

SUMMARY

## **ECJ 14 September 2016, case C-16/15 (Pérez López), Fixed-term work**

***&lt;p&gt;Successive fixed-term contracts cannot be justified by legal provisions allowing renewal in order to ensure the provision of certain services of a temporary, auxiliary or extraordinary nature when, in reality, there is no obligation to create additional permanent posts in order to bring an end to the structural use of fixed-term work to fill permanent posts.&lt;/p&gt;***

### **Summary**

Successive fixed-term contracts cannot be justified by legal provisions allowing renewal in order to ensure the provision of certain services of a temporary, auxiliary or extraordinary nature when, in reality, there is no obligation to create additional permanent posts in order to bring an end to the structural use of fixed-term work to fill permanent posts.

### **Facts**

Clause 5(1) of the Framework Agreement on fixed-term work annexed to Directive 199/70/EC provides:

“To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States [...] shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

- objective reasons justifying the renewal of such contracts or relationships;
- the maximum total duration of successive fixed-term employment contracts or relationships;

- the number of renewals of such contracts or relationships.”

A Spanish law of 16 December 2003 provides:

“1. On grounds of need, urgency or for the development of programmes of a temporary, auxiliary or extraordinary nature, the health services may appoint temporary regulated staff. Temporary regulated staff may be appointed on an interim, occasional or replacement basis. 2. Appointment on an interim (or ‘temporary replacement’) basis may be used to temporarily cover a vacant post in the healthcare institutions or services where it is necessary to ensure performance of the duties pertaining to that post. [...] Appointment on an occasional basis shall be made in the following situations:

- where it concerns the provision of certain services of a temporary, auxiliary or extraordinary nature;
- where it is necessary in order to ensure the permanent and continuous operation of the healthcare institutions;
- for the provision of additional services in order to compensate for a reduction of normal working hours.

### **National proceedings**

Ms Pérez López brought an action in which she argued, in essence, that her successive appointments were not intended to meet an auxiliary or extraordinary need of the health services, but corresponded in reality to a permanent activity. Accordingly, she claimed that the succession of fixed-term contracts constituted a breach of the law and should result in reclassification of her employment relationship. The court referred four questions to the ECJ. The first and third questions, taken together, were whether Clause 5 of the Framework Agreement must be interpreted as precluding the application of national legislation in such a way that the renewal of successive fixed-term employment contracts in the public health sector is deemed to be justified on ‘objective grounds’, within the meaning of that Clause, on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to meet certain temporary, auxiliary or extraordinary needs and that the authorities have a certain discretion in the decision as to whether to create permanent posts that bring an end to the employment of occasional regulated staff. The second question was whether Clause 5 of the Framework Agreement must be interpreted as precluding national legislation which requires a contractual relationship to terminate on the date provided by the fixed-term

contract, paying all outstanding remuneration, without prejudice to a possible reappointment. The fourth question was whether Clause 4 of the Framework Agreement is to be interpreted as precluding national legislation which fails to provide any compensation for termination of a contract of employment to occasional regulated staff while such compensation is granted to comparable workers employed under contracts for occasional employment.

### **ECJ's findings**

-

Clause 5(1) of the Framework Agreement assigns to the Member States the general objective of preventing abuse, while leaving to them the choice as to how to achieve it, provided that they do not compromise the objective or the practical effect of the framework. The national authorities must adopt measures that are not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the measures taken pursuant to the Framework Agreement are fully effective. Whereas, in the absence of relevant EU rules, the detailed rules for implementing such measures are a matter for the domestic legal order of the Member States, they must not be less favourable than those governing similar domestic situations (i.e. the principle of equivalence) or render the exercise of rights conferred by EU law impossible in practice or excessively difficult (i.e. the principle of effectiveness). Therefore, where an abusive use of successive fixed-term contracts or relationships has taken place, it must be possible to apply a measure offering effective and equivalent guarantees for the protection of workers in order to penalise that abuse and nullify the consequences of the breach of EU law (§24-33).

-

The concept of 'objective grounds' refers to precise and concrete circumstances characterising a given activity. Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from the pursuit of a legitimate social policy objective of a Member State. A national provision which merely authorises recourse to successive fixed-term contracts in a general and abstract manner, does not accord with these requirements. This would not allow objective and transparent criteria to be identified to check whether the contract renewal responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose (§38-40).

-

The relevant national legislation precisely determines the conditions under which successive fixed-term contracts or employment relationships may be entered into. The use of such contracts is permitted when it concerns the provision of services of a temporary, auxiliary or extraordinary nature, when it is necessary in order to ensure the permanent and continuous operation of the healthcare institutions or when it concerns the provision of additional services in order to compensate for a reduction of normal working hours. The Spanish law at issue also provides that, where more than two appointments are made for the provision of the same services for a total of 12 months or more in a period of two years, the competent authority must examine the reasons for those appointments and decide whether to create an additional permanent post. It follows that the national legislation at issue in the main proceedings does not lay down a general and abstract obligation to have recourse to successive fixed-term employment contracts, but limits the conclusion of such contracts for the purposes of satisfying, in essence, temporary requirements (§41-43).

