JUDGMENT OF THE COURT (Second Chamber)

13 September 2007 *

In Case C-307/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Social nº 1 de San Sebastián (Spain), made by decision of 6 July 2005, received at the Court on 4 August 2005, in the proceedings

Yolanda Del Cerro Alonso

v

Osakidetza-Servicio Vasco de Salud,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), J. Klučka, J. Makarczyk and G. Arestis, Judges,

* Language of the case: Spanish.

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 September 2006,

after considering the observations submitted on behalf of:

— Mrs Del Cerro Alonso, by A. Angoitia López, abogado,

— Osakidetza-Servicio Vasco de Salud, by R. Navajas Cardenal, abogado,

— the Spanish Government, by J. Rodríguez Cárcamo, acting as Agent,

— Ireland, by D.J. O'Hagan, Chief State Solicitor, acting as Agent, assisted by A. Collins SC, A. Kerr BL, F. O'Dubhghaill BL, M. Heneghan, State Solicitor, and J. Gormley, Advisory Counsel,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by M. Massella Ducci Teri, avvocato dello Stato,

— the United Kingdom Government, by T. Harris, acting as Agent, assisted by T. Ward and K. Smith, barristers,

— the Commission of the European Communities, by M. van Beek and R. Vidal Puig, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 January 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of clause 4(1) of the framework agreement on fixed-term work, concluded on 18 March 1999 ('the framework agreement'), 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 (OJ 1999 L 175, p. 43).

2 The reference was made in proceedings between Mrs Del Cerro Alonso and her employer Osakidetza-Servicio Vasco de Salud ('Osakidetza'), concerning the granting of length-of-service allowances.

Legal context

Community legislation

3 According to clause 1 of the framework agreement, it has as its 'purpose ... to:

(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;

(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

4 Clause 2(1) of the framework agreement provides:

'This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.'

5 Clause 3 of the framework agreement states:

'1. the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective

conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event;

2. the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. ...'

6 Clause 4(1) of the framework agreement provides:

'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.'

National legislation

7 The basic rules applicable to regulated staff in the Spanish Health Service are contained in Law 55/203 relating to the framework regulations for regulated staff of the health service (Ley 55/2003 del Estatuto Marco del personal estatutario de los servicios de salud), of 16 December 2003 (BOE No 301, of 17 December 2003, p. 44742).

8 As is apparent from Article 1 of Law 55/2003, that law aims to establish basic rules for the special civil service scheme governing the regulated staff who make up the national health system.

9 Article 2(1) of Law 55/2003 provides:

'This law shall be applicable to regulated staff employed in health centres or institutions of the Autonomous Communities Health Services, or in the health centres and services of the Administración General del Estado (General Administration of the State).'

10 Articles 8 and 9 of Law 55/2003 make a distinction between 'permanent regulated staff' and 'temporary regulated staff'.

11 Article 41(1) of Law 55/2003 specifies that 'the pay scheme for regulated staff is comprised of basic remuneration and additional remuneration'. In accordance with Article 42(1) of that law, the basic remuneration includes salary, bonuses and the three-yearly allowances, the latter being awarded for each three years of service.

12 Article 44 of Law 55/2003 states:

'Temporary regulated staff shall receive the full basic remuneration and additional remuneration which correspond to their post in the relevant health service, with the exception of the three-yearly allowances.'

13 The basic rules applicable to regulated staff were brought into force in the Basque Autonomous Community by Decree 231/2000, approving the agreement governing the working conditions of the staff of Osakidetza-Servicio Vasco de Salud (Decreto 231/2000, de 21 de noviembre, por el que se aprueba el Acuerdo de regulador de las

condiciones de trabajo del personal de Osakidetza-Servicio Vasco de Salud) of 21 November 2000 (BOPV No 234 of 7 December 2000, p. 21912). Article 74 of the Agreement governing staff working conditions of Osakidetza, annexed to that decree, states that, to receive the three-yearly allowances, the employee must be a member of the 'permanent regulated staff'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 It is apparent from the documents submitted to the Court by the referring court that, between 1 February 1990 and 30 June 2004, Mrs Del Cerro Alonso worked for more than 12 years as an administrative assistant in various hospitals in the public health service of the Basque Country and that during this period she was a member of the 'temporary regulated staff'.

15 Having succeeded in the relevant selection tests, Mrs Del Cerro Alonso has occupied a post of administrative assistant in a hospital in the public health service of the Basque Country since 1 July 2004 as a member of the 'permanent regulated staff'.

