Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 7 September 2017 [1]

Case C-158/16

Margarita Isabel Vega González
v
Consejería de Hacienda y Sector Público del gobierno del Principado de Asturias

(Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 1 de Oviedo (Administrative Court No 1, Oviedo, Spain))

(Directive 1999/70/EC — Framework agreement on fixed term work concluded by ETUC, UNICE and CEEP — Clause 4 — Meaning of 'employment conditions' — Special service leave to take up public office — Principle of non-discrimination)

1. This request for a preliminary ruling concerns the interpretation of the framework agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement') which is set out in the annex to Directive 1999/70/EC. [2] The request has been made in proceedings between Ms Margarita Isabel Vega González and the Consejería de Hacienda y Sector Público del gobierno del Principado de Asturias (Regional Ministry of Finance and the Public Sector of the Government of the Principality of Asturias, Spain). Essentially, the dispute concerns whether Ms Vega González should be allowed 'special service leave' from her employment as a non-established civil servant with a fixed-term employment relationship in order to take up office as an elected member of a legislative assembly. Had she been an established civil servant (in which case, she would have been a permanent worker within the meaning of the Framework Agreement), she would have enjoyed the right to special service leave in such circumstances.

2. The referring court seeks guidance on the application of the principle of non-discrimination and the meaning of the term 'employment conditions' in clause 4 of the Framework Agreement. As requested by the Court, I shall limit myself in this Opinion to examining the interpretation of the concept of 'employment conditions' in that provision.

1 Original language: English.

2 Council Directive of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43, and corrigendum OJ 1999 L 244, p. 64). ETUC, UNICE and CEEP are the abbreviations for the names in French for the European Trade Union Confederation, the Union of Industrial and Employers' Confederations of Europe and the European Centre of Enterprises with Public Participation, respectively.

Legal framework

EU law

Directive 1999/70

3. Article 1 of Directive 1999/70 explains that the purpose of the directive is 'to put into effect the framework agreement on fixed-term contracts concluded … between the general cross-industry organisations (ETUC, UNICE and CEEP)'.

4. The first paragraph of Article 2 states:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive [and must] take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. …'

5. Clause 1 of the Framework Agreement indicates that its purpose is to 'improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination' and to 'establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.

6. Clause 2 ('Scope') states that the Framework 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'.

7. Clause 3(1) defines 'fixed-term worker' as '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'. The term 'comparable permanent worker' is defined in clause 3(2) as 'a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills'.

8. Clause 4 embodies the principle of non-discrimination. It provides as follows:

'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.

…'

National law

9. Article 64(1)(g) of the Ley del Principado de Asturias 3/1985, de 26 de diciembre, de Ordenación de la Función Pública de la Administración del Principado de Asturias (Law of the Principality of Asturias 3/1985 of 26 December 1985 on the organisation of the civil service of the Government of the Principality of Asturias; 'Law No. 3/1985') provides an unconditional right to 'special service leave' for established civil servants who are elected members of the Junta General del Principado de Asturias (regional Parliament of the Principality of Asturias). Special service leave is granted by placing the civil servant in question on a particular 'administrative status'. That status is available only for

established civil servants. [3]

10. The order for reference and the material placed before the Court suggest that the Ley del Estatuto básico del empleado público (the Spanish law on the basic regulations relating to public servants), which is not directly at issue here, contains provisions that are essentially similar to those in the applicable regional legislation. The order for reference makes no finding in that respect.

Facts, procedure and questions referred

11. Ms Vega González claims to have been employed by the Asturian administrative authorities in various different capacities since 26 May 1989. Whilst the national court has made no explicit findings on that point, the order for reference makes it clear that she was appointed as an 'interina' (that is to say, a non-established civil servant) on 15 April 2011 in order to replace an established civil servant on secondment. Ms Vega González belonged to the higher category of administrative staff.

12. On 24 May 2015, Ms Vega González was elected to the regional Parliament of the Principality of Asturias. On 13 June 2015, she requested special service leave or, alternatively, personal leave from her position in order to take up her functions. Her claim in the subsequent proceedings appears to have been framed as requesting the right to return to her position once she ceased to hold elected office if at that point the post that she was occupying (a) had not been abolished and (b) had not been filled by an established civil servant.

