

service provided, or the duties actually performed within the municipal pharmacy.

As a concluding remark, the selling of a pharmacy is regulated with certain safeguards under national law, namely that pharmacies can only be sold to pharmacists whose names appear in the register of pharmacists and who either have the requisite qualifications to acquire a pharmacy or at least two years' professional experience. Given the latter, the objective of capitalizing on the professional experience gained could be attained through less restrictive measures such as the award of additional points under the tendering procedure to tenderers who provide proof of experience in managing a pharmacy.

Ruling

Article 49 TFEU must be interpreted as precluding a national measure that grants an unconditional right of pre-emption to pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender.

Note

As a primary point, the Court held (paras. 26-31) that only Article 49 TFEU is relevant in deciding the dispute in the main proceedings since the acquisition of a pharmacy for an indefinite period falls within the scope of Article 49 TFEU, in that it enables an economic activity to be pursued by means of a stable arrangement (*Gebhard*, C-55/94, para. 39; *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, paras. 23-24). In addition, the Court notes that the request for the preliminary ruling is admissible given several reasons (see paras. 32-36).

ECJ 22 January 2020, case C-177/18 (Baldonado Martín), Fixed-term work, other forms of discrimination

Almudena Baldonado Martín – v – Ayuntamiento de Madrid, Spanish case

Summary

The absence of severance compensation for interim civil servants is not contrary to Directive 1999/70.

Legal background

Clause 4(1) of the Framework Agreement, set out in the Annex to Council Directive 1990/70, prohibits, in respect of employment conditions, less favourable treatment of fixed-term workers compared to comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

The measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships are laid down in Clause 5(1)(a) to (c) of the Framework Agreement.

Article 49(1)(c) of the Workers' Statute is a Spanish law that states that workers covered by the Statute receive compensation equivalent to twelve days' remuneration for each year of service upon expiry of their employment contract.

Article 52 of the Workers' Statute contains objective grounds which may justify the termination of the employment contract. In accordance with Article 53(1)(b) of that Statute, the termination of an employment contract on any of the grounds set out in Article 52 confers entitlement on the worker to payment of compensation equivalent to twenty days' remuneration per year of service.

Facts

Baldonado Martín (hereafter 'BM') was assigned by the Municipality of Madrid as an interim civil servant to maintain green spaces. This assignment decision stated not only that BM would be employed to cover a vacant post until such time as the post was filled by an established civil servant, but also that that post would be abolished if the established civil servant being replaced

lost the right to have their post retained or if the authority took the view that the urgent ground for appointing an interim civil servant to cover the post no longer existed. After approximately seven years of working for the Municipality of Madrid, BM was notified that her post had been filled by an established civil servant. Therefore, her employment was terminated. Afterwards, BM requested a payment of compensation by the Municipality of Madrid for the cessation of her employment based on Article 4(3) TEU, Articles 20 and 21(1) of the Charter and on Clauses 4 and 5 of the Framework Agreement.

Questions

1. Must Clause 4(1) of the Framework Agreement be interpreted as precluding a national law that does not provide for the payment of any compensation either for fixed-term workers employed as interim civil servants or for established civil servants who have an employment relationship of indefinite duration, upon the termination of their employment?
2. Must Articles 151 and 153 of the TFEU, Articles 20 and 21 of the Charter and Clause 4(1) of the Framework Agreement be interpreted as precluding a national law that does not provide for payment of any compensation to fixed-term workers employed as interim civil servants upon the termination of their employment, whereas compensation is granted to fixed-term contract workers upon the expiry of their contract of employment?

* *The third question asked was inadmissible since it was manifestly hypothetical (see paragraphs 66–74).*

Consideration

First question

Clause 4(1) of the Framework Agreement prohibits, regarding employment conditions, less favourable treatment of fixed-term workers compared with permanent workers, on the sole ground that they are employed for a fixed term, unless different treatment is justified on objective grounds. Given the foregoing, it is important to note that BM falls within the definition of ‘fixed-term worker’ based on Clause 3(1) of the Framework Agreement and is therefore covered by that Agreement and Directive 1999/70. Moreover, the compensation requested by BM falls within the scope of Clause 4(1) of the Framework Agreement. In the present case, no less favourable treatment of interim civil servants compared with established servants exists because both do not receive a compensation for the cessation of their employment. Consequently, Clause 4(1) of the Framework Agreement must be interpreted as not precluding a national law that does not provide for the payment of any compensation either for fixed-term workers employed as interim civil servants or for established

civil servants who have an employment relationship of indefinite duration upon the termination of their employment, whereas it provides for the payment of such compensation to contract workers employed for an indefinite duration upon the termination of their contract of employment on an objective ground.