16 On 7 July 2004 the applicant requested recognition of the 12 years of service already completed, being the equivalent of four three-yearly allowances. Her employer, Osakidetza, accepted her request and set her length of service as of 17 April 1992. Mrs Del Cerro Alonso's pay was accordingly increased by four three-yearly allowances from 1 July 2004, the date of her establishment as a member of the permanent staff.

17 On 12 November 2004 Mrs Del Cerro Alonso made another request for payment of the three-yearly allowances, amounting to EUR 1 167.94, which fell due in the year preceding her establishment. She relied upon the third additional provision of the Royal Decree 1181/1989 adopting rules for the application of Law 70/1978 of 26 December 1978 on the recognition of prior service completed in the regulated staff of the National Institute of Health (Real Decreto 1181/1989 por el que se dictan normas de aplicación de la Ley 70/1978, de 26 de diciembre, de Reconocimiento de servicios previos en la Administración Pública al personal estatutario del Instituto Nacional de la Salud) (BOE No 237, of 3 October 1989, p. 30952) of 29 September 1989, which provides that the economic benefits arising from the recognition of the length of service may extend retroactively for a period of one year prior to the request for recognition of prior service.

18 As there was no response to her request, the applicant brought an action before the referring court, claiming, in effect, that the refusal to grant her retroactively the economic benefits arising from the recognition of length of service constitutes discrimination against 'temporary regulated staff' as compared to 'permanent regulated staff'.

19 Osakidetza opposes that claim on the ground that Decree 231/2000 specifies, as a necessary pre-condition for three-yearly allowances, that the individual in question must be classified as a member of 'permanent regulated staff'. As Mrs Del Cerro Alonso was not classified as such until 1 July 2004 she can benefit from the allowances only from that date.

20 The referring court is uncertain whether the applicant in the main proceedings is entitled, on the basis of the principle of non-discrimination set out in clause 4(1) of the framework agreement, to benefit from a more favourable outcome than that resulting from the application of the national law.

21 In this regard, it states that it is important, however, to determine whether the concept of 'employment conditions', within the meaning of that clause, includes the pay received by an employee.

22 Moreover, the referring court has doubts whether the fact that a difference in treatment between 'temporary regulated staff' and 'permanent regulated staff' is provided for in legislation or in an agreement between social partners constitutes an 'objective ground' within the meaning of that clause of the framework agreement.

23 It is in those circumstances that the Juzgado de lo Social n° 1 de San Sebastián (Social Court No 1 San Sebastian) (Spain) decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Where Directive 1999/70/EC provides that fixed-term workers are not to be treated in a less favourable manner than comparable permanent workers, does this also refer to financial conditions?

If the answer is in the affirmative:

(2) Is the fact that Article 44 of Law 55/2003 ... provides that fixed-term workers are not entitled to the length-of-service allowance granted to permanent workers an adequate objective ground?

(3) Are the agreements concluded between the staff union representatives and the administration adequate objective grounds for not granting the length-of-service allowance to temporary staff?'

The questions referred for a preliminary ruling

Preliminary observations

24 In order to give a useful reply to the questions submitted by the referring court, it should be ascertained, at the outset, whether a worker such as the applicant in the main proceedings comes within the scope of Directive 1999/70 and of the framework agreement.

25 In that regard, the Court has already ruled that it is apparent both from the wording of Directive 1999/70 and of the framework agreement, as well as from their background and purpose, that the provisions laid down can apply also to fixed-term employment contracts and relationships concluded with the public authorities and other public-sector bodies (Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 54 to 57; Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraphs 40 to 43, and Case C-180/04 *Vassallo* [2006] ECR I-7251, paragraphs 32 to 35).

26 It must be added that, as is clear from clause 1 of the framework agreement, the objective of that agreement is not only to establish a framework to prevent abuse arising from the use of successive fixed-term work contracts or agreements, but also to ensure the application of the principle of non-discrimination as regards fixed-term work.

27 Having regard to the importance of the principle of equal treatment and non-discrimination, which is one of the general principles of Community law, the provisions set out in that regard by Directive 1999/70 and the framework agreement for the purposes of ensuring that fixed-term workers enjoy the same benefits as

those enjoyed by comparable permanent workers, except where a difference in treatment is justified by objective grounds, must be deemed to be of general application since they are rules of Community social law of particular importance, from which each employee should benefit as a minimum protective requirement.