13. Her request was refused by a decision of 23 June 2015 of the Dirección general de función pública (Directorate General for the Civil Service). She applied for reconsideration of that initial decision to the Consejería de Hacienda y Sector Público del gobierno del Principado de Asturias (Regional Ministry of Finance and the Public Sector of the Government of the Principality of Asturias), which dismissed her application by a decision of 22 October 2015. She has now brought an action before the referring court seeking review of the latter decision.

14. The referring court explains that an established civil servant would under Spanish national law and under the applicable regional Asturian law — which leave the employer no discretion in this regard — have been entitled to special service leave if elected to the regional Parliament. However, Ms Vega González was employed as a non-established civil servant and the applicable legislation did not provide any such right for persons in that category. For that reason, her request for special service leave was refused.

15. It was in those circumstances that the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the term "employment conditions" in clause 4 of the [Framework Agreement] be interpreted as including a legal situation in which a fixed-term worker who has been elected to political office as a member of Parliament may, in the same way as a permanent member of staff, apply for and be granted a break in the service relationship with the employer so as to be reinstated in the same post once the relevant parliamentary term of office has expired?

3 It would appear from the written observations of the Commission and Ms Vega González that the regional Asturian legislation in question (Article 59(1) of Law No. 3/1985) allows for eight different administrative statuses for established civil servants: (a) active, (b) leave on personal grounds, (c) parental leave, (d) non-active status, (e) special service leave, (f) leave to serve in another public administration, (g) leave to serve in the regional public sector, and (h) suspension. According to Article 59(2) of Law No. 3/1985, public agents who are not established civil servants can be placed only in either status (a) ('active') or status (h) ('suspension').

(2) Must the principle of non-discrimination referred to in clause 4 of the [Framework Agreement] be interpreted as precluding regional legislation such as Article 59(2) of [Law No. 3/1985], which totally and absolutely precludes giving an "interino" [non-established civil servant] special service leave in the event of being elected a member of Parliament, when that right is given to [established civil servants]?'

16. Written observations have been submitted by Ms Vega González, the Spanish Government and the Commission. Although the Spanish Government requested a hearing, the Court considered that it had sufficient information to give a ruling based on the submissions lodged during the written part of the procedure and therefore decided, pursuant to Article 76(2) of the Rules of Procedure, not to hold a hearing.

Assessment

17. By way of introduction, I recall that the main proceedings concern a request for special service leave by a 'temporary' non-established civil servant who for the previous four years had been occupying a post to replace an established civil servant who was away on secondment and who was accordingly entitled to leave. The request was prompted by Ms Vega González's election to the regional Parliament of the Principality of Asturias. In her written observations, Ms Vega González argues that although in theory she could fulfil her duties as a democratically elected representative on a part-time basis, in practice she must devote herself full-time to her new functions if she is to discharge them effectively and play a full role in the work of the regional Parliament of the Principality of Asturias and its various sub-committees. The observations lodged by the Spanish government do not contradict that argument and I regard it as inherently convincing. I therefore accept the referring court's suggestion that, absent any entitlement for a non-established civil servant to obtain special service leave, the only option open to Ms Vega González (or another person in her position) if she wished to take up her functions on a full-time basis was to leave her job with no right to return once her elected mandate was completed.

18. It is not difficult to see how this could discourage such non-established civil servants from standing for election. That in turn could harm the diversity and representativeness of the legislative body in question.

19. By its first question, the referring court essentially asks whether the term 'employment conditions' within the meaning of clause 4(1) of the framework agreement should be interpreted as covering rights to leave such as the rights at issue in the main proceedings, where an established civil servant is entitled to special service leave in order to take office as an elected member of a body such as the regional Parliament of the Principality of Asturias, and an employee in a similar post who has a fixed-term employment relationship is not so entitled. I shall endeavour to explain why — contrary to the position espoused by the Spanish Government — that is indeed the case, based on both a literal and a teleological interpretation of that provision.

