Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 20 May 2015 [1]

Case C-177/14

María José Regojo Dans
v
Consejo de Estado

(Request for a preliminary ruling from the Tribunal Supremo (Spain))

(Reference for a preliminary ruling — Social policy — Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP — Public sector — Non-permanent staff — Clause 2(1) — Clause 3(1) — Classification as a fixed-term worker — Clause 3(2) — Concept of the same or similar work — Specific nature of the tasks — Comparison made in accordance with national law — Clause 4 — Principle of non-discrimination — Objective grounds)

1. This request for a preliminary ruling, made by the Tribunal Supremo (Supreme Court) (Spain), concerns the interpretation of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, set out in the Annex to Council Directive 1999/70/EC of 28 June 1999, ('the framework agreement on fixed-term work'). [2] The purpose of that measure, which, further to the Luxembourg Extraordinary European Council, seeks to achieve 'a better balance between flexibility in working time and security for workers', [3] is two-fold: first, it provides that Member States are to adopt measures to prevent abuse arising from the renewal of fixed-term contracts; [4] second, it requires that fixed-term workers are not treated in a less favourable manner than comparable permanent workers.

2. The questions put to the Court by the referring court relate to that second purpose. The Court is called upon, inter alia, to interpret the concept of 'the same or similar work/occupation', which characterises a permanent worker 'comparable' to a fixed-term worker claiming the benefit of clause 4 of the framework agreement on fixed-term work, and to rule on the characterisation of the 'objective grounds' capable of justifying unequal treatment.

I – Legal context

A – *EU law*

3. Clause 2(1) of the framework agreement on fixed-term work defines the scope of that agreement: it 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'.

1 — Original language: French.
2 — OJ 1999 L 175, p. 43.
3 — First paragraph of the preamble to the framework agreement on fixed-term work.
4 — Clause 5 of the framework agreement on fixed-term work.

4. Clause 3 of the framework agreement on fixed-term work defines the terms 'fixed-term worker' and 'comparable permanent worker'. According to paragraph 1 of that clause, for the purpose of the framework agreement, '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'. Pursuant to paragraph 2 of the same clause, for the purpose of the framework agreement on fixed-term work, 'comparable permanent worker' means a worker who, firstly, has an employment contract of indefinite duration 'in the same establishment' and, secondly, is 'engaged in the same or similar work/occupation, due regard being given to qualifications/skills'. Clause 3(2) states that, where there is no comparable permanent worker in the same establishment, 'the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice'.

5. Clause 4 of the framework agreement on fixed-term work lays down the principle of non-discrimination of fixed-term workers as compared with comparable permanent workers. Paragraph 1 of that clause provides that, '[i]n 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'. Paragraph 4 of the same clause states that '[p]eriod-of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length-of service qualifications are justified on objective grounds'.

B – *National law*

6. Article 8 of the Law on the basic regulations relating to public servants (Ley 7/2007 del Estatuto Básico del Empleado Público) of 12 April 2007[5] ('the LEBEP') defines public servants as 'persons who carry out duties for remuneration within the public authorities in the service of the general interest'. It explains that there are four types of public servants: 'career civil servants', 'interim (non-established) civil servants', 'staff engaged under employment contracts' (which may be fixed-term or permanent) and 'staff appointed on a non-permanent basis'.[6]

7. Article 9(1) of the LEBEP provides that '[c]areer civil servants are persons who, following an appointment in accordance with the law, are attached to a public authority by a relationship defined by statute and governed by administrative law, for the purpose of performing, on a permanent basis, professional services for remuneration'. Article 9(2) of the LEBEP specifies that, '[i]n any event, the performance of duties which entail direct or indirect involvement in the exercise of public powers or in the safeguarding of the general interests of the State and the public authorities falls exclusively to civil servants under such conditions as are laid down by the implementing law for each public authority'.

8. Article 12(1) of the LEBEP provides that '[n]on-permanent staff are persons who, by virtue of their appointment and on a non-permanent basis, perform only duties which are expressly classified as duties consisting in positions of trust or involving the performance of special advisory functions, their remuneration being met from the budget appropriations allocated for that purpose'. Paragraph 3 of that article states that '[a]ppointments and terminations of appointments shall not be subject to any restrictions. In any event, termination of an appointment shall occur on termination of the

5 — *Boletín Oficial del Estado* No 40, 13 April 2007.

6 — The category known, under Spanish law, as '*personal eventual*' will be referred to here as 'non-permanent staff'.

appointment of the postholder for whom the duty consisting in a position of trust or involving the performance of advisory functions is discharged'. Article 12(5) provides that '[t]he general rules applicable to career civil servants shall apply to non-permanent staff in so far as those rules are appropriate to the nature of their status'.

9. Prior to the entry into force of the LEBEP, on 13 May 2007, the rules applicable to public servants were contained in the Law on the civil service (Ley articulada de Funcionarios del Estado), adopted by Decree 315/1964 of 7 February 1964[7] ('the LFCE'), and in Law 30/1984 on measures for the reform of the civil service (Ley de Medidas para la Reforma de la Función Pública) of 2 August 1984[8] ('Law 30/1984'). Article 3 of the LFCE distinguished between 'career civil servants' and 'civil servants engaged under employment contracts'; the latter could be either '*funcionarios eventuales*' (civil servants appointed on a non-permanent basis) or '*funcionarios interinos*' ('interim (non-established) civil servants'). Article 4 of the LFCE provided that 'a career civil servant is any person who, following an appointment in accordance with the law, occupies a permanent post, is attached to the relevant staff group and receives pay or fixed allowances from sums earmarked for staffing in the General State Budget'. With regard to non-permanent staff, the second subparagraph of Article 20(2) of Law 30/1984 provided that such staff 'shall perform only duties which are expressly classified as duties consisting in positions of trust or involving the performance of special advisory functions; appointments and the termination of appointments shall not be subject to any restrictions and shall fall exclusively within the competence of Secretaries of State and Ministers and, as appropriate, Government Ministers of Autonomous Communities and Chief Executives of local authorities. Appointments of non-permanent staff shall automatically be terminated on termination of the appointment of the postholder for whom the duty consisting in a position of trust or involving the performance of special advisory functions is discharged'.

10. With regard to the remuneration of public servants, Article 23 of the LEBEP concerns the 'basic remuneration' of career civil servants. It provides that that remuneration includes, firstly, 'the salary assigned to each professional classification subgroup or, if there are no subgroups, to each professional classification group' and, secondly, 'three-yearly increments consisting of a fixed amount, specific to each professional classification subgroup or, if there are no subgroups, to each professional classification group, for each three-year period of service'.

11. The remuneration of non-permanent staff is governed by the finance laws. The most recent finance law applicable to the period at issue is Law 2/2012 of 29 June 2012[9] ('the 2012 Finance Law').[10] Article 26(4) of that law provides that 'non-permanent staff shall receive remuneration in the form of the salary and bonuses corresponding to the classification group or subgroup to which the Ministry of Finance and Public Administration equates their duties and the additional remuneration corresponding to the post reserved for non-permanent staff which they hold … . Career civil servants who, while on active duty or on secondment, hold posts reserved for non-permanent staff shall receive the basic remuneration corresponding to their classification group or subgroup, including the three-yearly increments, as appropriate, and the additional remuneration corresponding to the post which they hold'.

7 — *Boletín Oficial del Estado* No 40, 15 February 1964.

8 — *Boletín Oficial del Estado* No 185, 3 August 1984.

9 — *Boletín Oficial del Estado* No 156, 30 June 2012.

10 — According to the Spanish Government, the finance laws for the financial years 2008 to 2011 are largely identical in this regard to the 2012 Finance Law.

II – Facts, main proceedings and questions referred for a preliminary ruling

12. Ms Regojo Dans has been employed as a non-permanent member of staff by the Consejo de Estado (Council of State) since 1 March 1996. She holds the post of head of the secretariat of a Permanent Member of the Council and President of the Second Division. She was previously employed, again as a non-permanent member of staff, by the Tribunal Constitucional (Constitutional Court) from 4 July 1980 to 1 March 1996, with a brief interruption from 7 to 26 April 1995 during which she worked at the Consejo Económico y Social (Economic and Social Council) as a member of staff engaged under an employment contract.

13. On 25 January 2012, Ms Regojo Dans made an application to the Consejo de Estado, requesting that her right to receive the three-yearly length-of-service increments corresponding to the period during which she had been employed as a public servant — that is thirty-one and a half years as at the date of the application — be recognised, and that she be paid the sum corresponding to the past four years.

14. By decision of 24 July 2012, the President of the Consejo de Estado rejected her application.

15. Ms Regojo Dans has brought an administrative-law action against that decision before the referring court, claiming, inter alia, that the refusal to recognise her right to the three-yearly length-of-service increment constitutes a difference in treatment as compared with other public servants, and that such a difference in treatment is contrary to clause 4 of the framework agreement on fixed-term work.