-

In a sector of the public service with a large workforce, such as the public health sector, it is inevitable that temporary replacements will be necessary due, inter alia, to the unavailability of members of staff on sick, maternity, parental or other leave. The temporary replacement of workers in those circumstances may constitute an objective ground within the meaning of Clause 5(1)(a) of the Framework Agreement, justifying fixed-term contracts being concluded with the replacement staff and the renewal of those contracts as new needs arise, subject to compliance with the relevant requirements laid down in the Framework Agreement. Further, the obligation to organise the health service in such a way as to ensure that healthcare worker-patient ratios are constantly appropriate rests with the public authorities and is dependent on many factors that may reflect a need for flexibility which is capable of providing an objective justification under Clause 5(1)(a) of the Framework Agreement, for recourse to successive fixed-term employment contracts (§45-46).

-

By contrast, it is not accepted that fixed-term employment contracts may be renewed for the purpose of the performance, in a fixed and permanent manner, of tasks in the health service which are normally performed by ordinary hospital staff. The renewal of fixed-term employment contracts in order to cover needs which are not temporary in nature but are fixed and permanent is not justified for the purposes of Clause 5(1)(a) of the Framework

Agreement. This would conflict directly with the premise that employment contracts of indefinite duration are the general form of employment relationship (though fixed-term employment contracts are a feature of employment in certain sectors or for certain occupations and activities). To ensure compliance with Clause 5(1)(a) of the Framework Agreement, the renewal of successive fixed-term contracts should be checked to ascertain whether in fact a domestic provision such as that at issue in the main proceedings is not being used to meet the fixed and permanent staffing needs of the employer (§47-49).

-

The successive appointments of Ms Pérez López to provide hospital health services do not appear to be covered by the simple temporary needs of the employer. This is corroborated by the assessment of the referring court, which describes the coverage of posts in the healthcare sector by means of temporary regulated staff appointments as 'endemic'. It estimates that approximately 25% of the 50,000 medical and healthcare staff posts in the Madrid region are occupied by staff employed on a temporary basis for an average period of between five and six years, some of whom have been providing services continuously for over 15 years. In those circumstances, Clause 5(1)(a) of the Framework Agreement on fixed-term work must be interpreted as precluding the application of national legislation, such as that at issue in the main proceedings, by the authorities of the Member State concerned in such a way that the renewal of successive fixed-term employment contracts in the public health sector is deemed to be justified by 'objective grounds' within the meaning of that Clause on the ground that those contracts are founded on legal provisions allowing them to be renewed in order to ensure the provision of certain services of a temporary, auxiliary or extraordinary nature when, in fact, those needs are fixed and permanent (§50-52).

-

Even if national legislation permitting the renewal of successive fixed-term contracts to replace staff while waiting to fill permanent posts that have been created can, in principle, be justified by an objective ground, the actual application of that ground must comply with the requirements of the Framework Agreement, having regard to the particular features of the activity concerned and the conditions under which it is carried out. In the present case, the national legislation at issue in the main proceedings includes no obligation on the competent authority to create additional permanent posts in order to bring an end to the employment of occasional regulated staff. However, it appears from the findings made by the referring court that the permanent posts created are filled by the appointment of 'temporary' replacement staff, without there being any limit to the duration of the replacement contracts or the number

of renewals, so perpetuating a precarious situation for those workers.

-

The Framework Agreement does not specify the conditions under which employment contracts of indefinite duration may be used and is not intended to harmonise all national rules relating to fixed-term employment contracts. However, the power of the Member States to determine the content of national law on employment contracts cannot go so far as to allow them to compromise the objective or practical effect of the Framework Agreement. The objective pursued by Clause 5 of the Framework Agreement would be devoid of all content if, under national law, the new nature of an employment relationship, in itself, were able to constitute an 'objective ground' for the purposes of that clause, capable of authorising the renewal of a fixed-term employment contract (§58-60).

-

Only if the referring court finds that workers employed for an indefinite duration doing comparable work are paid compensation for termination, whereas no compensation is paid to occasional staff, is the difference in treatment covered by the principle of non-discrimination established in Clause 4 of the Framework Agreement applicable. However, this is not apparent from the documents seen by the Court and therefore the difference in treatment is not a matter of EU law (§67-68).

## **Judgment**

-

Clause 5(1)(a) of the Framework Agreement on fixed-term work must be interpreted as precluding the application of national legislation, such as that at issue in the main proceedings, by the authorities of the Member State concerned in such a way that: the renewal of successive fixed-term employment contracts in the public health sector is deemed to be justified on 'objective grounds' within the meaning of that Clause, on the ground that this is necessary to ensure the provision of services of a temporary, auxiliary or extraordinary nature when, in fact, those needs are fixed and permanent; there is no obligation on the competent authority to create additional permanent posts in

order to end the employment of occasional staff and it is permitted to fill permanent posts by hiring 'temporary' staff, so that the precarious situation of workers is perpetuated.

-

Clause 5 of the Framework Agreement on fixed-term work [...] must be interpreted as meaning that it does not, in principle, preclude national legislation requiring that the contractual relationship should terminate on the date provided by the fixed-term contract and that all outstanding remuneration is to be paid, without prejudice to a possible reappointment, provided that that legislation does not compromise the objective and practical effect of the Framework Agreement. This is a matter to be determined by the referring court.

-

The Court of Justice of the European Union has no jurisdiction to answer the fourth question.

---

**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2016-09-14

**Case number:** C-16/15 (Pérez López)