



Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

30 June 2022*

(Reference for a preliminary ruling – Social policy – Directive 1999/70/EC – Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP – Clause 4(1) – Principle of non-discrimination – Failure to take into account the services provided by an interim civil servant who has become a career civil servant for the purpose of consolidating his or her personal grade – Assimilation of those services to those provided by a career civil servant – Concept of ‘objective grounds’ – Taking into account the period of service for the purpose of acquiring the status of career civil servant – Structure of the vertical progression of career civil servants under national legislation)

In Case C-192/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castile and Leon, Spain), made by decision of 9 February 2021, received at the Court on 26 March 2021, in the proceedings

Mr Clemente

v

Comunidad de Castilla y León (Dirección General de la Función Pública),

THE COURT (Seventh Chamber),

composed of J. Passer, President of the Chamber, F. Biltgen (Rapporteur) and M.L. Arastey Sahún, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Clemente, by M. Pérez Rodríguez and F.J. Viejo Carnicero, abogados,
- the Comunidad de Castilla y León (Dirección General de la Función Pública), by D. Vélez Berzosa, acting as letrada,

* Language of the case: Spanish.

- the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, and by E. De Bonis, avvocato dello Stato,
- the European Commission, by D. Recchia and N. Ruiz García, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Clause 4(1) of the framework agreement on fixed-term work, concluded on 18 March 1999 ('the Framework Agreement'), which is 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, p. 43).
- 2 The request has been made in proceedings between the applicant in the main proceedings, to which the referring court attributed the fictitious name of 'Mr Clemente', and the Comunidad de Castilla y León (Dirección General de la Función Pública) (Autonomous Community of Castile and Leon (Directorate-General for the Civil Service), Spain) ('the Community') concerning the latter's refusal to consolidate the personal grade which was assigned to the applicant in the main proceedings as an interim civil servant prior to his appointment as a career civil servant.

Legal context

European Union law

- 3 Under Clause 1(a) of the Framework Agreement, its purpose is, inter alia, to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination.
- 4 According to Clause 2(1) of the Framework Agreement, that agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.
- 5 Clause 3 of the Framework Agreement, entitled 'Definitions', provides:
 1. For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.
 2. For the purpose of this agreement, the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.'

- 6 Clause 4 of the Framework Agreement, entitled ‘Principle of non-discrimination’, provides, in paragraph 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.’

Spanish law

- 7 Article 69(1) of Ley 7/2005 de la Función Pública de Castilla y León (Law 7/2005 on the civil service of the Autonomous Community of Castile and Leon) of 24 May 2005 (BOE No 162 of 8 July 2005, p. 24200) provides:

‘Regardless of the post he or she occupies, a career civil servant shall be entitled to receive, at the very least, the career allowance for the posts corresponding to his or her personal grade.’

- 8 Decreto 17/2018 por el que se regula la consolidación, convalidación y conservación del grado personal (Decree 17/2018 governing the consolidation, recognition and retention of personal grades) of 7 June 2018 (BOCyL No 113 of 13 June 2018) (‘Decree 17/2018’), which, in accordance with Article 2 thereof, applies to career civil servants of the Community, states in Article 3 thereof:

‘1. The consolidation of the personal grade shall be subject to fulfilment of the following conditions:

(a) the appointment to a post on a permanent basis, except for the starting grade of administrative career progression.

(b) the actual occupation of one or more posts of corresponding level.

2. Those two conditions must be fulfilled in the manner described in the following provisions.’

- 9 According to Article 4 of that decree:

‘1. The consolidation of the personal grade requires that he or she has been appointed on a permanent basis to a post at a level equal to or higher than that of the grade to be consolidated.

2. Administrative career progression begins, however, at the starting grade corresponding to the level of the post assigned to the career civil servant after the successful completion of the relevant selection process, irrespective of the manner in which the post is occupied, subject to a voluntary request for the consolidation of a lower grade.’

- 10 Article 5(1) of that decree provides:

‘The consolidation of the personal grade shall be subject to the temporary or permanent occupation of one or more posts of a level equal to or higher than the grade to be consolidated, for an uninterrupted period of two years or for a total period of three years in the event of interruption. Where both circumstances exist, the consolidation occurs on the date most favourable to the civil servant.’

11 Article 6 of the decree is worded as follows:

‘1. The grade to be consolidated may be higher than the personal grade already acquired up to a maximum of two degrees, but shall under no circumstances exceed the level of the post obtained on a permanent basis, nor the range of levels corresponding to the sub-group or group of the professional classification to which that post belongs.