20. It is settled case-law — and indeed, the Spanish Government makes no attempt to contest this point — that non-established civil servants in fixed-term employment relationships such as Ms Vega González fall within the scope *ratione personae* of Directive 1999/70 and the Framework Agreement.[4]

21. The national court explains that 'special service leave' (as sought by Ms Vega González) 'has the effect of interrupting the service relationship, the status and the place of employment being reserved, so that when the circumstances giving rise to the special service leave come to an end (which in this case would be at the end of the parliamentary term of office), the civil servant may return to working

4 Judgment of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres*, C-444/09 and C-456/09, EU:C:2010:819, paragraphs 40 to 45 and the case-law cited.

for the Government'. It adds that Article 64(2) of Law No 3/1985 provides that 'civil servants on special service leave shall be entitled to have their status and place of employment reserved and the time spent on such leave shall be included for the purposes of the calculation of three-yearly length-of-service increments and promotion in grade'. It is clear from that description that an established civil servant *retains certain benefits from the underlying employment relationship* whilst he or she is absent on special service leave. Those benefits relate both to the employment itself (a guaranteed job) and to progression on the career path and salary levels.

22. I take as my starting point the natural meaning of the words 'employment conditions'. In my view, that expression should be understood to mean the rights, entitlements and obligations that define a given employment relationship, that is to say, the conditions under which a person takes up employment.[5] That would clearly include matters such as pay, working hours, rights to paid or unpaid leave, and so on.

23. The Court has already clarified the meaning of 'employment conditions' as that term is used in the Framework Agreement in a number of cases. For the most part (though not exclusively) these have dealt with economic aspects of the employment relationship. Thus, the Court has found that the following, amongst others, are covered by the concept of 'employment conditions': compensation that the employer must pay to an employee on account of the termination of his fixed-term employment contract,[6] the notice period for termination of fixed-term employment contracts,[7] compensation that an employer must pay to an employee on account of the unlawful insertion of a fixed-term clause into his employment contract,[8] length-of-service increments or length-of-service allowances,[9] conditions relating to pay and to pensions which depends on the employment relationship, to the exclusion of conditions relating to pensions arising under a statutory social-security scheme,[10] a reduction of working hours by half and the consequent reduction in wages[11] and the right to participate in a teaching evaluation plan and the ensuing financial incentives.[12]

24. Each of these 'conditions' are, in my view, characterised by being a part of the specific package of rights, entitlements and obligations that defined the employment relationship at issue in each of those cases. It is, moreover, clear that the benefits that an established civil servant continues to enjoy whilst on special service leave touch on aspects of the employment relationship that have already been recognised by the Court as forming part of 'employment conditions'.[13]

25. I add that, in the specific circumstances of the case, the public authorities' refusal to grant special service leave placed Ms Vega González in a position where she would have to end her employment relationship so as to take up and fulfil her democratic mandate in the regional Parliament of the Principality of Asturias on a full-time basis. The Court has already recognised that conditions relating to the termination of a fixed-term contract form part of the 'employment conditions' covered by clause 4(1) of the Framework Agreement.[14] That may be said indirectly to strengthen the argument that, in such circumstances, *entitlement* to such leave also falls within that term.

5 See to similar effect my Opinions in *Epitropos tou Elegktikou Sinedriou*, C-363/11, EU:C:2012:584, point 67, and in *Rosado Santana*, C-177/10, EU:C:2011:301, point 55.

6 Judgment of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683.

7 Judgment of 13 March 2014, *Nierodzik*, C-38/13, EU:C:2014:152.

8 Judgment of 12 December 2013, *Carratù*, C-361/12, EU:C:2013:830.

9 Judgments of 13 September 2007, *Del Cerro Alonso*, C-307/05, EU:C:2007:509; of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres*, C-444/09 and C-456/09, EU:C:2010:819; and of 9 July 2015, *Regojo Dans*, C-177/14, EU:C:2015:450.

10 Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223.

