Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 30 March 2023 [1]

Case C-715/20

K.L.
v
X sp. z o.o.

(Request for a preliminary ruling
from the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta in Kraków, Poland))

(Reference for a preliminary ruling – Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP – Clause 4 – Principle of non-discrimination – Difference in treatment in the event of dismissal – Termination of a fixed-term employment contract – Lack of reasons in the act of termination)

1. Can a national provision which requires the reasons for dismissal to be stated only in the case of termination of a contract of indefinite duration and not in the case of a fixed-term contract comply with EU law, in particular with the principle of non-discrimination laid down in clause 4 of the framework agreement annexed to Directive 1999/70? Can a finding that that provision does not comply with EU law result in the direct application of the provisions of Directive 1999/70 even in a dispute between private parties?

I. Legal framework

A. European Union law

Directive 1999/70/EC [2]

2. Article 1 of Directive 1999/70 provides that:

'The purpose of the Directive is to put into effect the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto'.

[1] Original language: Italian.

[2] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, pp. 43 to 48); 'Directive 1999/70'.

The framework agreement on fixed-term work [3]

3. Clause 4, entitled 'principle of non-discrimination', provides that:

'1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

…

3. The arrangements for the application of this clause shall be defined by the Member States after consultation with the social partners and/or the social partners, having regard to Community law and national law, collective agreements and practice.

…'.

B. Polish law

4. Article 18^{3a} of the ustawa z dnia 26 czerwca 1974 r. Kodeks pracy (Law of 26 June 1974 establishing the Labour Code) (consolidated text: Dziennik Ustaw of 2020, item 1320, as amended) ('the Labour Code') provides that:

'§ 1. Workers should be treated equally with respect to the establishment and termination of an employment relationship, employment conditions and promotion conditions, as well as access to training in order to improve professional qualifications, in particular regardless of gender, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, and regardless of whether they are employed for a fixed term or for an indefinite term or on a full-time or part-time basis.

§ 2. Equal treatment in employment means that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in § 1 …'.

5. Article 30 of the Labour Code states that:

'§ 1. A contract of employment shall be terminated:

(1) by agreement between the parties;

(2) by a declaration by one of the parties including a notice period (termination of employment contract with notice);

(3) by a declaration by one of the parties not including a notice period (termination of an employment contract without notice);

(4) on expiry of the period for which it was concluded …

2. …

[3] Framework agreement on fixed-term work annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, pp. 45 to 48).

3. A declaration by either party of notice of termination or termination of an employment contract without notice shall be made in writing.

4. A declaration by the employer of notice of termination of an employment contract of indefinite duration or termination of an employment contract without notice shall state the reason justifying the notice of termination or the termination of the contract. …'.

6. Article 44 of the Labour Code provides that:

'A worker may lodge an appeal against the notice of termination of an employment contract with a labour court, as referred to in Section 12'.

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

7. On 1 November 2019, the applicant in the main proceedings ('the worker') and the defendant in the main proceedings ('the employer') entered into a fixed-term, part-time employment contract with an expiry date of 31 July 2022.

8. On 15 July 2020, the employer gave the worker a written declaration of notice of termination of the employment contract entered into between the parties, with a one-month notice period, which expired on 31 August 2020, without, however, stating any reasons.

9. Consequently, the worker brought an action before the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta in Kraków, Poland) ('the referring court') claiming compensation for the damage caused by the allegedly unlawful dismissal (based on Article 50 § 3 of the Labour Code).

10. In the main proceedings, the worker claimed, in the first place, that the employer's declaration of 15 July 2020 contained formal errors which constituted defects giving rise to a right to be awarded compensation, and, in the second place, that the notice of termination infringed the principle of non-discrimination based on the type of employment contract under EU law, as well as the rules of Polish law. [4]

11. The employer, by contrast, argued that, by complying with national legislation, it had not infringed either national law or EU law in any way. [5]

12. The Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta in Kraków), considering the worker's claim for damages, had doubts as to (i) the interpretation of Article 1 of Directive 1999/70 and clauses 1 and 4 of the framework agreement, and (ii) whether private persons could rely directly on the provisions of that directive and framework agreement before a national court.

[4] Article 30 § 4 of the Polish Labour Code provides that an employer is required to give reasons for dismissal only in the case of contracts of indefinite duration.

[5] Given that the provisions of the Labour Code distinguished between workers employed on the basis of an employment contract of indefinite duration and those employed on the basis of a fixed-term employment contract as regards the obligation to state the reasons for termination, the failure to state reasons in the dismissal at issue could not be considered discriminatory.

13. In those circumstances, the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta in Kraków) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 1 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC), and also [clauses 1 and 4] of that framework agreement, to be interpreted as precluding provisions of national law obliging employers to state in writing the reasons for a decision giving notice of termination of an employment contract only in relation to employment contracts of indefinite duration, and consequently subjecting to judicial review the well-foundedness of the reasons for the notice of termination of contracts of indefinite duration, without at the same time imposing such an obligation on employers (that is to say, an obligation to state the reasons justifying the notice of termination) in relation to fixed-term employment contracts (as a result of which only the issue of the compliance of the notice of termination with the provisions on termination of contracts is subject to judicial review)?