2. The period of employment of a post on a temporary basis, whether by way of secondment or temporary assignment, shall be credited for the purposes of consolidation only if the level of the posts held on a temporary basis is equal to or higher than that of the grade to be consolidated.

3. The acquisition of a new personal grade is subject to the expiry of a minimum period of two years from the date of consolidation of the previous grade.

4. Periods of employment shall be calculated in chronological order and are counted only once for the purposes of consolidation.’

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

12 From 28 May 2001 to 21 January 2008, the applicant in the main proceedings held the post of veterinary coordinator with the Community as an interim civil servant and by virtue of a single appointment. In accordance with the classification of posts in the civil service applicable to the Community, under which all posts are classified by reference to levels on a scale from 1 to 30, the applicant in the main proceedings was assigned a personal grade at level 24 for that post.

13 By order of 7 March 2006, as part of the process of consolidating temporary employment and providing stability of employment for health staff, selection tests were opened for entry into the Community’s Senior Specialist Cadre, specifically in relation to the ‘healthcare’ speciality (veterinary surgeons). That order provided that periods of service as interim civil servants in posts forming part of that cadre are allotted a value of 0.25 points for each complete month of service, up to a maximum of 40 points.

14 The applicant in the main proceedings successfully took part in those tests and was appointed, on 10 November 2015, with effect from 22 January 2008, to a permanent post for which he was assigned a personal grade of level 22.

15 By letter dated 18 March 2019, the applicant in the main proceedings asked the Community to consolidate his personal grade at level 24, on the ground that he had occupied a post corresponding to that grade as an interim civil servant.

16 The Community rejected that request on the grounds that the level of the posts held as an interim or temporary civil servant could not be consolidated and that the permanent post to which the applicant in the main proceedings had been appointed corresponded to a grade lower than the grade requested.

17 The applicant in the main proceedings brought an action before the court of first instance having jurisdiction, which held that he was only entitled to a personal grade of level 22, corresponding to the level of the permanent post to which he had been appointed as a career civil servant.

- 18 Hearing the appeal against that judgment at first instance, the Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castile and Leon, Spain), the referring court, notes that the consolidation of the personal grade at level 24 would entail the promotion of the applicant in the main proceedings to a grade higher than the grade corresponding to the post to which he was appointed on a permanent basis – level 22 - in breach of the conditions for consolidation referred to in Articles 3 and 4 of Decree 17/2018.
- 19 As regards the compatibility with Clause 4(1) of the Framework Agreement of the Community's refusal to consolidate the personal grade of the applicant in the main proceedings at level 24 with the post which he held as an interim civil servant, the referring court, in the first place, seeks clarification of the concept of 'comparable permanent worker' in that provision. In that regard, it submits that the situation of the applicant in the main proceedings, when he was an interim civil servant, was identical to that of a career civil servant occupying the same post in terms of the duties carried out, the qualifications required, the arrangements, the location and other employment conditions, so that, in the light of the consolidation of the personal grade, they are in principle comparable workers. The referring court cites, in that regard, judgment 1592/2018 of 7 November 2018 (ES:TS:2018:3744), by which the Tribunal Supremo (Supreme Court, Spain), taking into account, inter alia, the judgment of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557), held that, in view of the comparability of the situations between interim civil servants and career civil servants, the services provided by interim civil servants could be taken into account for the purposes of consolidating a personal grade.
- 20 However, the referring court notes, first, that the applicant in the main proceedings is not asking for the benefit of the consolidation of the personal grade at level 24 to be retrospectively granted to him, as a career civil servant, on the date of his appointment as an interim civil servant, but that the services previously provided as an interim civil servant should be taken into account for the purposes of consolidating the personal grade at level 24 on the date of his appointment as a career civil servant. Second, the referring court states that a career civil servant who occupies a higher-level post on a temporary basis, in particular in the event of secondment, is entitled to the consolidation not of the grade corresponding to that post but of the grade corresponding to the post to which he or she has been appointed on a permanent basis. In those circumstances, the referring court expresses doubts as to the comparability of the situations in the case in the main proceedings and asks whether the concept of a 'comparable permanent worker' must be interpreted as referring exclusively to the nature of the relationship with the Community, that is to say, depending on whether it concerns a career civil servant or an interim civil servant, or whether account must also be taken of the permanent or temporary nature of the post occupied by the career civil servant.
- 21 In the second place, the referring court puts forward two 'objective grounds', within the meaning of Clause 4(1) of the Framework Agreement, which may justify not taking into account the services provided as an interim civil servant for the purposes of the consolidation of a personal grade following his or her appointment as a career civil servant. First, in so far as those services were taken into consideration during the selection process for the acquisition of the status of career civil servant, taking them into account for the purposes of consolidating the grade would give rise to a double counting resulting in persons in the situation of the applicant in the main proceedings being treated more favourably than career civil servants who had not been interim civil servants.

