clause 4 of the Directive is unconditional and sufficiently precise for individuals to rely on it in the period from the transposition deadline, with retroactive effect.</p>

Facts

These cases concern two teachers who were employed by a public body (the "Consellería") in the Spanish autonomous community of Galicia. The cases relate to Directive 99/70, which put into effect the Framework Agreement on Fixed-Term Work (the "Directive"). Clause 4(1) of the Framework Agreement provides that, in respect of employment conditions, fixed-term workers must not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or employment relationship, unless different treatment is justified on "objective grounds". Clause 4(4) stipulates that the equal treatment requirement covers periodof-service qualifications. The deadline for transposing the Directive expired on 10 July 2001. Until 13 May 2007, the Spanish and Galician laws relating to civil servants entitled permanent civil servants, but not temporary ones, to three-yearly length of service salary raises ("increments"). On 12 April 2007, in the Del Cerro Alonso case (case C-307/05) the ECJ held this distinction to be incompatible with the Directive. Very shortly afterwards, Spain passed a law known as the "LEBEP", which made temporary civil servants eligible for the same increments as their permanent colleagues. However, the LEBEP provided that increments corresponding to periods of service preceding the date on which the LEBEP

took effect, which was 13 May 2007, would only take effect from that date, i.e. there was no retroactive effect.

National proceedings

Both teachers applied for retroactive increments and, when these were refused, sought judicial redress. In the case of Ms Gavieiro, the court to which she applied referred one question to the ECJ. The other court to which Ms Torres applied asked four (different) questions.

ECJ's ruling

1. In reply to the first question, the ECJ recalled its previous rulings that the Directive applies equally to private and public sector bodies. It added that the Directive implements the principle of equal treatment, which is a "principle of general application" (§ 36-45).

2. The next question asked (i) how to interpret "different length-ofservice qualifications" in Clause 4(4) of the Framework Agreement and (ii) whether the temporary nature of the employment of certain public servants is, in itself, an objective justification within the meaning of that Clause. The ECJ noted that in its Del Cerro judgment it had already held that a length-of-service payment identical to that in the present case is covered by Clause 4 of the Framework Agreement, which articulates a principle of EU social law and therefore cannot be interpreted restrictively (§ 45-50).

3. As already held in Del Cerro, a difference in treatment between permanent and temporary workers cannot be justified by a general, abstract national norm, such as a law or a collective agreement (§ 54), nor can the mere fact that someone's employment is temporary justify paying him or her less (§ 55-57).

4. The next question was whether the LEBEP is to be regarded as a national measure transposing the Directive, given that the LEBEP makes no reference to the Directive or, indeed, to any EU law. Article 2 of the Directive provides that when Member States adopt the laws, regulations and administrative provisions necessary to comply with that Directive, these are to contain a reference to the Directive. However, if a national law fails to make such a reference, that in itself does not preclude the law from being a valid measure of transposition (§ 60-63). Whether the LEBEP actually is a measure transposing the Directive is up to the Spanish courts to determine (§ 64-66).

5. The next question was whether an individual may rely on the direct (vertical) effect of the Directive in the period between the transposition deadline (in this case, 10 July 2001) and the

date on which it was transposed (in this case, 13 May 2007). The Spanish government suggested a negative answer, arguing that once a directive has been transposed into domestic law, an individual may no longer rely on its direct effect. In this case, Ms Gavieiro and Ms Torres had brought their case before the court after Spain had transposed the Directive. The Spanish government argued that, therefore, they could not invoke its direct effect. The ECJ disagreed with this view, noting that "the principle of effective legal protection is a general principle of EU law recognised, moreover, in Article 47 of the Charter of Fundamental Rights of the European Union", and that it is the responsibility of the national courts to provide such protection (§ 75).

6. Clause 4 of the Framework Agreement is unconditional and sufficiently precise to be relied upon by individuals. The argument that the autonomous community of Galicia had no choice but to follow Spanish law is of no relevance (§ 76-89).

7. The final question was whether the Spanish authorities were obliged to give the Directive retroactive effect, given the ECJ's ruling in the Impact case (case C-268/06). In that ruling the ECJ held that, in so far as a national law precludes retroactive application of legislation, a national court hearing a claim based on an infringement of a provision of national legislation transposing Directive 1999/70, must give that provision retroactive effect only if the national legislation makes this possible. The Impact case, however, dealt with a different issue. In the case of Ms Gavieiro and Ms Torres, they were subject to discrimination during the entire period up until 13 May 2007, and they relied on a provision of EU law having direct effect in order to compensate for a lacuna, which the incorrect transposition of Directive 1999/70 had allowed to subsist in Spanish law.

Ruling

Interim civil servants fall within the scope of Directive 1999/70, which covers length-of-service increments. The lack of a reference to the Directive in domestic law does not preclude that law from constituting a measure of transposition. Clause 4 of the Directive is unconditional and sufficiently precise for individuals to rely on it in the period from the transposition deadline, with retroactive effect.

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