(2) May the parties to a dispute before a court of law, in which private parties appear on both sides, rely on [clause 4] of the abovementioned framework agreement and the general EU-law principle of non-discrimination (Article 21 of the Charter of Fundamental Rights of the European Union), and consequently do the rules referred to above have horizontal effect?'

III. Legal analysis

A. The first question

1. Preliminary observations

14. The dispute in the main proceedings concerns a claim for damages brought by a worker against a (private) employer for having terminated an employment contract, in writing and including a notice period, without, however, having communicated at the same time the reasons underlying the notice of termination. The employer considers that it acted correctly, since, under Polish law, an employer is required to provide reasons together with the act of termination only if the contract which it intends to terminate is of indefinite duration.

15. In that context, the referring court asks the Court of Justice whether the difference in treatment between the two different types of contract (fixed-term contracts or contracts of indefinite duration) in terms of the obligation to state reasons at the time of the dismissal and the alleged consequent limitation of judicial protection in relation to the well-foundedness of the reasons constitute a form of discrimination prohibited under clauses 1 and 4 of the framework agreement.

16. In order to answer the question, it is necessary to identify properly the legal situation which gives rise to the difference in treatment under national legislation, by examining all the relevant provisions of national law. It is necessary to do this in order to be able to determine whether the formal differentiation between the two types of contract, with regard to the obligation to state the

reasons for termination, actually amounts to substantive discrimination against fixed-term workers, prohibited by clause 4 of the framework agreement. That analysis will enable us to assess whether an interpretation of national law in conformity with EU law is conceivable.

17. The analysis will be carried out using the following steps: (a) briefly outlining the scope of clause 4 of that framework agreement in order to understand the purpose and extent thereof, in particular as regards the concepts of 'employment conditions', 'comparable permanent workers', and 'less favourable' treatment 'solely because they have a fixed-term contract or relation'; (b) identifying the legal situation which gives rise to the alleged difference in treatment ('less favourable' treatment), distinguishing the substantive aspect of the protection afforded to workers against unjustified dismissal from the formal aspect of the communication of the reasons together with the act of termination; (c) making an overall assessment, on the basis of the information in the case file, of the system of protection put in place by the Polish legal order for fixed-term workers in order to determine whether or not it grants those workers effective protection against unjustified dismissal which is not, in essence, less favourable than that guaranteed to permanent workers; (d) assessing whether there are any 'objective grounds' for the non-application of that provision.

18. It will be for the referring court to determine whether the national rules comply with the principle of non-discrimination, taking into account the guidance that will be provided by the Court of Justice, in the light of all the circumstances of this specific case.

2. Purpose and extent of clause 4 of the framework agreement

19. Clause 4 of the framework agreement lays down a 'principle of non-discrimination' which does not amount to an absolute obligation of equal treatment between permanent workers and fixed-term workers. The socio-economic function of the two types of contract is different;[6] however, EU law seeks to prevent a situation where, on the basis of the duration of the contract alone, the national legislature and, ultimately, an employer may provide for differences in treatment that are not objectively 'justified'.

20. The principle of non-discrimination, and therefore the prohibition of 'less favourable' treatment of fixed-term workers as compared with 'comparable permanent workers', applies with regard to 'employment conditions'.

21. It is apparent from the case file that: (i) the applicant in the main proceedings was a fixed-term worker; (ii) Polish law provides for a difference in treatment in respect of fixed-term workers (as compared to permanent workers) in relation to an employer's obligation to state reasons in the act of termination.

22. With regard to the concept of 'employment conditions' within the meaning of clause 4(1) of the framework agreement, the decisive criterion for determining whether a measure comes within the scope of that concept is, precisely, the criterion of employment, that is to say, the employment relationship between a worker and his or her employer.[7]

[6] The socio-economic function of a fixed-term employment contract is, usually, to deal with temporary situations such as the implementation of a purely temporary company project or the replacement of another worker who is on sick leave or maternity leave.

[7] See judgments of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390, paragraph 41), and of 25 July 2018, *Vernaza Ayovi* (C-96/17, EU:C:2018:603, paragraph 27).

23. In that regard, the Court has held that that concept covers, inter alia, rules for determining the notice period applicable in the event of termination of fixed-term employment contracts and the compensation paid to a worker on account of the termination of his or her contract of employment with his or her employer. [8] It is readily apparent from that case-law that the detailed rules for the termination of the employment relationship come within the concept of 'employment conditions'. An interpretation of clause 4(1) of the framework agreement which excludes from the definition of that concept conditions relating to the termination of a fixed-term employment contract would limit the scope of the protection afforded to fixed-term workers against discrimination, in disregard of the objective assigned to that provision. [9]

24. With regard to the concept of 'comparable permanent workers', in accordance with the settled case-law of the Court, [10] 'the principle of non-discrimination requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified'. [11]

25. The assessment is divided into three stages: (i) verifying whether the situations are comparable; (ii) assessing the disadvantage; and (iii) verifying whether there are objective grounds justifying a difference in treatment.

26. The first involves an assessment of the factual situations, the aim of which is to establish whether those situations are similar, even if they are not identical. [12]

27. Where it considers that the comparability of the factual situations is established, the national court is called upon to establish whether there is a disadvantage to the detriment of the fixed-term worker concerned ('less favourable' treatment). I will examine this aspect further in the following points in order to identify properly the legal situation which gives rise to the difference in treatment.