- 22 Second, for career civil servants, vertical career progression and, therefore, the acquisition of grades to be consolidated are progressive, which is the consequence of the administrative structure itself and is intended to motivate those career civil servants and improve the performance of their duties. By contrast, interim civil servants do not form part of a body and are not classified in any group, since they are appointed to cover vacant posts in different bodies and groups according to need, and do not occupy a permanent post. The consolidation of the grade corresponding to the post occupied as an interim civil servant could generate ‘leaps’ and ‘advances’ in that vertical career progression as a career civil servant, without having to comply with the other legal requirements, which distorts the structure of that progression.
- 23 In that context, the referring court states that, although the Tribunal Supremo (Supreme Court) has, in the past, held that the consolidation of a personal grade was possible only where the post was occupied on a permanent basis, in view of its importance in the structure of the civil service, it applied Clause 4(1) of the Framework Agreement in its judgment cited in paragraph 19 above, regardless of the permanent nature of the post occupied. In addition, the referring court considers that, in paragraphs 47 and 50 of the judgment of 20 June 2019, *Ustariz Aróstegui* (C-72/18, EU:C:2019:516), concerning a remuneration supplement granted to career civil servants and not to interim civil servants, the Court drew a distinction between the difference in treatment based solely on length of service and that based on advancement to higher grades, suggesting that that difference in treatment could be justified by other factors in addition to the mere length of time spent in the post concerned.
- 24 In those circumstances, the Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castile and Leon) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Must the concept of “comparable permanent worker” in Clause 4(1) of the Framework Agreement ... be interpreted as meaning that, for the purposes of consolidating a personal grade, a period of service as an interim civil servant undertaken by a permanent civil servant before he or she obtained permanent status must be accorded the same treatment as service undertaken by another career civil servant?
- (2) Must Clause 4(1) of the Framework Agreement ... be interpreted as meaning that both (i) the fact that the period in question has already been taken into account to enable the individual to become a career civil servant and (ii) the design of the civil service career progression arrangements established in national legislation, are objective grounds that justify why a period of service as an interim civil servant undertaken by a permanent civil servant before he or she obtained permanent status should not be taken into account for the purposes of consolidating the individual’s personal grade?’

Consideration of the questions referred

- 25 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Clause 4(1) of the Framework Agreement precludes national legislation under which, for the purposes of consolidating a personal grade, account is not taken of services which a career civil servant provided as an interim civil servant before he or she acquired the status of career civil servant.

- 26 First of all, it should be recalled that Directive 1999/70 and the Framework Agreement are applicable to all workers performing remunerated services in the context of a fixed-term employment relationship linking them to their employer (order of 22 March 2018, *Centeno Meléndez*, C-315/17, not published, EU:C:2018:207, paragraph 38 and the case-law cited).
- 27 The provisions laid down in the Framework Agreement are intended to apply to fixed-term employment contracts and relationships concluded with the public authorities and other public-sector bodies (order of 22 March 2018, *Centeno Meléndez*, C-315/17, not published, EU:C:2018:207, paragraph 39 and the case-law cited).
- 28 In the present case, it is common ground that, as an interim civil servant with the Community for more than six years, the applicant in the main proceedings was regarded as a ‘fixed-term worker’ within the meaning of the Framework Agreement.
- 29 Next, it should be borne in mind that Clause 4(1) of the Framework Agreement prohibits, with regard to employment conditions, less favourable treatment of fixed-term workers as compared with permanent workers, solely because they are employed for a fixed term, unless different treatment is justified on objective grounds.
- 30 It is important to note in that regard that although, in accordance with Clause 2(1) of the Framework Agreement, that agreement applies to fixed-term workers as defined in Clause 3 of the Framework Agreement, the fact that the applicant in the main proceedings subsequently acquired the status of career civil servant and, therefore, that of a permanent worker, does not prevent him from relying on the principle of non-discrimination set out in Clause 4(1) of the Framework Agreement, in so far as he calls into question a difference in treatment for the purposes of consolidating his grade, as regards the taking into account of the services which he undertook as an interim civil servant before being appointed as a career civil servant (see, to that effect, judgment of 18 October 2012, *Valenza and Others*, C-302/11 to C-305/11, EU:C:2012:646, paragraphs 34 and 35 and the case-law cited).
- 31 Furthermore, it must be stated, as the referring court points out, that the consolidation of a personal grade to which the legislation at issue in the main proceedings relates constitutes an ‘employment condition’ within the meaning of Clause 4(1) of the Framework Agreement, the decisive criterion for determining whether a measure falls within the scope of that concept is, according to the settled case-law of the Court, precisely the criterion of employment, that is to say the employment relationship between a worker and his or her employer (judgment of 20 June 2019, *Ustariz Aróstegui*, C-72/18, EU:C:2019:516, paragraph 25).
- 32 First, it follows from Articles 3 to 5 of Decree 17/2018 that the consolidation of a personal grade is subject to two conditions, namely ‘the appointment to a post on a permanent basis, except for the starting grade of administrative career progression’, and ‘the actual occupation of one or more posts of [a level corresponding]’ to the post previously occupied. Second, in accordance with Article 69(1) of Law 7/2005 on the civil service of the Autonomous Community of Castile and Leon, that consolidation guarantees the career civil servant the right to receive the remuneration corresponding to the consolidated personal grade even in the event of a change of post. It is also a precondition for the career civil servant’s vertical career progression.
- 33 Therefore, in so far as it is apparent from the wording of the questions referred by the referring court that they are based on the premiss that interim civil servants are treated less favourably than career civil servants as regards taking into account the services provided in those respective