16. The Tribunal Supremo therefore decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the definition of ‘fixed-term worker’ in clause 3(1) of the framework agreement on fixed-term work ... include ‘non-permanent staff’ (‘*personal eventual*’) who are currently governed by Article 12 of [the LEBEP] … and ‘non-permanent staff’ who were previously governed by Article 20(2) of Law 30/1984 …?

(2) Is the principle of non-discrimination in clause 4(4) of the framework agreement on fixed-term work … applicable to such ‘non-permanent staff’, so that they may be granted the right to receive and be paid the remuneration in respect of length of service which is paid to career civil servants, staff engaged under employment contracts for an indefinite duration, interim (non-established) civil servants and staff engaged under fixed-term employment contracts?

(3) Do the rules, laid down in the two aforementioned Spanish laws, whereby the appointment of such ‘non-permanent staff’ and the termination of their appointment are not — on account of the positions of trust involved — subject to any restrictions, come within the objective grounds which under clause 4 may justify different treatment?’

17. Written observations on those questions have been submitted by Ms Regojo Dans, the Spanish and Italian Governments and the European Commission.

III – Legal analysis

A – *The first question referred for a preliminary ruling*

18. By its first question, the referring court asks the Court whether a worker performing 'a duty consisting in a position of trust or involving the performance of special advisory functions' must be regarded as a 'fixed-term worker' within the meaning of clause 3(1) of the framework agreement on fixed-term work.

19. It is my view that that question actually encompasses two questions. The first relates to the classification of non-permanent staff as 'workers'; the second concerns the classification of such staff as 'fixed-term' workers within the meaning of clause 3(1) of the framework agreement on fixed-term work.

1. Classification as 'workers'

20. According to the referring court, a non-permanent member of staff can be regarded as a 'worker' within the meaning of clause 3(1) of the framework agreement on fixed-term work only if he satisfies one or more of the following three criteria: an activity which may be equated with a private-sector occupation, a relationship of subordination and remuneration which represents a means of subsistence for him. [11]

21. However, neither clause 3(1) nor any other clause of the framework agreement on fixed-term work defines the term 'worker'. Indeed, clause 2(1) provides that the employment contract or employment relationship is 'defined in law, collective agreements or practice in each Member State'. Recital 17 in the preamble to Directive 1999/70 states that '[a]s regards terms used in the framework agreement [on fixed-term work] but not specifically defined therein, this Directive allows Member States to define such terms in conformity with national law or practice'. In *Sibilio*, the Court, when asked about the classification of the relationship between persons carrying out work of social utility and the Italian authorities, held that it is for the Member State and/or the social partners to define what constitutes an employment contract or employment relationship covered by the framework agreement on fixed-term work, pursuant to clause 2(1) of that agreement. [12] It falls to the referring court, the only court with jurisdiction to interpret domestic law, [13] to rule on the classification of non-permanent staff as 'workers'.

11 — The request for a preliminary ruling actually states that the difficulty lies in 'determining whether the concepts of trust and of special advice which characterise the duties of these "non-permanent staff" under Spanish law mean that such staff cannot be regarded as "professionals", an attribute inherent in the definitions of "fixed-term worker" and "comparable permanent worker" contained in clause 3(1) and (2) of the framework agreement'. Such 'professionalism' is characterised by the three criteria set out in point 20 above.

12 — Judgment in *Sibilio* (C-157/11, EU:C:2012:148, paragraph 45).

13 — It is true that the Court has held that 'Directive 1999/70 and the framework agreement on fixed-term work are applicable to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to their employer' (judgments in *Del Cerro Alonso*, C-307/05, EU:C:2007:509, paragraph 28; *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 114; *Gavieiro Gavieiro and Iglesias Torres*, C-444/09 and C-456/09, EU:C:2010:819, paragraph 42; *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 40; *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 33; and *Mascolo and Others*, C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 68; order in *León Medialdea*, C-86/14, EU:C:2014:2447, paragraph 39; and judgment in *Nisttahuz Poclava*, C-117/14, EU:C:2015:60, paragraph 31).
However, the Court has never clarified what is to be regarded as a 'service' or as 'remunerat[ion]': so general a definition scarcely appears to me to impinge upon the competence of the Member States.
Moreover, I would point out that such a definition differs from that accepted by the Court in the context of the free movement of workers, which contained a third criterion: a relationship of subordination (judgment in *Lawrie-Blum* (66/85, EU:C:1986:284, paragraph 17)). As Advocates General Kokott and Poiares Maduro explain, there is no single definition of 'worker': it varies according to the instrument of EU law in question (Opinion of Advocate General Kokott in *Wippel*, C-313/02, EU:C:2004:308, point 43, and Opinion of Advocate General Poiares Maduro in *Del Cerro Alonso*, C-307/05, EU:C:2007:3, point 11). Perhaps the omission of that third criterion should be construed as the Court's intention to take account of the development of 'atypical' employment relationships, in which the distinction between salaried employment and independent employment is losing its meaning: see Barnard, C., *EU Employment Law*, Fourth Edition, Oxford University Press, 2012, pp. 144 and 152 to 154.

22. The competence of the Member States to define the employment contract or employment relationship is subject to a single condition: they cannot, as the Court held in *Sibilio*, arbitrarily exclude a category of persons from the protection offered by Directive 1999/70 and the framework agreement on fixed-term work'.[14] Indeed, recital 17 in the preamble to Directive 1999/70 states that the Member States are to define the terms not defined by the framework agreement on fixed-term work, provided that the definitions in question respect the content of that agreement. The definition under national law of the employment contract or employment relationship cannot therefore jeopardise the objectives or the effectiveness of the framework agreement on fixed-term work. The Court has thus held that Member States cannot exclude public servants from the protection of that framework agreement: '[t]he definition of "fixed-term workers" for the purposes of the framework agreement [on fixed-term work], set out in clause 3(1), encompasses all workers without drawing a distinction according to whether their employer is in the public, or private, sector'.[15] Similarly, in *Sibilio*, the Court pointed out that the Italian Republic could not adopt a formal classification other than that of an 'employment relationship' where 'that formal classification is simply fictitious, thus disguising a genuine employment relationship within the meaning of [Italian] law'.[16] In *O'Brien*, in which the Court had to rule on the relationship between part-time judges and the Irish authorities, it took the view that Ireland could refuse to regard that relationship as an employment relationship only 'if the nature of the employment relationship concerned is substantially different from the relationship between employers and their employees which fall within the category of workers under national law'.[17] In order to carry out that comparison properly, the referring court had to consider the rules for appointing and removing judges as well as the way in which their work is organised (working hours, periods of employment, flexibility) and the fact that they were entitled to social benefits (sick pay, maternity or paternity pay).[18]

23. In other words, although the Court, pursuant to clause 2(1) of the framework agreement on fixed-term work, does not define the employment relationship, it does nevertheless require that a definition of that term is not applied arbitrarily: it requires that the criteria for the employment relationship, as defined in the applicable national law, are applied equally to all persons claiming the protection of that framework agreement.[19]

24. The question put by the referring court should therefore be answered to the effect that, although it is for the Member States to define the employment contract or employment relationship, it must be ensured that that definition does not result in the arbitrary exclusion of a category of persons, in the present case that of non-permanent staff, from the protection afforded by Directive 1999/70 and the framework agreement on fixed-term work. Indeed, non-permanent staff must be afforded such protection where the nature of their relationship with the public authorities is not substantially different from the relationship between persons who, under Spanish law, fall within the category of workers and their employers.

14 — Judgment in *Sibilio* (C-157/11, EU:C:2012:148, paragraph 51).

15 — Judgment in *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 40).

16 — Judgment in *Sibilio* (C-157/11, EU:C:2012:148, paragraph 49).

17 — The judgment in *O'Brien* concerned the interpretation not of the framework agreement on fixed-term work but of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9) ('the framework agreement on part-time work'). That is, however, of little significance: the wording of clause 2(1) of the framework agreement on part-time work (which provides that '[t]his Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State') is very close to the wording of clause 2(1) of the framework agreement at issue in the present case. Furthermore, the Court cites *O'Brien* in *Sibilio* (judgment in *O'Brien*, C-393/10, EU:C:2012:110, paragraph 51).

18 — Judgment in *O'Brien* (C-393/10, EU:C:2012:110, paragraphs 45 and 46).

19 — See Robin-Olivier, S., 'Le droit social de l'Union est-il capable de réduire la fragmentation de la catégorie des travailleurs?', *Revue trimestrielle du droit européen*, 2012, p. 480. The author points out, in relation to *O'Brien*, that 'the skill of the Court in that case consists in conducting a review within the very framework of the national law, in accordance with a requirement of consistency inherent in that law'. With regard to clause 2(1) of the framework agreement on fixed-term work, Advocate General Poiares Maduro speaks of a 'conditional renvoi' to national law (Opinion of Advocate General Poiares Maduro in *Del Cerro Alonso*, C-307/05, EU:C:2007:3, point 15).