28. It is only if the outcome of the first two stages is that the situations are comparable and that there is less favourable treatment that the national court is required to establish whether there are objective grounds that could justify the difference in treatment.

8 See judgment of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390, paragraphs 42, 44 and 45).

9 See judgment of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390, paragraph 43 and the case-law cited).

10 See judgments of 17 April 1997, *EARL de Kerlast* (C-15/95, EU:C:1997:196, paragraph 35); of 13 April 2000, *Karlsson and Others* (C-292/97, EU:C:2000:202, paragraph 39); of 6 March 2003, *Niemann* (C-14/01, EU:C:2003:128, paragraph 49); of 30 March 2006, *Spain* v *Council* (C-87/03 and C-100/03, EU:C:2006:207, paragraph 48); of 11 July 2006, *Franz Egenberger* (C-313/04, EU:C:2006:454, paragraph 33); of 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014, paragraph 42); of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390, paragraph 46); and of 5 June 2018, *Montero Mateos* (C-677/16, EU:C:2018:393, paragraph 49).

11 Judgment of 18 October 2012, *Valenza* (C-302/11 to C-305/11, EU:C:2012:646, paragraph 40).

12 According to settled case-law, in order to assess whether the persons concerned are engaged in the same or similar work for the purposes of the framework agreement, it is necessary to determine, in accordance with clause 3(2) and clause 4(1) of that framework agreement, whether, in the light of a number of factors, such as the nature of the work, training requirements and employment conditions, those persons can be regarded as being in a comparable situation; see order of 18 May 2022, *Ministero dell'istruzione (Electronic card)* (C-450/21, not published, EU:C:2022:411, paragraph 41).

3. The legal situation which gives rise to the alleged discrimination: the 'less favourable' treatment

29. Having clarified the limits of the scope of clause 4 of the framework agreement, it is necessary to identify the legal situation which gives rise to the alleged difference in treatment under that clause, which, as we shall see, in connection with the overall protection afforded to fixed-term workers, is the decisive point in assessing whether it is possible to interpret national law in conformity with EU law.

30. It is apparent from the case file that Article 30 § 4 of the Labour Code lays down the obligation to 'state the reason justifying the notice of termination or the termination of the contract' in the case of 'notice of termination of an employment contract of indefinite duration' or 'termination of an employment contract without notice'.

31. The Polish legislature, after having imposed, in Article 30 § 3, the written form for termination of all types of contracts (with or without notice), therefore intended to limit the obligation to give a formal statement of reasons only to cases of termination without notice (of a fixed-term contract or a contract of indefinite duration). It follows that that formal obligation to state the reasons for termination does not apply in the case of the termination of a fixed-term contract with notice.

32. However, it cannot be inferred from this that the Polish legislature intended to put in place a different system of protection against unjustified dismissal for fixed-term workers as compared with permanent workers.

33. Indeed, a distinction must be drawn between the (substantive) aspect of the protection of workers against unjustified dismissal – the requirement that a worker on a fixed-term contract cannot be dismissed for a discriminatory or unlawful reason – and the (formal) aspect – the obligation for an employer to state (or not to state) in the act of termination the reasons on the basis of which it has decided to terminate the contract early.

34. The only provision of EU law that grants workers protection against unlawful (individual) dismissals is contained in Article 30 of the Charter of Fundamental Rights of the European Union ('the Charter').

35. That provision states that 'every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices'.

36. The referring court, in its analysis, raises doubts as to the compatibility of the national rules with Article 30 of the Charter; however, this is due to the fact that, in its view, the national rules 'in principle [exclude] the possibility of a labour court examining whether the dismissal of a worker employed on the basis of [a fixed-term] contract is justified'.[13] I will examine in the following point how it is precisely from that issue – whether or not it is possible for a national court to review the justifiability of the dismissal of a fixed-term worker – which is the subject of opposing positions in Polish case-law, that the issue of whether or not it is possible to interpret the national law in conformity with EU law arises.

37. The mandatory content of the provision refers to protection against the 'unjustified' nature of the dismissal and not to the (formal) aspects of the content of communications by an employer.

[13] Request for a preliminary ruling, paragraph 34.

38. Ensuring that an employer is obliged to inform a worker, in the act of termination, of the reasons formally underlying the dismissal does not amount to ensuring the effective protection of that worker.

39. Having regard to the effectiveness of Directive 1999/70, it is, by contrast, essential that a worker is placed in a position to have a third court actually verify whether the reasons underlying the dismissal are well founded.

40. It is certainly undeniable, as has been indicated by the European Commission, that the prior communication of those reasons enables a worker to exercise his or her rights of defence more quickly: he or she does not have to wait for the judicial phase to know the reasons for the dismissal.

41. However, EU law does not specifically require Member States to oblige an employer expressly to state the reasons for dismissal in the act of termination, as has been noted by the Republic of Poland in its observations. [14]

42. I will, therefore, proceed to the last stage of my analysis regarding the first question referred for a preliminary ruling: does the Polish legal order provide effective protection for fixed-term workers in the event of notice of early termination, even where there is no prior formal communication of the reasons?