28 Accordingly, Directive 1999/70 and the framework agreement are applicable to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to their employer.

29 The mere fact that a post may be classified as 'regulated' under national law and has certain characteristics typical of the civil service in the Member State in question is irrelevant in that regard. Otherwise, in reserving to Member States the ability to remove at will certain categories of persons from the protection offered by Directive 1999/70 and the framework agreement, the effectiveness of those Community instruments would be in jeopardy as would their uniform application in the Member States (see, by analogy, Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraphs 58 and 59, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 99). As is clear not only from the third paragraph of Article 249 EC, but also from the first paragraph of Article 2 of Directive 1999/70, in light of recital 17 of that Directive, the Member States are required to guarantee the result imposed by Community law (*Adeneler*, paragraph 68).

30 Since it is agreed that Mrs Del Cerro Alonso worked for more than 12 years in various hospitals within the public health system of the Basque Country as a member of the temporary staff and that, moreover, the dispute in the main proceedings concerns the comparison between a member of the temporary regulated staff and a member of the permanent regulated staff, the applicant in the main proceedings comes within the scope of Directive 1999/70 and of the framework agreement.

The first question

31 By its first question the referring court essentially asks whether the concept of 'employment conditions', referred to at clause 4(1) of the framework agreement, should be interpreted as meaning that it may be the basis for a claim such as that in the main proceedings, which is for the grant to a fixed-term worker of a length-of-service allowance which is reserved under national law solely to permanent staff.

32 The Spanish Government, Ireland and the United Kingdom Government contend that a negative response is required to this question on the basis of the wording of Article 137(5) EC, as interpreted in Case C-14/04 *Dellas and Others* [2005] ECR I-10253, paragraph 39.

33 It should be pointed out at the outset that the Council of the European Union, in adopting Directive 1999/70, in order to implement the framework agreement, relied on Article 139(2) EC, which provides that agreements concluded at a Community level shall be implemented for matters covered by Article 137 EC.

34 Among the areas in which Article 137 EC empowers the Council to lay down minimum requirements by way of directives in order to achieve the objectives referred to in Article 136 EC, including the improvement in the working environment of workers and their adequate social protection, Article 137(1)(b) EC lists 'working conditions'.

35 However, according to Article 137(5), the provisions of Article 137 EC 'shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'.

36 In that regard, it should be recalled, first, that, according to clause 1(a) of the framework agreement, its objective is to 'improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination'. Similarly, the preamble to the framework agreement states that it 'illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination'. Recital 14 of Directive 1999/70 explains that the aim of the framework agreement is, in particular, to improve the quality of fixed-term work by setting out the minimum requirements in order to ensure the application of the principle of non-discrimination.

37 It follows that the framework agreement aims to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer using such an employment relationship to deny those workers rights which are recognised for permanent workers.

38 That principle of Community social law cannot be interpreted restrictively.

39 Secondly, as Article 137(5) EC derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph must be interpreted strictly so as not to unduly affect the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC.

40 More particularly, the exception relating to 'pay' set out in Article 137(5) EC is explained by the fact that fixing the level of wages falls within the contractual freedom of the social partners at a national level and within the relevant competence

of Member States. In those circumstances, in the present state of Community law, it was considered appropriate to exclude determination of the level of wages from harmonisation under Article 136 EC et seq.

41 The 'pay' exception cannot, however, be extended to any question involving any sort of link with pay; otherwise some of the areas referred to in Article 137(1) EC would be deprived of much of their substance.

42 It follows that the derogation in Article 137(5) EC does not prevent a fixed-term worker from seeking, on the grounds of the principle of non-discrimination, the benefit of a condition of employment reserved only for permanent workers, even though the application of that principle leads to the payment of a pay differential.

43 Contrary to the arguments of the Spanish Government, Ireland and the United Kingdom Government, the above interpretation is not called into question by the case-law of the Court, according to which the minimum requirements which the Council may adopt by way of directives on the basis of Article 137 EC cannot apply to pay (*Dellas and Others*, paragraph 39) and thus Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) does not apply to workers' pay (*Dellas and Others*, paragraph 38, and Order of 11 January 2007 in Case C-437/05 *Vorel* [2007] ECR I-331, paragraph 32).