25. As the referring court states, non-permanent staff cannot be excluded from the benefit of the framework agreement on fixed-term work on account of their status as public servants. [20]

26. However, such staff may be so excluded if their relationship with the public authorities is substantially different from the relationship between their employers and workers classified as such under Spanish law. In this regard, the referring court observes that, pursuant to Article 9(1) of the LEBEP, the relationship between career civil servants and the public authorities is a 'relationship defined by Statute and governed by administrative law, for the purpose of performing, on a permanent basis, *professional services for remuneration*'. [21] It is therefore for the referring court to assess whether the relationship between non-permanent staff and the public authorities is substantially different from that described in Article 9(1) of the LEBEP.

27. Nevertheless, I fail to see why the general classification of 'duties consisting in positions of trust or involving the performance of special advisory functions' would not cover the performance of 'professional services', and that appears to be the view of the referring court. I would also point out that Article 26(4) of the 2012 Finance Law provides that 'non-permanent staff shall receive remuneration in the form of the salary … corresponding to the classification group or subgroup to which the Ministry of Finance and Public Administration equates their duties …'; the basic salary of non-permanent staff is therefore identical to that of the career civil servants classified within the same group. As for the rules for appointment and removal from post, which — in *O'Brien* — the Court finds to be a relevant factor when assessing whether a substantial difference exists, it appears to me that there is no need to take account of such rules in the present case. The rules governing removal from post are relevant when determining whether non-permanent staff are 'fixed-term' workers, not whether they are 'workers'; in that connection, I would point out that *O'Brien* concerned the interpretation of the framework agreement on part-time work, not the framework agreement on fixed-term work at issue here. As for the rules governing appointments, which are indeed different since — unlike career civil servants — non-permanent staff are not recruited by competition, such rules appear to me to be irrelevant, provided that the non-permanent staff perform services similar to those performed by career civil servants and that the remuneration of the former is comparable to that of the latter.

28. I will now consider the second element of the concept of a 'fixed-term worker' within the meaning of clause 3(1) of the framework agreement on fixed-term work, namely the 'end of the employment contract or relationship'. Unlike the concept of a 'worker', that of the 'end of the employment contract or relationship' is defined by the framework agreement.

2. Classification as a 'fixed-term worker' within the meaning of clause 3(1) of the framework agreement on fixed-term work

29. Clause 3(1) of the framework agreement on fixed-term work defines a fixed-term worker as a worker bound to an employer by an employment contract or relationship 'the end [of which] is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event'.

20 — Judgments in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 54); *Marrosu and Sardino* (C-53/04, EU:C:2006:517, paragraph 39); *Vassallo* (C-180/04, EU:C:2006:518, paragraph 32); *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 25); *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 38); *Della Rocca* (C-290/12, EU:C:2013:235, paragraph 34); *Fiamingo and Others* (C-362/13, C-363/13 and C-407/13, EU:C:2014:2044, paragraph 29); and *Mascolo and Others* (C-22/13, C-61/13, C-63/13 and C-418/13, EU:C:2014:2401, paragraph 67).

21 — Emphasis added.

30. In the present case, the employment relationship of non-permanent staff may come to an end in two scenarios: automatically, where the appointment of the individual's line manager is terminated, or on a discretionary basis, where the line manager decides to terminate the employment relationship (in the words of the Italian Government, this is a case of a termination '*ad nutum*'). Indeed, Article 12(3) of the LEBEP provides that 'appointments and terminations of appointments shall not be subject to any restrictions. In any event, termination of an appointment shall occur on termination of the appointment of the postholder for whom the duty consisting in a position of trust or involving the performance of advisory functions is discharged'. The situation was identical under Law 30/1984. The second subparagraph of Article 20(2) of Law 30/1984 in fact provided that 'appointments and the termination of appointments shall not be subject to any restrictions and shall fall exclusively within the competence of Secretaries of State and Ministers and, as appropriate, Government Ministers of Autonomous Communities and Chief executives of local authorities. Appointments of non-permanent staff shall automatically be terminated on termination of the appointment of the postholder for whom the duty consisting in a position of trust or involving the performance of special advisory functions is discharged'.

31. The classification of non-permanent staff as 'fixed-term' workers within the meaning of clause 3(1) of the framework agreement on fixed-term work is raised not by the referring court but by the Spanish Government. However, I take the view that this point must be addressed. In addition, both the applicant in the main proceedings and the Commission have submitted observations on this point. According to the applicant, this point was likewise considered before the referring court.

32. The Spanish Government submits that non-permanent staff cannot be regarded as 'fixed-term' workers within the meaning of clause 3(1) of the framework agreement on fixed-term work. Indeed, it takes the view that appointments of non-permanent staff are, as a matter of principle, terminated on a discretionary basis and that, in such cases, the end of the employment relationship is not determined by an 'objective condition' within the meaning of that provision. The fact that the termination of a non-permanent member of staff's appointment occurs, 'in any event', automatically on account of the termination of the appointment of that staff member's line manager, does not alter that conclusion.

33. The applicant in the main proceedings makes the point that, under Article 12(1) of the LEBEP, *personal eventual* perform their duties 'on a non-permanent basis'. The termination of their appointment on a discretionary basis, like the automatic termination of their appointment on account of the termination of their line manager's appointment, is determined by objective conditions. Indeed, the applicant appears to be of the view that the decision to terminate an appointment taken by the line manager constitutes in itself an 'objective condition' within the meaning of clause 3(1) of the framework agreement on fixed-term work.

34. I do not share the applicant's view that the termination of an appointment on a discretionary basis by the line manager, without the line manager having to provide grounds for the termination, is determined by objective conditions within the meaning of clause 3(1) of the framework agreement on fixed-term work. It is true that the scenarios envisaged by that provision ('reaching a specific date, completing a specific task, or the occurrence of a specific event') are not exhaustive: clause 3(1) precedes that list with the words 'such as'. Nevertheless, the power of a line manager to terminate the appointment of non-permanent staff on a discretionary basis includes the power not to terminate that appointment: it is not certain that the line manager will decide to terminate the appointment. The termination of the appointment of a non-permanent member of staff on a discretionary basis cannot therefore, in my view, be regarded as being determined by an 'objective condition' within the meaning

of clause 3(1) of the framework agreement.[22]

35. However, the termination of the line manager's appointment does constitute an objective condition which automatically entails the termination of the appointment of the non-permanent member of staff. Since one of the two scenarios provided for in Spanish law in which an appointment is terminated may be regarded as determining 'the end of the employment contract or relationship' within the meaning of clause 3(1) of the framework agreement on fixed-term work, non-permanent staff must be regarded as 'fixed-term' workers within the meaning of that provision. Furthermore, the Spanish legislature itself draws attention to the ancillary nature of the termination of an appointment on a discretionary basis by the line manager, since Article 12(3) of the LEBEP provides that the termination of an appointment occurs 'in any event' on account of the termination of the line manager's appointment. Moreover, the possibility of a termination of the appointment on a discretionary basis by the line manager appears to me to be highly improbable in the present case, since it has not occurred over the course of the sixteen years spent by the applicant at the Consejo de Estado.

36. Having considered above the applicability of the framework agreement on fixed-term work to non-permanent staff, I now intend to ascertain whether the applicant is the subject of less favourable treatment, which is prohibited under clause 4 of that agreement.

B – *The second question referred for a preliminary ruling*

37. By its second question, the referring court in essence asks the Court whether the principle of non-discrimination laid down in clause 4(4) of the framework agreement on fixed-term work is to be interpreted as meaning that non-permanent staff cannot be refused the three-yearly length-of-service increment paid to career civil servants, interim civil servants and staff engaged under fixed-term or permanent employment contracts.

38. However, in my view, it is in relation to clause 4(1), rather than clause 4(4), of the framework agreement on fixed-term work that it is necessary to examine whether the Spanish legislature's refusal to grant the increment at issue to non-permanent staff constitutes discrimination. Clause 4(4) does lay down the same prohibition as clause 4(1),[23] but it concerns 'period-of service qualifications relating to particular conditions of employment', whereas clause 4(1) relates, in general terms, to 'employment conditions'. In addition, an increment is not a length-of-service qualification. The increment at issue is refused to non-permanent staff not where their length of service is insufficient, but because they do not have the status of career civil servants. Moreover, in the four cases in which the Court has had to rule on a length-of-service increment, it is in the light of clause 4(1) of the framework agreement that it conducted its assessment.[24]

22 — In this connection, I would point out that the Court has held, in relation to a worker engaged under a contract of indefinite duration and dismissed in the course of the probationary period, that the probationary period, during which the contract could be freely terminated, did not constitute a fixed-term contract. '[A] probationary period essentially makes it possible for a worker's aptitude and skills to be checked, whilst a fixed-term employment contract is used if the end of the employment contract or relationship is determined by objective conditions' (judgment in *Nisttahuz Poclava* (C-117/14, EU:C:2015:60, paragraph 36).

23 — The Court has held that '[c]lause 4(4) lays down the same prohibition [as clause 4(1] as regards period-of-service qualifications relating to particular conditions of employment' (judgments in *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 64, and *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 39; order in *Bertazzi and Others*, C-393/11, EU:C:2013:143, paragraph 29).