4. The system of protection for fixed-term workers put in place by the Polish legal order

43. With regard to this specific aspect of my analysis, I have found different positions between the statements of the referring court and, by contrast, the information provided by the Polish Government in its written observations and at the hearing.

44. Underlying this, there also appears to be some uncertainty in the national case-law and, above all, some inconsistency in the referring court's order.

45. On the one hand, the referring court asserts that the Sąd Najwyższy (Supreme Court, Poland) recognised, in its judgment of 8 May 2019 (II PK 41/18), the possibility for a court to review and assess the reasons for termination of a fixed-term contract, despite having doubts as to the compatibility of Article 30 § 4 of the Labour Code with EU law.

46. Furthermore, in another respect, according to the referring court, the Trybunał Konstytucyjny (Constitutional Court, Poland) has stated that the competent labour court may also examine the termination of a fixed-term employment contract from the point of view of a possible infringement of the socio-economic purpose of the law or the rules of social conduct (Article 8 of the Labour Code) or the existence of a difference in treatment or discrimination in respect of an employee which is prohibited by law in the case provided for in Article 11^3 and Article 18^{3a} of the Labour Code – provisions which are, therefore, not at odds with Article 2 (the principle of the democratic rule of law) and Article 32 (which enshrines the principle of equality before the law and the prohibition of discrimination in political, social or economic life for any reason whatsoever) of the Polish Constitution.

[14] Observations of the Republic of Poland, paragraph 31.

47. On the other hand, the national court asserts, in paragraph 34 of its order, that the national rules at issue exclude, in principle, the possibility of a labour court examining whether the dismissal of a worker employed on the basis of a fixed-term contract is justified.

48. The Polish Government observed, more precisely and in detail, [15] that, in the Polish system of law, the fact that an employer is not obliged to communicate reasons does not entitle it to dismiss a worker unjustifiably. Before a court, indeed, an employer is required to state the reasons for the dismissal if it is requested to do so.

49. For that purpose, it is sufficient for a worker to adduce prima facie evidence which gives rise to a presumption that the termination is discriminatory or abusive in nature because it is contrary to the rules of social conduct or the socio-economic purpose of the law. [16]

50. It will then be for the employer concerned to demonstrate that the reasons which it itself has given at the request of the court are well founded.

51. Again according to the Polish Government, the procedure laid down for work-related disputes also ensures that fixed-term workers have effective protection, essentially similar to that afforded to permanent workers: a labour court is a specialised court; access to justice is free of charge; and the *ex officio* powers of the court concerned are rather broad and, as I understand it, allow for effective protection of the weaker party in the relationship.

52. Even the Commission, [17] while critical of the choice made by the Polish legislature, acknowledges in its observations that it is possible to interpret the national law in conformity with EU law.

53. The referring court, by contrast, as I have mentioned, appears to argue in favour of the incompatibility of the national rules with EU law; however, in my view, it does so on the basis of an unproven automatic connection. In the wording of the first question referred for a preliminary ruling, the failure to state the reasons in the act of termination is linked (by means of the phrase 'and consequently') to a lack of judicial review of the reasons for the termination. That is to say, it would appear that the referring court bases its doubts as to the compatibility of Polish law with EU law, from the point of view of the obligation to state the reasons for the notice of termination, on the very fact that the lack of such an obligation in respect of fixed-term contracts results in a lack of 'subjecting … the well-foundedness of the reasons for the notice of termination' to judicial review.

54. It is clear that if that were the case, that is to say, if the fact that an employer is not obliged to state the reasons in the act of termination were to have the (automatic) consequence of a court having no power to assess the well-foundedness and lawfulness of the dismissal, the national provision would undoubtedly be contrary to EU law.

55. Otherwise, in my view, if the national court were to find the following circumstances, all converging towards effective judicial protection for fixed-term workers which is not substantively less favourable than for permanent workers (which is the purpose of the principle of non-discrimination under clause 4 of the framework agreement), there would be room for an

[15] Minutes of the hearing, p. 2, and written observations, paragraph 23.

[16] Observations of the Republic of Poland, paragraph 25.

[17] Written observations, paragraph 32; even if later, in its reply to the questions, the Commission concludes that the national rules are incompatible with EU law.

interpretation which is compatible: the possibility for a worker to rely before a court on the discriminatory and unlawful nature of the dismissal imposed; proceedings managed by a specialised court with effective *ex officio* powers to require an employer, following a mere allegation by a worker that the dismissal is discriminatory, to prove the lawfulness of the reasons for the notice of termination; and access to a court free of charge, without any particular formalities or obligations.

56. One final observation on a point raised at the hearing: a legislative initiative is allegedly underway to amend the provisions of the Labour Code in order to remove the current distinction, as regards the obligation to state the reasons for termination, between fixed-term contracts and contracts of indefinite duration. While taking into account the initiative of the Polish legislature, I consider that it is irrelevant for the purposes of the analysis carried out, since it may simply demonstrate the Polish legislature's intention to remove any possible interpretative doubt and not necessarily be evidence of the current non-conformity of the provisions in force with EU law.

57. I therefore consider, in the light of the foregoing observations, that the referring court may usefully explore the possibility of an interpretation in conformity with EU law, by applying the criteria set out above.