44 It follows unambiguously from the context of the grounds of the judgment in *Dellas and Others* and of the Order in *Vorel* that, in the cases giving rise to those decisions, the issue which arose was the effect which the interpretation of 'working time' and

'rest periods' within the meaning of Directive 93/104 can have on the 'level' of pay received by employees performing on-call duties (*Dellas and Others*, paragraphs 37 and 38, and the order in *Vorel*, paragraph 32).

45 Therefore the Court's ruling that methods of payment for periods of on-call duty are not capable, in the present state of Community law, of being harmonised is entirely consistent with the interpretation of the derogation in Article 137(5) EC set out in paragraphs 41 and 42 of the present judgment. The national authorities retain sole competence to establish the level of wages and salaries due in that respect to each worker, as Directive 93/104 does not, in principle, preclude the establishment by Member States of a law which, with regard to periods of on-call duty performed by the employee at his place of work, lays down different pay for periods in the course of which work is actually done and those during which no actual work is done (order in *Vorel*, paragraphs 35 and 36).

46 For the same reasons, the establishment of the level of the various constituent parts of the pay of a worker such as the applicant in the main proceedings is still unquestionably a matter for the competent bodies in the various Member States. That is not, however, the subject of the dispute before the referring court.

47 In contrast, as has already been explained at paragraphs 44 and 45 of the present judgment, the question whether in applying the principle of non-discrimination laid down in clause 4(1) of the framework agreement, one of the constituent parts of the pay should, as an employment condition, be granted to fixed-term workers in the same way as it is to permanent workers does come within the scope of Article 137(1)(b) EC and therefore of Directive 1999/70 and the framework agreement adopted on that basis.

48 In those circumstances, the reply to the first question is that the concept of 'employment conditions' referred to in clause 4(1) of the framework agreement must be interpreted as meaning that it can act as a basis for a claim such as that at issue in the main proceedings, which seeks the grant to a fixed-term worker of a length-of-service allowance which is reserved under national law solely to permanent staff.

The second and third questions

49 The second and third questions concern, essentially, the interpretation of the concept of 'objective grounds' which, according to clause 4(1) of the framework agreement, can justify different treatment for fixed-term workers as compared to permanent workers.

50 The referring court asks, more specifically, whether the mere fact that the difference in treatment between the fixed-term workers and permanent workers regarding the length-of-service allowance is provided for by a law or by an agreement between staff union representatives and the administration is capable of constituting such an objective ground.

51 In those circumstances it is necessary to examine the second and third questions together.

52 It is important to recall, in that regard, that the Court has already ruled on a similar question concerning the same concept of 'objective reasons' which, according to clause 5(1)(a) of the framework agreement, justify the renewal of contracts or employment relationships for repeated fixed-term contracts.

53 The Court held that that concept of 'objective reasons' must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. 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 pursuit of a legitimate social-policy objective of a Member State (*Adeneler and Others*, paragraphs 69 and 70).

54 On the other hand, a national provision which merely authorises recourse to successive fixed-term contracts, in a general and abstract manner by a rule of statute or secondary legislation, does not accord with the requirements as stated in the previous paragraph (*Adeneler and Others*, paragraph 71).

55 More specifically, recourse to fixed-term employment contracts solely on the basis of a general provision, unlinked to what the activity in question specifically comprises, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose (*Adeneler and Others*, paragraph 74).

56 The same interpretation is necessary, by analogy, regarding the identical concept of 'objective grounds' within the meaning of clause 4(1) of the framework agreement.

57 In those circumstances, that concept 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.

58 On the contrary, that concept requires the unequal treatment at issue to be justified by the existence of precise and concrete 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.

59 Accordingly, the reply to the second and third questions is that clause 4(1) of the framework agreement must be interpreted as meaning that it precludes the introduction of a difference in treatment between fixed-term workers and permanent workers which is justified solely on the basis that it is provided for by a provision of statute or secondary legislation of a Member State or by a collective agreement concluded between the staff union representatives and the relevant employer.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The concept of 'employment conditions' referred to in clause 4(1) of the framework agreement on fixed-term work, concluded on 18 March 1999,**

and 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 meaning that it can act as a basis for a claim such as that at issue in the main proceedings, which seeks the grant to a fixed-term worker of a length-of-service allowance which is reserved under national law solely to permanent staff.

2. **Clause 4(1) of the framework agreement must be interpreted as meaning that it precludes the introduction of a difference in treatment between fixed-term workers and permanent workers which is justified solely on the basis that it is provided for by a provision of statute or secondary legislation of a Member State or by a collective agreement concluded between the staff union representatives and the relevant employer.**

[Signatures]