24 — Judgments in *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 47) and *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 50); orders in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 32) and *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraph 37). See in particular paragraph 50 of *Gavieiro Gavieiro and Iglesias Torres*: '[i]n so far as the referring court is seeking, in the context of a dispute concerning the entitlement of interim civil servants to a length-of-service increment, an interpretation of the expression 'different length-of-service qualifications', in clause 4(4) of the framework agreement, it should be noted that the Court of Justice has already ruled that a length-of-service payment identical to that at issue in the main proceedings, receipt of which was reserved under national law to the permanent regulated staff in the health service to the exclusion of temporary staff, is covered by the concept of 'employment conditions' referred to in clause 4(1) of the framework agreement.'

39. In this connection, the Court has held that '[t]he framework agreement [on fixed-term work], in particular clause 4 thereof, 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'.[25] According to settled case-law, the principle of non-discrimination requires that comparable situations must not be treated differently unless such treatment is objectively justified.[26] I shall therefore examine, firstly, whether non-permanent staff are in a situation comparable to that of career civil servants, interim civil servants or staff engaged under employment contracts, and, secondly, whether there is a difference in treatment. If that is the case, I shall examine, as part of my response to the third question referred for a preliminary ruling by the national court, whether such a difference in treatment may be justified on 'objective grounds' within the meaning of clause 4(1) of the framework agreement on fixed-term work.

1. The comparability of the situations

40. Clause 4(1) of the framework agreement on fixed-term work prohibits the less favourable treatment of fixed-term workers as compared with comparable permanent workers. Clause 3(2) of that agreement defines a 'comparable permanent worker' as 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'. It specifies that '[w]here there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice'.

41. In my opinion, the definition of a 'comparable' permanent worker poses two problems, which I shall examine in turn: what is 'the same or similar' work and within which framework should the comparable permanent worker be sought if there is no such worker in the same establishment (here: the Consejo de Estado)?

a) The 'same or similar' work within the meaning of clause 3(2) of the framework agreement on fixed-term work

42. The assessment of the 'same or similar' nature of the work carried out by a fixed-term worker who claims to be suffering discrimination and that performed by a 'comparable' permanent worker is, in principle, a matter for the referring court.[27] However, that does not prevent the Court from providing the referring court with criteria designed to guide it in its assessment.[28] The Court has thus stated that, 'in order to assess whether workers are engaged in the same or similar work, it must be determined whether, in the light of a number of factors, such as the nature of the work, training requirements and working conditions, those workers can be regarded as being in a comparable situation'.[29]

43. What exactly do the 'nature of the work, training requirements and working conditions' involve?

25 — Judgment in *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 23).

26 — Judgment in *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 65).

27 — Order in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 39); judgment in *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 67); order in *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraph 44); judgment in *Valenza and Others* (C-302/11 to C-305/11, EU:C:2012:646, paragraph 43); order in *Bertazzi and Others* (C-393/11, EU:C:2013:143, paragraph 33); and judgment in *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 32).

28 — Judgment in *Marrosu and Sardino* (C-53/04, EU:C:2006:517, paragraph 54).

29 — Order in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 37); judgment in *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 66); order in *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraph 43); judgment in *Valenza and Others* (C-302/11 to C-305/11, EU:C:2012:646, paragraph 42); order in *Bertazzi and Others* (C-393/11, EU:C:2013:143, paragraph 32); and judgment in *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 31).

44. In *Montoya Medina*, the Court endorsed the referring court's analysis, which was based on an 'examination of the legal status of university lecturers on permanent contracts and of university lecturers on fixed-term contracts', to find that 'those two statuses presuppose the same academic qualifications — since the possession of a doctorate is required in both cases –, similar professional experience — three years in one case and two years in the other –, and the performance of teaching and research duties'.[30] The Court did not require that the referring court conduct an in-depth examination of the tasks performed by university lecturers on permanent contracts and those on fixed-term contracts (for example, that it determine whether they teach one or several subjects, to what level they teach, whether they supervise dissertations) or of their training (for example, how many years of experience they actually have).[31]

45. By contrast, in *O'Brien*, the Court conducted a more extensive examination of the work carried out by the workers concerned. It stated that it was explained by the parties, at the hearing, that the work of part-time judges and full-time judges is identical and that they carry out their functions in the same courts and at the same hearings.[32] Unlike the approach taken by it in *Montoya Medina*, the Court was not satisfied here with the mere pursuit of the same profession (that of a judge). After pointing out that the criteria laid down in clause 3(2) of the framework agreement on part-time work are based on 'the content of the activity', it satisfied itself, by means of an examination of the courts and the hearings at which that activity is carried out, that that activity has the same 'content'.[33]

46. It was in a judgment concerning the interpretation of Article 157(1) TFEU that the Court first made reference to 'the nature of the work, training requirements and working conditions'.[34] Article 157(1) TFEU lays down the principle of equal pay for male and female workers 'for equal work or work of equal value'. Moreover, in *Montoya Medina*, where the Court states that situations must be compared taking into account those three factors, reference is made to *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*,[35] a judgment concerning the interpretation of Article 157(1) TFEU.[36] It therefore seems to me relevant to examine the case-law relating to that article, all the more so since there are very few judgments concerning the interpretation of the framework agreement on fixed-term work in which the Court examines the 'work' in which the workers concerned are engaged.[37]

47. In *Brunnhofer*, the Court had to rule on the situation of an applicant who was responsible for supervising loans by the 'foreign' department within an Austrian bank and claimed to have suffered discrimination on grounds of sex. She argued that her situation was comparable to that of a male colleague who was employed by the same bank and classified in the same job category under the applicable collective agreement, a category which covered employees with training in banking who carry out skilled banking work on their own. The Court asked the referring court to determine

30 — Order in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 38).

31 — The Court follows a similar approach in *Lorenzo Martínez*, in which it concludes, 'on the basis of the information provided by the referring court' that career civil servants and interim civil servants of the Autonomous Community of Castilla y León are in a comparable situation because they perform 'similar duties' (teaching), duties which do not require 'different academic qualifications or experience'. See order in *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraphs 45 and 46).

32 — Judgment in *O'Brien*, C-393/10, EU:C:2012:110, paragraph 62.

33 — Judgment in *O'Brien*, C-393/10, EU:C:2012:110, paragraph 61.

34 — Judgment in *Royal Copenhagen* (C-400/93, EU:C:1995:155, paragraph 33).

35 — Judgment in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* (C-309/97, EU:C:1999:241).

36 — Order in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 37).

37 — I would point out, for the sake of completeness, that, according to the Court, evidence of the same or similar work is constituted by the fact that the applicant, who had previously been employed for an indefinite duration by the same employer, held the same post under a fixed-term contract (the contract in question was a part-time contract, the applicant wishing to take early retirement): both the nature of the work and the working conditions were identical since the post was the same (judgment in *Nierodzik*, C-38/13, EU:C:2014:152, paragraph 33). The Court has appeared to follow the same approach in the reverse situation, namely that of applicants who had previously been employed on a fixed-term basis by the same employer and claimed to have carried out the same duties under their contracts of indefinite duration (judgment in *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 47, and order in *Bertazzi and Other* s, C-393/11, EU:C:2013:143, paragraph 36). However, those cases concern very specific circumstances in which the same person had carried out the same work under a different type of contract: they are therefore not very helpful.

whether the plaintiff and the male comparator were performing comparable work, even though the male colleague was responsible for dealing with important customers and had authority to enter into binding commitments, whereas the applicant, who supervised loans, had less contact with clients and could not enter into commitments that directly bound her employer.[38] It is clear that the Court does not rule out the possibility that, despite carrying on one and the same profession (that of senior bank employees), the workers concerned may not be engaged in the same work: in my view, the Court therefore assesses that concept strictly, since it takes account of the difference between the tasks performed (supervision of loans and management of the customer portfolio) as well as the authority to enter into binding commitments and the different powers of the workers concerned.

48. Similarly, in *Kenny*, the Court appears to me to have interpreted the concept of the same work strictly. In that case, civil servants at the Irish Ministry of Justice claimed that they were suffering discrimination on the grounds of sex because they received lower pay than their male colleagues — civil servants not at the Ministry of Justice but with the police force — who were assigned to the same tasks, namely clerical duties. The Court asked the referring court to take into account, firstly, the difference in professional qualifications between the Ministry of Justice civil servants and the police officers and, secondly, the fact that some police officers assigned to clerical duties also had to perform other tasks to meet operational needs, such as communicating with Europol and Interpol, and that all police officers could, in exceptional circumstances, be called upon to work in the field in order to meet operational needs.[39] The Court does not therefore rule out the possibility that, despite carrying out identical common tasks (clerical duties), the workers concerned may not be engaged in the same work: it assesses that concept strictly, taking into account the performance of other, different tasks (policing duties). It is true that the solution adopted by the referring court could depend, in *Kenny*, on the breakdown between the clerical duties and policing duties performed by the members of the police force in question.[40]

49. It appears to me that, in the present case, it is the approach followed by the Court in *Montoya Medina* which should be followed, rather than the approach it adopted in *O'Brien*, *Brunnhofer* and *Kenny*: the concept of 'the same or similar' work, within the meaning of clause 3(1) of the framework agreement on fixed-term work, must in my view be interpreted broadly, which does not require an examination of the tasks performed by the workers concerned.