5. The 'objective grounds' for excluding the application of the principle of non-discrimination

58. As I have mentioned above, if the referring court considers that it cannot give an interpretation in conformity with EU law on the basis of the assessment of the less favourable treatment, it is still necessary to consider the issue of whether it is possible to exclude the application of the principle of non-discrimination on the basis of 'objective grounds'.

59. According to the settled case-law of the Court, the concept of 'objective grounds' requires the observed unequal treatment to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. [18]

60. Reliance on the mere temporary nature of the employment relationship does not in itself create an objective ground. [19] To hold otherwise would render the objectives of Directive 1999/70 and the framework agreement meaningless. The Commission asserts, precisely on the basis of those arguments, that there are no objective grounds. [20] By contrast, the Republic of Poland argues, in its observations as well as at the hearing, that such grounds can be found among the

[18] 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; see orders of 18 May 2022, *Ministero dell'istruzione (Electronic card)* (C-450/21, not published, EU:C:2022:411, paragraph 45), and of 22 March 2018, *Centeno Meléndez* (C-315/17, not published, EU:C:2018:207, paragraph 65).

[19] See order of 22 March 2018, *Centeno Meléndez* (C-315/17, not published, EU:C:2018:207, paragraph 63).

[20] See the Commission's observations, paragraph 24, where it is stated that 'a difference in treatment, as regards working conditions, between fixed-term and permanent workers cannot be justified by a criterion which, in a general and abstract manner, refers to the duration of the work itself. If the mere temporary nature of an employment relationship were to be held to be sufficient to justify such a difference, the objectives of Directive 1999/70 and the framework agreement would be rendered meaningless. Instead of improving the quality of fixed-term work and promoting the equal treatment which both Directive 1999/70 and the framework agreement seek to achieve, the use of such a criterion would be tantamount to perpetuating a situation that is disadvantageous to fixed-term workers' (see order of 9 February 2012 in Case C-556/11, *Lorenzo Martínez*, not published, paragraph 50 and the case-law cited).

reasons of employment policy which may justify a difference in treatment, in particular the need for greater flexibility that the labour market demands. [21] In essence, it appears to refer to a general and abstract criterion which can be linked to the duration of the work itself.

61. In my view, in the light of the case-law cited and the information in the case file, subject to verification by the referring court, the Polish Government's arguments that the fact of laying down – or not laying down – obligations to state reasons for the termination of fixed-term employment contracts and employment contracts of indefinite duration is justified by the different social and economic function of those two types of contract and by the pursuit of a legitimate social policy objective of the Member State concerned, namely full and productive employment, cannot be accepted.

B. The second question

62. By its second question, the referring court seeks to ascertain, in essence, whether clause 4 of the framework agreement may be relied on by the parties to a dispute before a court of law, in which private parties appear on both sides.

63. In the first place, it should be borne in mind that the principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States and requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States. That principle requires, inter alia, national courts, in order to ensure the effectiveness of all provisions of EU law, to interpret, to the greatest extent possible, their national law in conformity with EU law and to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State. [22]

64. More specifically, the Court has repeatedly held that a national court, when hearing a dispute exclusively between individuals, is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by that directive. [23]

65. Nevertheless, the principle that national law must be interpreted in conformity with EU law has certain limits. Thus, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, and it cannot serve as the basis for an interpretation of national law *contra legem*. [24]

66. In the second place, it should be noted that, where the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is unable to interpret national legislation in accordance with the requirements of EU law, the principle of the primacy of EU law requires that national court to give full effect to those provisions, if necessary refusing, including

[21] Observations of the Republic of Poland, paragraph 10.

[22] See judgments of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 53, 54 and 57 and the case-law cited), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraphs 25 and 26).

[23] See judgments of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 38 and the case-law cited), and of 4 June 2015, *Faber* (C-497/13, EU:C:2015:357, paragraph 33).

[24] See, to that effect, judgments of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 39 and the case-law cited), and of 13 December 2018, *Hein* (C-385/17, EU:C:2018:1018, paragraph 51).

of its own motion, to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such a provision by legislative or other constitutional means. [25]

67. That said, account should also be taken of the other essential characteristics of EU law and, in particular, of the nature and legal effects of directives. [26] A directive, the provisions of which are clear, precise and unconditional, has direct effect vis-à-vis the State, that is to say, 'vertical direct effect'. [27] However, a directive cannot of itself impose obligations on a private individual and cannot therefore be relied on as such against that individual before a national court. [28] In accordance with the third paragraph of Article 288 TFEU, the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to which it is addressed'; the European Union has the power to enact, in a general and abstract manner, obligations for individuals with immediate effect only where it is empowered to adopt regulations.

68. Therefore, in accordance with the settled case-law of the Court, even a clear, precise and unconditional provision of a directive does not allow a national court to disapply a provision of its national law which conflicts with it if, were that court to do so, an additional obligation would be imposed on a private individual. [29]

69. Turning to the present case, clause 4(1) of the framework agreement has, according to the case-law of the Court, 'vertical direct effect', [30] but, in the light of the case-law cited in the preceding point, it cannot have 'horizontal direct effect', and therefore a worker cannot derive a right from the framework agreement and from Directive 1999/70 which he or she can rely on against his or her employer before a national court.