The Court notes that it is for the referring court to verify if, in the present case, interim civil servants are in a situation comparable with that of the contract workers employed by the Municipality of Madrid under an employment contract of indefinite duration, during the same period (see, by analogy, *Aragón Carrasco and Others*, C-367/18, not published, paragraph 37 and the case law cited). Such a comparable situation would occur if fixed-term workers carried out the same duties as contract workers employed by the same employer for an indefinite period or held the same post as them (see *Grupo Norte Facility*, C-574/16, paragraphs 50 and 51; *Montero Mateos*, C-677/16, paragraphs 53 and 54; *de Diego Porras*, C-619/17, paragraphs 64 and 65; and *Aragón Carrasco and Others*, C-367/18, not published, paragraph 36). Hence, it is important for the referring court to verify whether there is an objective reason justifying the fact that the termination of the employment relationship of an interim civil servant does not give rise to payment of compensation, whereas a contract worker under a contract of indefinite duration is entitled to compensation when dismissed on one of the grounds set out in Article 52 of the Workers’ Statute. However, the latter mentioned compensation under Article 53(1)(b) of the Workers’ Statute is the result of circumstances arising that were not foreseen as at the date the contract was entered into and that disrupt the normal continuation of the employment relationship. In this light, it must be noted that BM’s contract was terminated based on foreseen circumstances since her post was filled by an established civil servant. Consequently, Clause 4(1) of the Framework Agreement must be interpreted as not precluding a national law that does not provide for the payment of any compensation for termination of employment to fixed-term workers employed as interim civil servants whereas it provides for the payment of such compensation to contract workers employed for an indefinite duration upon the termination of their contract of employment on an objective ground.

Altogether, Clause 4(1) of the Framework Agreement must be interpreted as not precluding a national law that does not provide for the payment of any compensation either for fixed-term workers employed as interim civil servants or for established civil servants who have an employment relationship of indefinite duration upon the termination of their employment, whereas it provides for the payment of such compensation to contract workers employed for an indefinite duration upon the termination of their contract of employment on an objective ground.

Second question

First of all, the Court notes that the referred question is asked because of the fact that fixed-term contract work-

ers employed by the Municipality of Madrid, who are covered by the Workers' Statute, receive compensation upon termination of their employment contract based on Article 49(1)(c) of that Statute. Interim civil servants are not included by that Article and do not receive an equivalent compensation based on the Basic Statute of Public Employees (EBEP).

After that, each article mentioned in the second question is discussed separately as regards the difference in treatment.

As the difference in treatment is based on whether it is statutory or contractual (and not whether the employment relationship is fixed-term or indefinite), Clause 4(1) of the Framework Agreement does not apply (*Pérez López*, C-16/15, paragraph 66). Hence, that provision must be interpreted as not precluding a national law that does not provide for the payment of any compensation either for fixed-term workers employed as interim civil servants or for established civil servants who have an employment relationship of indefinite duration, upon the termination of their employment.

Moreover, Articles 151 and 153 TFEU establish the general objectives and measures of the EU's social policy. In this light, BM's request for the payment of compensation or the obligation for Member State to ensure that compensation cannot be deduced from such provisions (*Podilá and Others*, C-133/17 and C-134/17, not published, paragraph 37).

As regards Articles 20 and 21 of the Charter, these could in principle cover the difference in treatment of an employment relationship based on whether it is statutory or contractual (*Milkova*, C-406/15, paragraphs 55 to 63). However, the field of application of the Charter so far as concerns action by the Member State is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law (*Paoletti and Others*, C-218/15, paragraph 13 and the case law cited). This implementation is based on the nature of the legislation at issue, whether it pursues objectives other than those covered by EU law and whether there are specific rules of EU law on the matter or rules which are capable of affecting it (*Julián Hernández and Others*, C-198/13, paragraph 37 and the case law cited). In this light, BM stated that Article 49(1)(c) of the Workers' Statute is intended to implement Clause 5 of the Framework Agreement. However, the Court already held that the compensation provided for in Article 49(1) of the Workers' Statute does not fall within one of the categories of measures set out in Clause 5(1)(a) to (c) of the Framework Agreement. In addition, that compensation could not be considered as capable of achieving the general objective set out in Clause 5 of the Framework Agreement, namely preventing abuse arising from the use of successive fixed-term employment contracts or relations (*de Diego Porras*, C-619/17, paragraphs 92 to 94). The payment of the compensation is made without consideration to the legitimacy or misuse of such contract or relationships. Therefore, the measure does not appear appropriate to penalize misuse of successive fixed-term

employment contract or relations and to nullify the consequences of the breach of EU Law. The payment of the compensation is not sufficiently effective and sufficiently deterrent to ensure that the measures taken pursuant to the Framework agreement are fully effective (*de Diego Porras*, C-619/17, paragraphs 94 and 95). Given the foregoing, the Court notes that Article 49(1) of the Workers' Statute pursues a different objective from that of Clause 5 of the Framework Agreement and cannot be regarded as implementing EU law within the meaning of Article 51(1) of the Charter. Hence, the difference in treatment cannot be assessed in the light of the guarantees of the Charter, especially Articles 20 and 21 thereof. Given the aforementioned consideration, it is concluded that Articles 151 and 153 of the TFEU and Clause 4(1) of the Framework Agreement must be interpreted as not precluding a national law that does not provide for payment of any compensation to fixed-term workers employed as interim civil servants upon the termination of their employment, whereas compensation is granted to fixed-term contract workers upon the expiry of their contract of employment.

Ruling

Clause 4(1) of the Framework Agreement on fixed-term work concluded on 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as not precluding a national law that does not provide for the payment of any compensation either for fixed-term workers employed as interim civil servants or for established civil servants who have an employment relationship of indefinite duration, upon the termination of their employment, whereas it provides for the payment of such compensation to contract workers employed for an indefinite duration upon the termination of their contract of employment on an objective ground. Articles 151 and 153 of the TFEU and Clause 4(1) of the Framework Agreement on fixed-term work set out in the Annex to Directive 1999/70 must be interpreted as not precluding a national law that does not provide for payment of any compensation to fixed-term workers employed as interim civil servants upon the termination of their employment, whereas compensation is granted to fixed-term contract workers upon the expiry of their contract of employment.