50. Indeed, in accordance with settled case-law regarding the framework agreement on fixed-term work, '[h]aving regard to the objectives pursued by [that] agreement, …, clause 4 [thereof] must be understood as expressing a principle of European Union social law which cannot be interpreted restrictively'.[41] The Court has thus interpreted the concept of 'employment conditions' referred to in clause 4(1) broadly: it has held that the decisive criterion for determining whether a measure constituted an employment condition was, precisely, the criterion of employment, that is to say, the employment relationship between a worker and his employer.[42] It has inferred from this that a length-of-service increment,[43] a pension (where it depends on the employment relationship and does not arise under a statutory social-security scheme),[44] compensation paid on account of the unlawful insertion of a fixed-term clause into an employment contract[45] and the notice period for the

38 — Judgment in *Brunnhofer* (C-381/99, EU:C:2001:358, paragraph 50).

39 — Judgment in *Kenny and Others* (C-427/11, EU:C:2013:122, paragraphs 30 and 33).

40 — The Court points out (and thus states to be a relevant factor) that it is unaware of 'the number of [police] officers … who perform only clerical duties and the number of those who, in addition, have to perform tasks to meet operational needs, such as communicating with the European Police Office (Europol) or Interpol'. See the judgment in *Kenny and Others* (C-427/11, EU:C:2013:122, paragraph 32).

41 — Judgments in *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 38) and *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 49); order in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 31); order in *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraph 36); and judgments in *Carratù* (C-361/12, EU:C:2013:830, paragraph 33) and *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 24).

42 — Judgments in *Carratù* (C-361/12, EU:C:2013:830, paragraph 35) and *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 25).

43 — Judgment in *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 48).

44 — Judgment in *Impact* (C-268/06, EU:C:2008:223, paragraph 134).

45 — Judgment in *Carratù* (C-361/12, EU:C:2013:830, paragraph 36).

termination of fixed-term employment contracts [46] had to be regarded as employment conditions. In *Nierodzik*, it found inter alia that an interpretation of clause 4(1) which excludes from the definition of 'employment conditions', within the meaning of that provision, conditions relating to termination of a fixed-term contract would limit the scope of the protection granted to fixed-term workers against discrimination, in disregard of the objective assigned to that provision.' [47] It appears to me that a similar finding may be made with regard to the concept of 'the same or similar' work, the performance of which defines the 'comparable permanent worker' referred to in clause 4(1) of the framework agreement on fixed-term work: an interpretation of clause 4(1) which excludes from the definition of a 'comparable permanent worker' a permanent worker who does not perform precisely the same tasks would limit the scope of clause 4, in disregard of the objective of that clause. Indeed, such an interpretation would deprive a fixed-term worker who claims to be suffering discrimination of a reference worker, since the tasks performed would not be exactly the same.

51. In my opinion, a broad interpretation of the concept of 'the same or similar' work also has that consequence, namely that it may not be concluded on the basis of the performance of a second activity, which differs from the common activity, that the work is not the same or similar, since that second activity constitutes merely an incidental activity, that is to say, the worker concerned devotes less time to it than to the common activity. Similarly, the merely potential performance of a second activity, which differs from the common activity, cannot, in my view, form the basis for the conclusion that the work is not the same or similar. Such a solution is consistent with *O'Brien*, in which the Court held that 'it cannot be argued that full-time judges and [part-time judges] are not in a comparable situation because they have different careers, as the latter retain the opportunity to practise as barristers. The crucial factor is that they perform essentially the same activity'. [48]

52. The tasks performed must still be taken into account by the referring court. However, account does not have to be taken of them in order to determine whether the fixed-term worker is engaged in the same or similar work to the comparable permanent worker, but rather to verify whether the difference in treatment may be justified on an objective ground. Clause 4(1) of the framework agreement on fixed-term work provides for a two-stage analysis: firstly, consideration of whether the fixed-term worker is treated less favourably than a comparable permanent worker in respect of an employment condition; secondly, determination of whether such a difference in treatment may be justified on an objective ground.

53. I would point out in this regard that, although in the context of the examination of unequal treatment, the Court does refer — as shown above — to the 'nature of the work', [49] in the context of the examination of the justification for the unequal treatment it makes reference to the 'specific nature of the tasks for the performance of which fixed-term contracts have been concluded and [to] the inherent characteristics of those tasks': [50] the use of different terms ('work' and 'tasks') suggests

46 — Judgment in *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 29).

47 — Judgment in *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 27).

48 — Judgment in *O'Brien* (C-393/10, EU:C:2012:110, paragraph 62).

49 — See point 42 of this Opinion.

50 — See judgment in *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 73): '[the] concept [of 'objective grounds'] requires the unequal treatment found to exist to be justified by the existence of 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 that unequal treatment in fact meets a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Those factors may result, in particular, *from the specific nature of the tasks for the performance of which fixed-term 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' (emphasis added). See also judgments in *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 53) and *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 55); the orders in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 41) and *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraph 48); the judgment in *Valenza and Others* (C-302/11 to C-305/11, EU:C:2012:646, paragraph 51); and the order in *Bertazzi and Others* (C-393/11, EU:C:2013:143, paragraph 40).

that examination of the unequal treatment must be limited to the comparison of the 'work', a general term, whereas examination of the justification must take account of the 'tasks' performed, the 'specific' nature of which is emphasised. The 'tasks' do not therefore have to be taken into account when examining the unequal treatment.

54. I would point out that the same factor cannot be taken into account both to establish, firstly, the existence of unequal treatment and then, secondly, to justify it. If the situation of the workers concerned has been deemed to be comparable, this means that they are engaged in the same or similar work within the meaning of clause 3(1) of the framework agreement on fixed-term work. Consequently, the unequal treatment cannot subsequently be justified by the different nature of the work carried out.[51] The unequal treatment could be justified by the different nature of the work carried out only if different content were assigned to the concept of the same or similar work at each of the two stages of the examination required by clause 4: the mere 'nature of the work' to establish the existence of unequal treatment and the 'specific nature of the tasks' to justify it.[52]

55. An alternative solution would be to take account of the work carried out only with a view to establishing the existence of unequal treatment: such treatment could thus be justified only by 'pursuit of a legitimate social-policy objective of a Member State',[53] and not by the different nature of the work. In such a scenario, account could be taken of the specific nature of the tasks to establish the existence of unequal treatment. However, such a scenario is not, in my view, compatible with the objective of the framework agreement on fixed-term work as defined in clause 1(a) thereof, namely to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination. Indeed,

51 — It is true that the Court has also held that '[t]he nature of the duties performed by [the fixed-term worker concerned] … and the … experience which he thereby acquired are not merely one of the factors which could objectively justify different treatment as compared with [the comparable permanent worker]. They are also among the criteria which make it possible to determine whether he is in a situation comparable with that of [that comparable permanent worker]' (judgments in *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 69, and *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraph 44; and order in *Bertazzi and Others*, C-393/11, EU:C:2013:143, paragraph 34).
See, in this regard, Tobler, C., 'The Publication of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the *Mangold* Approach', in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Asser Press, 2013, pp. 443-469: 'recently, the Court confirmed in another context that the same factual elements may be relevant in the analytically different contexts of compatibility and objective justification (Rosado Santana, para. 69), *which is rather confusing*' (p. 464) (emphasis added).
However, I would point out that, in the judgments concerned, that paragraph appears *before* the paragraph relating to the 'specific nature of the tasks', which is cited in point 53 of this Opinion and states that the 'tasks' are to be taken into account to determine whether the unequal treatment is justified. The paragraph relating to the 'specific nature of the tasks' must therefore, in my view, be understood as a clarification of the paragraph concerning the 'nature of the duties'.

52 — Advocate General Cosmas had, moreover, drawn the Court's attention to this point in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, which concerned the interpretation of Article 157(1) TFEU. The nature of the work and the conditions in which it is carried out may be 'used … in two ways', that is to say, both to compare the duties carried out and to justify the difference in treatment, only if they are defined differently for each of those uses. In the Advocate General's view, 'if the training factor is to be used meaningfully in two ways, it cannot imply the same thing in both cases'. In that case, the same activity (psychotherapy) was carried out by doctors and by qualified psychologists (the latter were therefore not doctors). The Advocate General proposed that account be taken of professional training both to determine whether the situations were comparable and, where appropriate, to examine whether the difference in treatment was justified. He therefore suggested that different content be assigned to the criterion of professional training at each of those two stages: in his view, the comparability of the situations could be ruled out only if the professional training were 'fundamentally different', whereas the justification could be accepted where the professional training was merely 'different' (Opinion of Advocate General Cosmas in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, C-309/97, EU:C:1999:8, point 33).
The Court does not take up the distinction proposed by the Advocate General: it takes the view that the situations are not comparable and therefore does not rule on the justification or the criteria for that justification (judgment in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, C-309/97, EU:C:1999:241, paragraph 20). Nor did it offer any greater clarity on this point in *the* judgments in *Royal Copenhagen*, (C-400/93, EU:C:1995:155, paragraph 42), and *JämO*, (C-236/98, EU:C:2000:173, paragraphs 48 and 52).