70. At this stage, it is necessary to establish whether a right to be relied on as against an employer may be derived directly from the Charter, in respect of which the abovementioned clause 4(1) would be a means of implementation. We thus enter into the delicate area of horizontal direct effect which the Court has, in certain limited situations, recognised for some provisions of the Charter. The provisions of the Charter that could be invoked, in the present case, are Article 21 (non-discrimination), Article 20 (equality before the law), Article 30 (right to protection against unjustified dismissal) and Article 47 (right to an effective remedy and to a fair trial).

[25] See, to that effect, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 58 and the case-law cited).

[26] See, to that effect, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 59).

[27] See judgments of 9 November 1995, *Francovich* (C-479/93, EU:C:1995:372, paragraph 11); of 11 July 2002, *Marks & Spencer* (C-62/00, EU:C:2002:435, paragraph 25); and of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 103).

[28] See judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 48); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 20); of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 108 and 109); of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 42); of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 36); and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 43).

[29] See judgments of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraphs 31, 32 and 33).

[30] See judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 68).

71. The Court has recognised the horizontal direct effect of Article 21.[31] However, in the judgments concerned, the Court referred to discriminatory factors expressly mentioned in that provision, such as age and religion. The issue that needs to be clarified here is whether Article 21 also covers discrimination between fixed-term and permanent workers, that is to say, discrimination based on a socio-economic criterion.

72. The first aspect to point out is that the drafters of the Charter deliberately[32] opted for a non-exhaustive list of grounds of discrimination in Article 21 thereof, as is shown by the use of the term 'such as', which entails acknowledging that grounds of discrimination beyond those expressly mentioned in that provision may fall within its scope.

73. However, acknowledging that the list of grounds of discrimination is not exhaustive does not amount to saying that it is an entirely indefinite list which opens itself up to the most disparate grounds of discrimination. In that regard, the legislative technique used is significant. The drafters of the Charter laid down the prohibition of discrimination based on certain expressly stated grounds, which are not the only grounds because the list is preceded by the expression 'such as' (in French, '*notamment*'; in Italian, '*in particolare*'; in Spanish, '*en particular*'; in German, '*insbesondere*'). However, while that expression indicates that the list of grounds is not exhaustive, it also indicates that the expressly stated grounds are examples of the type of discrimination referred to in clause 21. Other grounds of discrimination will be covered by that provision provided that they are homogeneous with those mentioned therein.

74. By considering the expressly stated grounds, it is easy to see that they all refer to discrimination affecting human dignity. All discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion, belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation is related to the value of human dignity.

75. In that sense, it is possible to consider Article 21 of the Charter as a specification of human dignity which opens the list of values enshrined in Article 2 of the EU Treaty; values which, as the Court has made clear in particular with regard to the 'rule of law'[33] and 'solidarity',[34] are not mere policy guidelines. Rather, they have actual legal effect and are specified in a number of general principles at the level of that primary law and then in more detailed rules.

76. The value of human dignity constitutes the actual *Grundnorm* (basic norm) of post-World War Two European constitutionalism against the horrors of totalitarianism which denied any value of the human person. Human dignity, which is central to the constitutional traditions of the Member States and consistently placed at the foundation of the constitutional identity of the European Union, guides the interpretation of primary law and determines the expansive force of the principles in which it is specified, as is precisely the case with regard to the prohibition of discrimination. At the same time, however, it marks the limits of those principles, giving

[31] See judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257) ('the judgment in *Egenberger*'); of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874); of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43); and of 19 April 2016, *DI* (C-441/14, EU:C:2016:278).

[32] Compare with the exhaustive list of grounds set out in Article 1 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

[33] See judgments of 16 February 2022, *Hungary* v *Parliament and Council* (C-156/21, EU:C:2022:97, paragraphs 136 and 232), and of 16 February 2022, *Poland* v *Parliament and Council* (C-157/21, EU:C:2022:98, paragraphs 145 and 264).

[34] See judgment of 15 July 2021, *Germany* v *Commission* (C-848/19 P, EU:C:2021:598, paragraphs 43, 45 and 49).

constitutional coverage to the horizontal effect of the right referred to in Article 21 [of the Charter], which gives specific expression to the principle of the prohibition of discrimination, where the grounds of discrimination are attributable to a violation of human dignity.

77. Consequently, among the grounds of discrimination covered by Article 21 of the Charter, there can be no room for a ground of a socio-economic nature, such as that concerning the status of a worker or the type of contractual relationship between him or her and his or her employer.

78. That conclusion is supported by three additional considerations. In the first place, again with regard to the legislative technique used in Article 21 of the Charter, it should be pointed out that the exclusion of an exhaustive catalogue of prohibited grounds of discrimination did not result in the adoption of a 'general clause' or what German doctrine refers to as an 'indeterminate legal concept' (*unbestimmter Rechtsbegriff*), such as, for example, 'good faith', 'urgency', and 'public security', which are intrinsically elastic and may be enriched by changeable meanings which adapt to changes in the legal order and in the social conscience itself. On the contrary, the drafters of the Charter listed certain grounds of discrimination, considering each one a specification ('such as') of a certain type of discrimination, namely that which attacks human dignity.