11 Order of 9 February 2017, *Rodrigo Sanz*, C-443/16, EU:C:2017:109.

12 Order of the Court of 21 September 2016, *Álvarez Santirso*, C-631/15, EU:C:2016:725.

13 Thus, the three-yearly length-of-service increments have already expressly been classified by the Court as part of 'employment conditions': see judgments of 13 September 2007, *Del Cerro Alonso*, C-307/05, EU:C:2007:509, paragraph 47 and 48; of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres*, C-444/09 and C-456/09, EU:C:2010:819, paragraphs 50 to 58; and order of 18 March 2011, *Montoya Medina*, C-273/10, not published, EU:C:2011:167, paragraphs 32 to 34.

14 Judgment of 13 March 2014, *Nierodzik*, C-38/13, EU:C:2014:152; see point 23 above.

26. The Court has repeatedly stated that 'the decisive criterion for determining whether a measure falls within the scope of "employment conditions" … is, precisely, the criterion of employment, that is to say the employment relationship between a worker and his employer'. [15] In other words, conditions that are a part of the employment relationship are covered.

27. Rights that may involve suspending certain normal elements of the employment relationship, such as rights to personal or parental leave, should in my view also be regarded as covered under this same reading of the Framework Agreement. They, too, form part of the package of rights, entitlements and obligations that define the employment relationship between a worker and his employer. During the period of special service leave, certain rights and obligations are suspended (notably, the right to receive salary and the obligation to perform duties). However, *other rights attaching to the employee continue*.

28. The Spanish Government disagrees. It argues that the situation at issue does not involve 'employment conditions,' since the granting of a suspension of the employment relationship is not a part of the relationship between a worker and his employer. It emphasises that the suspension requested follows from Ms Vega González's deliberate and unilateral decision to participate in the regional elections and to take up office as an elected member of the regional Parliament of the Principality of Asturias on a full-time basis.

29. I find that reasoning hard to follow.

30. Ms Vega González seeks the right to continue the employment relationship on the same terms as — or on terms that are as similar as possible to — the terms to which an established civil servant is entitled. Those terms are clearly part of the rights, entitlements and obligations that define the employment relationship between the worker and employer in question, that is to say, the 'employment conditions'. The essential point is that an established civil servant in circumstances similar to those of Ms Vega González continues to accrue certain benefits flowing from the employment relationship and has the right to re-enter service after finishing his term as an elected member of the legislative assembly in question, whereas a fixed-term worker (here, a non-established civil servant) doing exactly the same job does not.

31. The fact that Ms Vega González's need to apply for special service leave arises from her 'deliberate and unilateral decision' to stand for elected office is entirely irrelevant. The reasoning advanced is akin to claiming that, since a female worker's employer is not (at least normally) involved in her decision to become pregnant, she should therefore not be able to benefit from maternity leave. It will readily be apparent that such an argument (and its corollary here) is fundamentally misconceived.

32. The right to special service leave at issue in the main proceedings is clearly a part of the package of rights, entitlements and obligations that define the employment relationship between the civil servant and his employer. It is therefore part of the 'employment conditions' within the meaning of the Framework Agreement and the directive.

33. Refusing such a right, which is unconditionally available to established civil servants, to their non-established counterparts on the basis that that right is not a part of the fixed-term worker's 'employment conditions' not only does violence to the plain meaning of the text. It also runs directly counter to the purpose of the Framework Agreement and the directive.

15 See, most recently, order of 9 February 2017, *Rodrigo Sanz*, C-443/16, EU:C:2017:109, paragraph 32 and the case-law cited.

34. According to the Court's settled case-law, it is necessary when interpreting a provision of EU law to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part. [16]

35. Pursuant to clause 1(a) of the Framework Agreement, the purpose of that agreement is, inter alia, to 'improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination'. That purpose should be understood in the context of the objective set out in Article 151 TFEU of promoting employment and improved working conditions.