53 — See point 86 of this Opinion.

as has been shown above, such an objective calls for a broad interpretation of clause 4. Moreover, such broad interpretation appears to be the approach chosen by the Court: when interpreting clause 4 of the framework agreement on fixed-term work, it is in the context of examining the justification that it refers to the specific nature of the tasks.[54]

56. I therefore take the view that it should be explained to the referring court that, in the light of the objectives of the framework agreement on fixed-term work, the concept of 'the same or similar' work within the meaning of clause 3(2) cannot be interpreted strictly. The specific nature of the tasks performed by the workers concerned cannot therefore be taken into account in order to determine whether they are engaged in the same or similar work. However, it may be taken into account to establish whether the unequal treatment is justified on objective grounds within the meaning of clause 4(1). Similarly, the — actual or merely potential — performance of a second activity, which differs from the common activity, cannot form the basis of the conclusion that the work is not the same or similar, since that second activity is merely an incidental activity, that is to say, the worker concerned devotes less time to it than to the common activity.

57. As for professional training, it can — in my view — be of only secondary importance as compared with the nature of the work when the purpose is to establish whether the situations are comparable. Indeed, it appears to me questionable to take the view, as the Court did in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, that a doctor and a psychologist are not in comparable situations solely because their qualifications are different where they are engaged in exactly the same work.[55] This is tantamount to assuming that, since they have different professional training, their work is in reality different, not because the purpose of that work is different (the activities carried out were the same: psychotherapy) but because it is carried out in a different manner. In addition, for the purposes of determining whether work is the same or similar, taking into account not only the purpose of the work but also the manner in which that work is carried out does not appear to me to be consistent with the objective of the framework agreement on fixed-term work, which calls for a broad interpretation of clause 4(1).

58. In the present case, the applicant claims to be suffering discrimination as compared with all the public servants who receive the three-yearly length-of-service increment refused to her, namely career civil servants, interim civil servants and staff engaged under employment contracts.

59. However, the applicant cannot be regarded as being in a comparable situation to all public servants, regardless of their activities: her situation is comparable only to that of public servants who are engaged in 'the same or similar' work within the meaning of clause 3(2) of the framework agreement on fixed-term work.

54 — I would point out that taking account of 'the specific nature of the tasks' not to establish whether the situations are comparable but to determine whether the difference in treatment may be justified could have the consequence of alleviating the burden of proof on the fixed-term worker, which seems to me to be consistent with the objective of the framework agreement on fixed-term work, as defined in clause 1(a) thereof. It is true that the framework agreement on fixed-term work is completely silent on the allocation of the burden of proof, and the related case-law has provided no clarification. However, it seems to me that a fixed-term worker who claims to be suffering discrimination could have difficulties establishing that he performs exactly the same tasks as a permanent worker who benefits from the advantage denied to the fixed-term worker, in particular if those workers work in different establishments. Requiring that the fixed-term worker establish not that he is engaged in the same or similar work but that he performs exactly the same tasks could therefore, in practice, make it difficult for him to claim the protection afforded by clause 4 of the framework agreement.

55 — Judgment in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* (C-309/97, EU:C:1999:241, paragraph 20): '[i]t appears from the information contained in the order for reference that, although psychologists and doctors employed as psychotherapists … perform seemingly identical activities, in treating their patients they draw upon knowledge and skills acquired in very different disciplines, the expertise of psychologists being grounded in the study of psychology, that of doctors in the study of medicine'. See also the Opinion of Advocate General Cosmas in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* (C-309/97, EU:C:1999:8, point 35): '[e]ven though their duties, considered by reference to the purpose thereof, appear to be the same, that is to say, psychotherapy, the persons concerned possess fundamentally different knowledge and experience, and therefore fundamentally different therapeutic skills, and this has a significant influence on the work they perform'.

60. In this regard, the Spanish Government argues that non-permanent staff are not engaged in the same or similar work as other public servants because they are engaged in specific work, namely duties consisting in positions of trust or involving the performance of special advisory functions.

61. That argument cannot be accepted in my view.

62. It is true that, according to Article 12(1) of the LEBEP, non-permanent staff are to perform '*only* duties which are classified as duties consisting in positions of trust or involving the performance of special advisory functions'.[56] It is likewise true that, under Article 9(2) of the same law, non-permanent staff cannot perform 'duties which entail direct or indirect involvement in the exercise of public powers or in the safeguarding of the general interests of the State and the public authorities'. In a judgment of 17 March 2005, the Tribunal Supremo explained that 'non-permanent staff must remain prohibited from performing activities involving professional collaboration which enter into the sphere of the normal functions of the public authorities, be they external functions of providing services and law enforcement to citizens or internal functions of a purely administrative and organisational nature'.[57]

63. However, firstly, I have difficulty seeing how trust could characterise the work of the applicant as opposed to that of other public servants: the line manager's trust is indeed a pre-requisite for the performance of certain duties carried out by other public servants.[58] Secondly, although non-permanent staff cannot, according to the wording used by the Tribunal Supremo cited in the previous point, perform the normal functions of the authorities, career civil servants may, however, perform the duties consisting in positions of trust or involving the performance of special advisory functions which are usually assigned to non-permanent staff. Indeed, Article 26(4) of the 2012 Finance Law, like Article 24(2) of Law 22/2013 on the 2014 Finance Law, makes reference to 'career civil servants who, while on active duty or on secondment to provide special services, hold posts reserved for non-permanent staff'.

64. It is therefore not possible to rule out, solely on the basis of the Spanish legislation, that non-permanent staff are engaged in the same or similar work as some public servants. The referring court must therefore ascertain whether the work actually carried out by the applicant, namely office work, is the same or similar to the work carried out by certain permanent public servants.

65. I would point out, in this connection, that the applicant is the head of the secretariat of a Permanent Member of the Council, the President of the Second Division of the Consejo de Estado.

66. There are other secretaries within the Second Division of the Consejo de Estado.: Since the applicant is the 'head of the secretariat' of the Second Division, several secretaries must work within that division. There are certainly other secretaries in the other divisions of the Consejo de Estado. The referring court will therefore have to determine whether those secretaries, unlike the applicant, are employed under permanent contracts. If that is the case, their work should, in my view, be regarded as being the same or similar to that of the applicant.

67. It is possible that there are differences between the tasks performed by the applicant, as head of the secretariat, and those of mere secretaries, who do not lead a secretariat. For example, the applicant might be in charge of managing the diary of the President of the Second Division and any contact with the other divisions within the Consejo de Estado, tasks which would not be performed by mere

56 — Emphasis added.

57 — Judgment of the Tribunal Supremo of 17 March 2005, chamber for administrative proceedings, seventh division, application No 4245/1999 (ROJ STS 1711/2005).

58 — The applicant states that, as a secretary, she does not perform 'special advisory' duties.

secretaries. Nevertheless, it is my view that such differences between the tasks performed by the head of the secretariat and by mere secretaries should be taken into account not to determine whether they are engaged in the same or similar work, and therefore whether their situations are comparable, but to determine whether the difference in treatment can be justified.

68. It cannot be ruled out, however, that all the secretaries at the Consejo de Estado, whether or not they lead a secretariat, are engaged under fixed-term contracts. If that is the case, it need not, in my opinion, be concluded from that fact that the applicant cannot benefit from clause 4 of the framework agreement on fixed-term work. Indeed, the second sentence of clause 3(2) of that agreement provides that '[w]here there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice'. It is my opinion that the Consejo de Estado may be regarded as the public-sector equivalent of an establishment. Within which framework should a comparable permanent worker be sought if there is no such worker within the Consejo de Estado: secretaries at other Spanish consultative bodies, secretaries in Spanish courts, secretaries working for Spanish public authorities, whether or not they are judicial authorities?

b) The reference framework where there is no comparable permanent worker in the same establishment

69. In *Valenza*, *Bertazzi* and *Nierodzik*, the Court accepted as comparable permanent workers those persons working for the same public regulatory authority (the Italian competition authority and the Italian gas and electricity authority)[59] or the same public hospital.[60] Although the Court gave no reasons for its choices, it seems to me that the same regulatory authority or the same hospital may be regarded as being the equivalent, in the public sector, of the same establishment referred to in the first sentence of clause 3(2) of the framework agreement on fixed-term work.