capacities for the purposes of consolidating a personal grade, it is necessary to examine, in the first place, whether those two categories of workers are in a comparable situation, within the meaning of Clause 4(1) of the Framework Agreement.

- 34 In order to assess whether workers are engaged in the same or similar work, for the purposes of the Framework Agreement, it must be determined, in accordance with Clauses 3(2) and 4(1) of the that agreement, 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 (judgment of 20 June 2019, *Ustariz Aróstegui*, C-72/18, EU:C:2019:516, paragraph 34 and the case-law cited).
- 35 While it is for the referring court, which alone has jurisdiction to assess the facts, to determine whether career civil servants and interim civil servants are in a comparable situation (see, to that effect, judgment of 20 June 2019, *Ustariz Aróstegui*, C-72/18, EU:C:2019:516, paragraph 35 and the case-law cited), it is apparent from the order for reference itself that, in the present case, the situation of the applicant in the main proceedings, when he was an interim civil servant, was identical to his situation as a career civil servant as regards the duties as veterinary coordinator, the qualifications required, the arrangements, the location and other employment conditions.
- 36 That being so, the referring court states that a career civil servant who occupies a post of a higher level on a temporary basis, that is to say on secondment, consolidates the grade corresponding not to the post occupied on secondment but to the post to which he or she is appointed on a permanent basis. The referring court therefore asks whether the consolidation, by a career civil servant, of his or her higher grade when he or she was an interim civil servant would constitute reverse discrimination against career civil servants.
- 37 In that regard, it is appropriate to point out that it follows from the wording of Clause 4(1) of the Framework Agreement that it is sufficient for the fixed-term workers at issue to be treated in a less favourable manner than permanent workers in a comparable situation in order for those fixed-term workers to claim the benefit of that clause (judgment of 20 June 2019, *Ustariz Aróstegui*, C-72/18, EU:C:2019:516, paragraph 31).
- 38 It appears that the applicant in the main proceedings occupied for several years, as an interim civil servant and by virtue of a single appointment, the post of veterinary coordinator in the Community, for which he was assigned a personal grade of level 24 under the system for classification of posts applicable to the Community. Consequently, the situation of the applicant in the main proceedings must be compared with that of a career civil servant who occupies such a post on a permanent basis.
- 39 It follows, subject to verification by the referring court in the light of all the relevant information, that it must be held that the situation of an interim civil servant, such as that of the applicant in the main proceedings before he acquired the status of career civil servant, is comparable to that of a career civil servant who occupies, on a permanent basis, the same post as that occupied by that interim civil servant.
- 40 In those circumstances, it is necessary to ascertain, in the second place, whether there are ‘objective grounds’, within the meaning of Clause 4(1) of the Framework Agreement, capable of justifying the difference in treatment referred to in paragraph 33 above.