36. The Court has held on numerous occasions that clause 4 of the Framework Agreement aims to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer from using such employment relationships to deny those workers rights which are recognised for permanent workers; and that clause 4 expresses a 'principle of EU social law which cannot be interpreted restrictively'. [17]

37. An interpretation of the term 'employment conditions' in clause 4(1) of the Framework Agreement that excludes rights to leave (such as the right to special service leave at issue in the main proceedings) from the scope of that term would be contrary to the purpose of Directive 1999/70 and the Framework Agreement, since it would allow 'rights which are recognised for permanent workers' to be denied to fixed-term workers. [18] Were rights to leave to be excluded from the scope of application of the principle of non-discrimination, that would unquestionably reduce, rather than improve, the quality of fixed-term work.

38. It follows that refusing such a right to a fixed-term worker contravenes the principle of non-discrimination laid down in clause 4 of the Framework Agreement, if (a) an established civil servant entitled to such special service leave is a 'comparable permanent worker' vis-à-vis the fixed-term worker and (b) the difference in treatment is not justified on objective grounds.

39. So far as those issues are concerned, I shall confine myself to three brief observations.

40. First, I find nothing in the material before the Court to suggest that the work performed by Ms Vega González as a non-established civil servant (with at least four years' continuous service) [19] is radically different from that performed by the established civil servant whom she is replacing. Whilst findings of fact are ultimately a matter for the national court, it seems reasonably likely that Ms Vega González may properly be compared to her established civil servant colleague for these purposes.

41. Second, no material has been placed before the Court that adequately justifies the clear difference in treatment. The Spanish Government claims, in essence, that entitlements to leave are intertwined with the career structure of established civil servants. So far as I can tell, however, such entitlements are objectively likely to be beneficial to established and non-established civil servants alike.

16 See, among many authorities, judgments of 17 November 1983, *Merck* v *Hauptzollamt*, 292/82, EU:C:1983:335, paragraph 12; of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 203; or more recently, judgment of 14 June 2017, *Khorassani*, C-678/15, EU:C:2017:451, paragraph 26.

17 See judgments of 13 September 2007, *Del Cerro Alonso*, C-307/05, EU:C:2007:509, paragraph 38; of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 114; of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 27; and orders of 21 September 2016, *Álvarez Santirso*, C-631/15, EU:C:2016:725, paragraph 33; and of 9 February 2017, *Rodrigo Sanz*, C-443/16, EU:C:2017:109, paragraph 30.

18 See, among several authorities, judgments of 13 September 2007, *Del Cerro Alonso*, C-307/05, EU:C:2007:509, paragraph 37; of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres*, C-444/09 and C-456/09, EU:C:2010:819, paragraph 48; of 13 March 2014, *Nierodzik*, C-38/13, EU:C:2014:152, paragraph 23; and of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 26.

19 It will be recalled that Ms Vega González in fact claims to have been employed by the Asturian administrative authorities in different capacities since 26 May 1989 (see point 11 above). If that is right — a matter which it is for the national court to verify — that would mean that she had almost exactly 26 years' public service behind her when she was elected to the regional Parliament of the Principality of Asturias on 24 May 2015. Since 2011, she had been replacing an established civil servant who was on secondment (see point 11 above).

42. Finally, I recall that Ms Vega González did *not* seek an unconditional guarantee that she would be reinstated at the end of her mandate in the regional Parliament of the Principality of Asturias. Rather, she requested the right to return to her position if, at that point, the post that she had been occupying (a) had not been abolished and (b) had not been filled by an established civil servant. That seems to me, at least prima facie, to be a request that takes proportionate account of any genuine differences that may properly be considered to exist between established and non-established civil servants as regards the right to re-join the public administration after a period of service as an elected democratic representative. The former's right to resume active employment is unconditional; whereas the latter's by definition is not.

Conclusion

43. In the light of the foregoing considerations, I propose that the Court should reply as follows to the referring court's first question:

The term 'employment conditions' within the meaning of clause 4(1) of the Framework Agreement 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 should be interpreted as covering rights to leave such as the rights at issue in the main proceedings, where an established civil servant is entitled to take special service leave in order to take up office as an elected member of a regional parliament, and an employee in a similar position who has a fixed-term employment relationship is not so entitled.