79. Moreover, the Court has repeatedly ruled out its power to expand the list of grounds set out in Article 21 of the Charter. [35]

80. In the second place, it should be noted that the 'Explanations relating to the Charter of Fundamental Rights' state that, 'in so far as [Article 21 of the Charter] corresponds to Article 14 of the [Convention for the Protection of Human Rights and Fundamental Freedoms], it applies in compliance with it'. The European Court of Human Rights (ECtHR), in relying on the 'any other condition' clause, has extended the prohibition of discrimination to cases in which the inequality is based on gender identity, [36] as well as sexual orientation, [37] disability [38] and, lastly, age; [39] all factors which relate to the dignity of the person, which are the only factors which can be assessed by that court.

81. Lastly, it may be useful to recall that the case-law of the Court has interpreted Article 1 of Directive 2000/78 as meaning that that directive does not cover discrimination based on professional category. [40]

82. Ruling out the applicability of Article 21 of the Charter to the present case, we might consider whether it is possible to invoke Article 20 thereof. Indeed, the Court has recognised that the principle of equality, as regards fixed-term workers, is implemented by Directive 1999/70 and in particular by clause 4 of the framework agreement. [41] However, there are no rulings of the Court in which it is envisaged that Article 20 [of the Charter] may have direct horizontal effect. Moreover, in my view, such an interpretation of that article should be ruled out.

[35] See judgments of 11 July 2006, *Chacón Navas* (C-13/05, EU:C:2006:456, paragraph 56); of 17 July 2008, *Coleman* (C-303/06, EU:C:2008:415, paragraph 46); of 7 July 2011, *Agafiței and Others* (C-310/10, EU:C:2011:467); and of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:1989).

[36] ECtHR, *Identoba and Others v. Georgia*, no. 73235/12, § 96, 12 May 2015.

[37] ECtHR, *Fretté v. France*, no. 36515/97, § 32, 26 February 2002.

[38] ECtHR, *Glor v. Switzerland*, no. 13444/04, 30 April 2009, and ECtHR, *Guberina v. Croatia*, no. 23682/13, 22 March 2016.

[39] ECtHR, *Schwizgebel v. Switzerland*, no. 25762/07, 10 June 2010.

[40] See judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 63).

[41] See judgment of 25 July 2018, *Vernaza Ayovi* (C-96/17, EU:C:2018:603, paragraph 20).

83. A provision of the Charter has horizontal direct effect if it is mandatory and unconditional. The Court has, therefore, ruled out horizontal direct effect where a provision [of the Charter], such as Article 27 [thereof], refers to the cases and conditions provided for by Union law and national laws and practices. [42]

84. On closer inspection, even Article 20 [of the Charter], although it lacks an express reference to Union law and national laws, is not unconditional and mandatory. Those attributes, indeed, presuppose that that provision gives rise to a right for an individual with a corresponding precise obligation on the part of another individual. This means that both the content of the right and that of the corresponding obligation can be derived directly from the Charter without there being a need to have recourse to other legislative acts.

85. In the case of Article 21 and Article 31(2), the latter of which concerns the right to paid leave, if the conditions laid down in those two provisions are satisfied, the individual concerned is the holder of a right with precise content which corresponds to an obligation, with equally precise content, on the part of another individual. [43]

86. Article 20 [of the Charter], unlike the provisions for which the Court has recognised horizontal direct effect, has an 'open structure', which precludes directly deriving (i) a subjective right from it and (ii) a corresponding legal obligation from the specific content of that right, irrespective of the interposition of a legislative act.

87. Indeed, if a private individual complains that, although he or she is in a different situation from another individual, the law subjects him or her to the same treatment as that other individual, and therefore claims that there is a difference in treatment, the exact content of that treatment cannot be inferred from the Charter and therefore the corresponding obligation on the part of the other private individual would also remain indeterminate. In such cases, once it has been ascertained that the (national or EU) legislative act is contrary to the principle of equality, there is an ensuing obligation for the (national or European) legislature to adapt its own legislation on the matter according to a discretion which may be more or less broad. [44]

88. Next, in the opposite scenario, in which the individual instead complains of having been treated unequally even though the situations are comparable, it should be noted that the results of the comparison test are not automatic and unequivocal. Indeed, it is difficult to identify, with certainty and automatically, an objective criterion or consistent legal doctrine which determines when the situations will be considered comparable. This has been recognised by Advocate General Sharpston: 'it is … clear that the criteria of relevant resemblances and differences vary with the fundamental moral outlook of a given person or society'. [45] The Advocate General acknowledged frankly that our sense of what constitutes a relevant or irrelevant difference depends on a series of value judgements which are related to cultural and historical circumstances.

89. This fluidity means that it is not always easy to foresee how the comparison test will be applied to a given series of situations. Thus, where the principle of equality is at stake, it is not possible to derive directly from Article 20 of the Charter the actual content of the right of a private individual

[42] See judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraphs 45 and 49).

[43] See judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 79).

[44] See judgment of 16 September 2010, *Chatzi* (C-149/10, EU:C:2010:534, paragraphs 68 and 71).

[45] See Opinion of Advocate General Sharpston in *Bartsch* (C-427/06, EU:C:2008:297, point 44).

relying on that article and the corresponding obligation on the part of another private individual who has established a legal relationship with that private individual, irrespective of the intermediation of a legislative act.

90. The situation envisaged in Article 21 [of the Charter], in which the grounds of differentiation which make discrimination incompatible with human dignity and therefore prohibited by primary law are stated, is very different, with the consequence that the individual discriminated against may assert the right to have the discrimination based on those grounds removed and more favourable treatment extended to him or her.