- 41 It follows from the settled case-law of the Court that 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. Those factors may be apparent, in particular, from the specific nature of the tasks for the performance of which the fixed-term contracts were 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 (judgment of 20 June 2019, *Ustariz Aróstegui*, C-72/18, EU:C:2019:516, paragraph 40 and the case-law cited).
- 42 By contrast, that concept must be understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general or abstract national measure, such as a law or collective agreement (see, to that effect, judgment of 8 September 2011, *Rosado Santana*, C-177/10, EU:C:2011:557, paragraph 72 and the case-law cited).
- 43 Reliance on the mere temporary nature of the employment of interim civil servants is therefore not, of itself, capable of constituting an objective ground within the meaning of Clause 4(1) of the Framework Agreement (see, to that effect, judgment of 20 June 2019, *Ustariz Aróstegui*, C-72/18, EU:C:2019:516, paragraph 41 and the case-law cited).
- 44 As regards possible justifications for the difference in treatment found in the case in the main proceedings, the referring court refers, first, to the vertical career progression of career civil servants, which is progressive and which stems from the administrative structure itself.
- 45 In that regard, in so far as vertical career progression and the consolidation of a personal grade are inherent to the status of career civil servants, it should be borne in mind that, in view of the discretion enjoyed by Member States as regards the organisation of their own public administrations, those States can, in principle, without acting in a manner contrary to Directive 1999/70 or the Framework Agreement, lay down conditions for becoming career civil servants together with conditions of employment for those civil servants (judgment of 20 June 2019, *Ustariz Aróstegui*, C-72/18, EU:C:2019:516, paragraph 43).
- 46 Although Directive 1999/70 and the Framework Agreement do not therefore preclude, in principle, the consolidation of the personal grade from being reserved for career civil servants alone, the fact remains that the legislation of a Member State cannot impose a general and abstract condition relating solely to the temporary nature of the work of interim civil servants, without taking account of the specific nature of the tasks performed and the inherent characteristics of those tasks.
- 47 In that regard, it should nevertheless be noted, as is apparent from the order for reference, that the national legislation applicable in the case in the main proceedings provides that the mere fact that a career civil servant occupies, on a temporary basis, a post which corresponds to a grade higher than that corresponding to the post which he or she occupies on a permanent basis does not automatically give him or her the right to consolidate that higher grade.

- 48 In those circumstances, to allow a career civil servant to consolidate the higher grade he or she had when working an interim civil servant could constitute reverse discrimination against career civil servants who were temporarily seconded to a post which corresponds to a higher grade than the grade corresponding to the post to which they were appointed on a permanent basis.
- 49 Therefore, in so far as the national legislation applicable in the case in the main proceedings, while excluding the automatic consolidation of a grade occupied on a temporary basis, allows account to be taken, for the purposes of determining the grade to be consolidated, of the period occupied in a temporary post, which it is for the referring court to ascertain, that legislation must be applied equally to persons who have occupied that temporary post as interim civil servants or as career civil servants appointed on a permanent basis.
- 50 Second, the referring court considers that, in so far as the services provided by the applicant in the main proceedings as an interim civil servant were taken into account during the selection process which enabled him to acquire the status of career civil servant, taking them into account for the purposes of consolidating the personal grade would amount to a double counting of those services, which would result in the applicant in the main proceedings being granted more favourable treatment than other career civil servants.
- 51 However, the establishment of conditions for access to the status of career civil servant and the benefit of the consolidation of the personal grade received by such a civil servant, which, as mentioned in paragraphs 31 and 32 above, constitutes a condition of employment, are two distinct aspects of the regime applicable to career civil servants, so that taking account of the services provided by the person concerned as an interim civil servant for access to the status of career civil servant or for the purposes of consolidating a personal grade cannot be regarded as leading to the double counting of those services for the sole purpose of consolidating a personal grade.
- 52 Therefore, although, in accordance with the case-law cited in paragraph 45 above, it is legitimate to lay down conditions for access to the status of career civil servant, the establishment of such conditions for access cannot justify a difference in treatment in the light of the conditions for that consolidation.
- 53 In the light of the foregoing considerations, the answer to the questions referred is that Clause 4(1) of the Framework Agreement precludes national legislation under which, for the purposes of consolidating a personal grade, account is not taken of services which a career civil servant provided as an interim civil servant before he or she acquired the status of career civil servant.

Costs

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

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

Clause 4(1) the framework agreement on fixed-term work, concluded on 18 March 1999, which is 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,

precludes national legislation under which, for the purposes of consolidating a personal grade, account is not taken of services which a career civil servant provided as an interim civil servant before he or she acquired the status of career civil servant.

[Signatures]