70. However, in *Montoya Medina* and *Lorenzo Martínez*, as well as in *Rosado Santana*, the Court accepted as comparable permanent workers, in the case of a university lecturer on a fixed-term contract at the University of Alicante, the 'permanent university lecturers of the university-level teaching staff [of the same] autonomous community'.[61] In the case of a non-university level professor who had worked at a public educational centre in the Autonomous Community of Castilla y León, the Court accepted as comparable permanent workers the career civil servants of the 'non-university level teaching staff of [the same] autonomous community'.[62] In the case of an interim civil servant of the Autonomous Community of Andalusia, the Court accepted as comparable permanent workers the career civil servants of the same autonomous community within the same category of public servants.[63] Although, once again, the Court does not explain its choices, it seems to me that those workers cannot be regarded as being part of the same establishment or its public-sector equivalent: if that had been the Court's intention, it would have selected workers at the same university or the same educational centre.

71. However, I observe that the employment conditions of the workers concerned were, in the cases cited in the previous point, governed by the same measure or by a measure originating from the same entity. The employment conditions of the fixed-term and permanent university lecturers of the Autonomous Community of Valencia were governed by the same government decree of that

59 — Judgment in *Valenza and Others* (C-302/11 to C-305/11, EU:C:2012:646, paragraph 43) and order in *Bertazzi and Others* (C-393/11, EU:C:2013:143, paragraph 33).

60 — Judgment in *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 32).

61 — Order in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 39).

62 — Order in *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraph 46).

63 — Judgment in *Rosado Santana* (C-177/10, EU:C:2011:557, paragraphs 67 and 83).

autonomous community.[64] The remuneration of the interim and career civil servants of the Autonomous Community of Castilla y León was governed by the same Spanish law (the LEBEP, the law at issue in this case) and the same annual decree of that autonomous community.[65] The calculation of the length of service of the interim and career civil servants of the Autonomous Community of Andalusia, although seemingly governed by two measures, was regulated by the Spanish legislature.[66] Accordingly, in those cases, the Court could have — in my view — intended to define the reference framework as including workers whose employment conditions were governed by the same measure, or by a measure adopted by the same entity, as those of the fixed-term worker who claimed to be suffering discrimination.

72. Such a definition of the reference framework may be explained by a line of reasoning similar to that adopted by the Court in *Lawrence*.[67] In that judgment, the Court held that Article 157(1) TFEU was applicable only to persons working for the same employer. If the workers concerned are in the employ of different employers, the differences in remuneration cannot be attributed to a single source. Consequently, there is no body which is responsible for the inequality and which could restore equal treatment. However, in the cases cited in point 70 above, the employment conditions could indeed be attributed to the same source, whether it be the government of the autonomous community concerned or the Spanish legislature. Moreover, the Court explains in *Lawrence* that differences in remuneration can be attributed to a single source in three situations: where they 'aris[e] directly *from legislative provisions* or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public'.[68] According to the Court, the legislature may therefore be regarded as being a single source, thus allowing comparison with all the workers in relation to whom it has determined the remuneration arrangements.

73. The second sentence of clause 3(2) of the framework agreement on fixed-term work also supports such a definition of the reference framework. It provides that, where there is no comparable worker in the same establishment, the comparison is to be made in accordance with national law. By accepting as comparable permanent workers those workers whose employment conditions are governed by the same law as the employment conditions of the fixed-term worker concerned, the reference framework is effectively defined in accordance with national law.

74. It therefore seems to me that, if a comparable permanent worker cannot be identified in the same establishment, that worker must be sought amongst the workers whose employment conditions can be attributed to the same source. In the case of the public sector, in which the employment conditions are defined by the public authorities,[69] such a solution means that a broad definition of the reference framework can be used; this is consistent with the objectives of the framework agreement on fixed-term work. I will attach one proviso to the approach followed by the Court in the cases mentioned in point 70 above: it is my view that, in order to comply with the wording of clause 3(2) of

64 — Order in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 13).

65 — Order in *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraphs 10 to 17).

66 — Judgment in *Rosado Santana* (C-177/10, EU:C:2011:557, paragraphs 10 to 12).

67 — Judgment in *Lawrence and Others* (C-320/00, EU:C:2002:498, paragraph 18). See also the judgment in *Allonby* (C-256/01, EU:C:2004:18, paragraph 46).

68 — Judgment in *Lawrence and Others* (C-320/00, EU:C:2002:498, paragraph 17). My emphasis.

69 — I would point out, in this regard, that the definition of the reference framework as including workers whose employment conditions can be attributed to a single source may, if applied to the private sector, result in the definition of a restricted framework. Clause 3(2) of the framework agreement on fixed-term work thus provides that, where there is no comparable permanent worker in the same establishment, the comparison is to be made by reference to the applicable collective agreement: where the applicable collective agreement is a company-wide collective agreement, the reference framework will be limited to the workers of the undertaking concerned. In addition, the definition of the reference framework according to the source of the employment conditions may result in accepting — in respect of the same work (secretary) — a more restricted framework for private-sector workers (in the case of private-sector secretaries on fixed-term contracts, permanent secretaries at the same undertaking since the applicable collective agreement is a company-wide agreement) than for public-sector workers (in the case of public-sector secretaries on fixed-term contracts, permanent secretaries within the public administration as a whole). However, such consequences appear to me to stem from the wording of the second sentence of clause 3(2) of the framework agreement on fixed-term work, which in fact provides for a comparison by reference to the applicable collective agreement or in accordance with national law, collective agreements or practice: it therefore gives the Member States the freedom to define the reference framework.

the framework agreement, it is necessary to establish whether there is a comparable permanent worker within the same establishment, that is to say, in the case of the public sector, within the same authority, the same administration or the same department, before looking for such a worker amongst those whose employment conditions can be attributed to the same source.

75. In the present case, it is therefore first of all within the Consejo de Estado that it is necessary to look for a comparable permanent worker. If there is no such worker at the Consejo de Estado, he must be sought amongst the workers whose employment conditions are governed by the LEBEP (which establishes the remuneration of career civil servants and which states that the rules governing career civil servants are, in principle, applicable to non-permanent staff) and the finance laws (which determine the remuneration of non-permanent staff and exclude the contested three-yearly length-of-service increment from that remuneration): the remuneration conditions of the non-permanent staff and the career civil servants have the same source, the Spanish legislature. It appears to me that, in the absence of a comparable permanent worker at the Consejo de Estado, it is first of all amongst the secretaries of the other Spanish consultative bodies and Spanish courts that such a worker should be sought. Clause 3(2) of the framework agreement on fixed-term work requires that such a worker is found within the same establishment, that is to say, from the narrowest framework possible before the reference framework is widened. Accordingly, looking for the worker within the other Spanish consultative bodies and Spanish courts before widening the search, if necessary, to the civil servants of other administrations seems to me to be consistent with the spirit of clause 3(2).

76. Having indicated with which permanent workers the applicant's situation must be compared, and in accordance with which criteria that is to be done, I shall now focus on examining whether the applicant was treated in a less favourable manner.

2. The difference in treatment

77. The dispute in the main proceedings concerns the grant of the three-yearly length-of-service increment provided for in Article 23 of the LEBEP.

78. Clause 4(1) of the framework agreement on fixed-term work prohibits the discrimination of fixed-term workers in respect of employment conditions. In addition, the Court has held that a length-of-service increment does constitute an 'employment condition' within the meaning of that provision.[70] In *Gavieiro Gavieiro and Iglesias Torres*, the Court had inter alia to rule on the three-yearly length-of-service increment at issue in the main proceedings (although, in that judgment, the applicants were interim civil servants, whereas Ms Regojo Dans is a non-permanent member of staff).[71]

79. Article 23(b) of the LEBEP provides that career civil servants are entitled to a three-yearly length-of-service increment and defines that increment as 'a fixed amount, specific to each professional classification subgroup or, if there are no subgroups, to each professional classification group, for each three-year period of service'. Article 25(1) of the LEBEP provides that interim civil services are to receive the three-yearly length-of-service increment. However, Article 26(4) of the 2012 Finance Law, which concerns the remuneration of non-permanent staff, makes no mention of the three-yearly length-of-service increment: they therefore do not receive it, as — moreover — the referring court explains.

70 — Judgments in *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraphs 47 and 48) and *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 50); orders in *Montoya Medina* (C-273/10, EU:C:2011:167, paragraph 32) and *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraph 37).

71 — Judgment in *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 20).

80. There is therefore a difference in treatment between, on the one hand, non-permanent staff who are, as has been shown above, 'fixed-term' workers within the meaning of clause 3(1) of the framework agreement on fixed-term work and do not receive the contested increment, and, on the other hand, career civil servants, who do receive it and whose permanent worker status is not disputed.

81. By contrast, interim civil servants, who do receive the contested increment, are civil servants providing services on a fixed-term basis. [72] The difference in treatment between non-permanent staff and interim civil servants is therefore not covered by clause 4(1) of the framework agreement on fixed-term work, under which fixed-term workers must not be treated in a less favourable manner than comparable *permanent* workers. [73]

82. Similarly, in relation to staff engaged under employment contracts, a difference in treatment can exist only as compared with permanent staff (Article 8(2)(c) of the LEBEP provides that the contracts of staff engaged under employment law are either of indefinite duration or for a fixed term) and where permanent staff receive the contested increment.