91. Moreover, if the unjustified difference in treatment to the detriment of a private individual were sufficient for that individual to be able, in the areas in which the Charter applies, to rely on Article 20 thereof against another private individual, Article 21 [of the Charter] would essentially be rendered meaningless. Indeed, Article 21 of the Charter, as we have seen, has a horizontal direct effect which concerns only discrimination based on grounds relating to respect for human dignity, particularly those expressly mentioned, and not all types of discrimination.

92. As regards the right to protection from unjustified dismissal, Article 30 cannot have direct effect either, since its application depends on national laws and practices.[46] Consequently, it is not possible to envisage the application of the combined provisions of Article 30 and clause 4 of the framework agreement.

93. As is well known, and as the Court has clarified with reference to Article 27 of the Charter, which has an almost identical structure to that of Article 30 thereof, it should be recalled that it is settled case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law.[47]

94. Clause 4 of the framework agreement annexed to Directive 1999/70 does not implement Article 30 of the Charter, and no secondary provision of EU law governs the aspects relating to the obligation to state reasons at the time of the act terminating a worker's contract.

95. The obligation to state reasons at the time of the act of termination also in respect of fixed-term contracts cannot be inferred, as a directly applicable rule of law, from the wording of Article 30 [of the Charter]. Therefore, in the words of the Court, which appear to fit perfectly in the present case, I consider that 'the facts of the case may be distinguished from those which gave rise to the judgment in Case C-555/07, *Kücükdeveci*, in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such'.[48]

96. Therefore, Article 30 of the Charter cannot, as such, be relied on in a dispute, such as that in the main proceedings, in order to conclude that the national provision at issue, which may not be in conformity with Directive 1999/70, should not be applied.

97. If it is agreed that Articles 21, 20 and 30 of the Charter do not apply in the present case, Article 47 thereof will also not apply.

[46] Article 30 of the Charter confers on workers the '… right to protection against unjustified dismissal, in accordance with Union law and national laws and practices'.

[47] See judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 42).

[48] See judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 47).

98. The Court has recognised the horizontal direct effect of Article 47. However – and this is worth emphasising – that horizontal direct effect has always been recognised in combination with other rights enforceable against a private individual. In particular, the judgment in *Egenberger* recognised the horizontal direct effect of Article 47, but that article was applied in combination with the general principle of non-discrimination as enshrined in Article 21 of the Charter and set out in Directive 2000/78.[49] The combination, in that case, of Article 47 and another provision of the Charter with horizontal direct effect is required by the same regulatory structure of Article 47: it recognises the right to an effective remedy for everyone 'whose rights and freedoms guaranteed by the law of the Union' are violated.

99. Thus, the application of Article 47 of the Charter presupposes that the private individual concerned is the holder of a right or a freedom, guaranteed by the law of the Union, on which he or she may rely in legal proceedings. Consequently, the Court, when examining whether that provision may be relied on, must verify whether there is a provision of substantive law which, in the specific situation concerned, confers on the party concerned rights on which he or she may rely before a court.[50]

100. This means that not only must the situation at hand fall within the scope of the Charter – otherwise the Charter, as a whole, would not be applicable – but there must also be a *concrete* right or freedom, protected by EU law, which benefits the specific litigant.[51]

101. That issue did not arise in the cases which gave rise to the judgments in *DI*, *Bauer and Willmeroth*, and *Cresco Investigation*,[52] as Articles 21 and 31 of the Charter, specified in the corresponding directives, conferred substantive rights on the applicants at first instance in those cases and Article 47 of the Charter was not invoked. I also note that limitations may be placed on the exercise of the right to an effective remedy before a tribunal, enshrined in Article 47 of the Charter.[53]

102. The condition referred to in the preceding points is not satisfied in the present case, since the worker does not derive a right against the employer from the framework agreement; nor can he derive such a right from Article 20 or Article 21 of the Charter.

[49] See the judgment in *Egenberger*, paragraphs 75 to 77.

[50] See judgment of 1 August 2022, *Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor)* (C-19/21, EU:C:2022:605, paragraph 50).

[51] See Opinion of 7 April 2022, *Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor)* (C-19/21, EU:C:2022:279, point 47 and the case-law cited).

[52] See judgments of 19 April 2016, *DI* (C-441/14, EU:C:2016:278); of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871); and of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43).

[53] See judgment of 6 October 2020, *État luxembourgeois (Right to bring an action against a request for information in tax matters)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 60).

IV. Conclusion

103. On the basis of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta in Kraków, Poland) as follows:

Article 1 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC), as well as clauses 1 and 4 of that framework agreement,

must be interpreted as not precluding provisions of national law obliging employers to state in writing the reasons for a decision giving notice of termination of an employment contract only in relation to employment contracts of indefinite duration, provided that the national court establishes, considering it possible to interpret the national provisions in conformity with EU law, that judicial review of the well-foundedness of the reasons for the notice of termination of fixed-term employment contracts is ensured and that fixed-term workers can rely on effective judicial protection in the light of the criteria set out above.

In a dispute between private parties, clause 4 of the framework agreement on fixed-term work cannot be relied on by the parties to that dispute.