83. Having examined the existence of a difference in treatment, I will now turn to the justification for such a difference.

C – *The third question referred for a preliminary ruling*

84. By its third question, the referring court asks the Court whether the rules governing the appointment of non-permanent staff and the termination of their appointment on a discretionary basis constitute an objective ground capable of justifying a difference in treatment for the purposes of clause 4 of the framework agreement on fixed-term work.

72 — In *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819), the Court found that the framework agreement on fixed-term work was applicable to Spanish interim civil servants (whose employment conditions were governed, as in the present case, by the LEBEP).

73 — I would point out that the situation on which the Court has to rule in the present case differs from that which gave rise to the order in *Rivas Montes* (C-178/12, EU:C:2013:150).
In that order, the Court had to rule on the Spanish provision which, in the case of career civil servants governed by administrative law, stated that, in connection with the calculation of a length-of-service increment, account was to be taken of all previous periods of service, irrespective of the authority in which those periods had been completed. By contrast, the same provision stated, in the case of staff engaged under contracts governed by employment law, that account was to be taken of the periods of service completed within the same authority only. The Court held that it lacked jurisdiction to rule on the compatibility of that Spanish provision with clause 4 of the framework agreement on fixed-term work. It pointed out that the contractual staff were employed either on a fixed-term or permanent basis, and that all members of contractual staff were treated in the same way (with only their periods of service completed within the same authority being taken into account). It inferred from this that the alleged difference in treatment was based not on the fixed-term or permanent nature of the employment relationship but rather on the legal nature of that relationship (its administrative-law or employment-law nature). Such a difference in treatment was therefore not covered by EU law.
In *Rivas Montes*, in which a member of staff engaged under a contract of employment claimed the benefit of clause 4, not all the contractual staff were on fixed-term contracts: some of them were on permanent contracts; however, they were all treated in the same way. By contrast, in the present case, in which a non-permanent member of staff is claiming the benefit of clause 4, all non-permanent staff are employed on a fixed-term basis and all are treated in the same way (none of them is entitled to the contested increment).
In any event, the solution adopted by the Court in *Rivas Montes* appears to me to be questionable. Indeed, in so far as the applicant had been employed on a fixed-term basis and some permanent workers (career civil servants) benefited from the advantage which was refused to the applicant, it would have been preferable, in my opinion, to take the view that this was a case of unequal treatment prohibited by clause 4 of the framework agreement on fixed-term work. By refusing, as the Court did, Ms Rivas Montes the benefit of clause 4, it is effectively requiring that *all* comparable permanent workers (career civil servants and contractual staff on permanent contracts), and not just *certain* comparable permanent workers (career civil servants), benefit from the advantage refused to the fixed-term worker who claims to be suffering discrimination. That is, in my view, a restrictive interpretation of clause 4, whereas the objectives and practical effect of the framework agreement on fixed-term work call for a broad interpretation of that clause. Finally, I would point out that, in *Vino*, upon which the Court relies in *Rivas Montes*, no permanent worker was able to benefit from the advantage claimed by the applicant, since that advantage consisted in the mandatory statement, in the fixed-term employment contract, of the reason why that contract was concluded on a fixed-term basis (with the omission of such a statement triggering its reclassification as a permanent employment contract). There was therefore a difference in treatment between certain fixed-term workers (those working, like the applicant, for the Italian postal service in respect of which an act provided that the contract did not have to state the reason why it was concluded on a fixed-term basis) and other fixed-term workers (those who benefited from the provisions of common law, that is to say, whose contract had to state the reason why it was concluded on a fixed-term basis). See order in *Vino* (C-20/10, EU:C:2010:677, paragraphs 15, 16 and 57).

85. Clause 4(1) of that agreement provides that, in respect of employment conditions, fixed-term workers are not to be treated in a less favourable manner than comparable permanent workers, unless different treatment is justified on objective grounds.

86. In accordance with settled case-law, the concept of 'objective grounds' must be understood as not permitting a difference in treatment 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. The difference in treatment must 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. It must in addition satisfy the principle of proportionality, that is to say, meet a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose. For the purposes of clause 4 of the framework agreement on fixed-term work, 'the specific nature of the tasks for the performance of which fixed-term contracts have been concluded' and the 'pursuit of a legitimate social-policy objective of a Member State' may constitute 'objective grounds'.[74]

87. The rules governing the appointment of non-permanent staff and the termination of their appointment on a discretionary basis cannot constitute an 'objective ground' within the meaning of clause 4 of the framework agreement on fixed-term work. In accordance with settled case-law, if the mere temporary nature of an employment relationship were held to be sufficient to justify a difference in treatment as between fixed-term workers and permanent workers, the objectives of Directive 1999/70 and the framework agreement would be rendered meaningless and it would be tantamount to perpetuating a situation disadvantageous to fixed-term workers.[75]

88. The objective of rewarding the loyalty of staff by means of the contested increment does, however, appear to me, as the Spanish Government submits, to be a social-policy objective capable of justifying the unequal treatment. Nevertheless, the national measure must still be appropriate for achieving such an objective and proportionate. I would point out that the applicant, who has thirty-one and a half years' service with the Spanish public authorities, has never received the contested increment. I therefore doubt that the measure is proportionate.

89. As for the specific nature of the tasks, that is, as I have set out above, an 'objective ground' within the meaning of clause 4 of the framework agreement. It will be for the referring court to determine whether the tasks performed by the applicant are capable of justifying the refusal of the contested increment. However, I would point out that, although the tasks performed by the applicant do differ from those of other secretaries, it is because she exercises authority not enjoyed by the other secretaries, through her organisational and management duties: I have difficulty seeing how the performance of additional tasks would justify the refusal of additional remuneration.

IV – Conclusion

90. In the light of all the foregoing considerations, I propose that the Court should answer the questions referred by the Tribunal Supremo as follows:

(1) Clauses 2(1) and 3(1) of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999, are to be interpreted as meaning that it is for the Member States to define the employment contract or employment relationship. However, the referring court must ensure that that definition does not result in the arbitrary exclusion of the category of non-permanent

74 — Judgment in *Valenza and Others* (C-302/11 to C-305/11, EU:C:2012:646, paragraphs 50 and 51) and order in *Bertazzi and Others* (C-393/11, EU:C:2013:143, paragraphs 39 and 40).

75 — Judgment in *Valenza and Others* (C-302/11 to C-305/11, EU:C:2012:646, paragraph 52) and order in *Bertazzi and Others* (C-393/11, EU:C:2013:143, paragraph 41).

staff from the protection afforded by the framework agreement. Indeed, non-permanent staff must be afforded such protection where the nature of their relationship with the public authorities is not substantially different from the relationship between persons who, under Spanish law, fall within the category of workers and their employers.

(2) Clause 3(1) of the framework agreement is to be interpreted as meaning that the automatic termination of the appointment of a worker on account of the termination of the appointment of his line manager is an objective condition determining the end of the employment relationship, even though the employment relationship may also come to an end simply on the decision of the line manager.

(3) In order to assess whether workers are engaged in the 'same or similar' work within the meaning of clause 3(2) of the framework agreement, it must be determined whether, in the light of a number of factors, such as the nature of the work, training requirements and working conditions, those workers can be regarded as being in a comparable situation. In the light of the objectives of the framework agreement, the concept of 'the same or similar' work cannot be interpreted strictly. The specific nature of the tasks for the performance of which the fixed-term contract was concluded and the inherent characteristics of those tasks cannot therefore be taken into account in order to determine whether the workers are engaged in 'the same or similar' work. Nor can account be taken of the — actual or merely potential — performance of a second activity, which differs from the common activity, since that second activity is merely an activity which is incidental to the common activity.

(4) Clause 3(2) of the framework agreement is to be interpreted as meaning that, where there is no comparable permanent worker in the same public authority or the same department of a public administration, that worker must be sought amongst the permanent workers whose employment conditions were defined by the same entity and who are engaged in the same or similar work.

(5) Clause 4(1) of the framework agreement is to be interpreted as meaning that a length-of-service increment comes within the concept of an 'employment condition' within the meaning of that provision.

(6) Rules governing the appointment of non-permanent staff and the termination of their appointment on a discretionary basis cannot constitute an objective ground justifying a difference in treatment within the meaning of clause 4(1) of the framework agreement. However, the objective of rewarding the loyalty of the staff at a public authority is such an objective ground. Nevertheless, the refusal to grant a length-of-service increment to a member of staff who has completed more than 30 years of service in the public authority cannot be regarded as appropriate for achieving such an objective. As for the specific nature of the tasks for the performance of which the fixed-term contract was concluded and the inherent characteristics of those tasks, they do constitute an 'objective ground' within the meaning of clause 4(1) of the framework agreement. The exercise by the fixed-term worker of authority not enjoyed by the comparable permanent worker cannot, however, justify the less favourable treatment of the fixed-term worker.