Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

12 May 2022*

(Reference for a preliminary ruling – Social policy – Directive 2008/104/EC – Temporary agency work – Article 5(1) – Principle of equal treatment – Article 3(1)(f) – Concept of 'basic working and employment conditions of temporary agency workers' – Compensation payable in respect of days of paid annual leave not taken and the corresponding holiday bonus pay in the event of the termination of the employment relationship)

In Case C-426/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Judicial da Comarca de Braga, Juízo do Trabalho de Barcelos (Braga District Court, Barcelos Labour Court, Portugal), made by decision of 15 July 2020, received at the Court on 10 September 2020, in the proceedings

GD,

ES

v

Luso Temp – Empresa de Trabalho Temporário SA,

THE COURT (Sixth Chamber),

composed of I. Ziemele, President of the Chamber, T. von Danwitz and A. Kumin (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Portuguese Government, by A. Pimenta, P. Barros da Costa, J. Marques, D. Silva and L. Claudino Oliveira, acting as Agents,

– the European Commission, by D. Recchia and G. Braga da Cruz, acting as Agents,

* Language of the case: Portuguese.

after hearing the Opinion of the Advocate General at the sitting on 9 December 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the first subparagraph of Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9), read in conjunction with Article 3(1)(f) thereof.

2 The request has been made in proceedings between temporary agency workers GD and ES, and Luso Temp – Empresa de Trabalho Temporário SA ('Luso Temp'), a company with which those workers had concluded temporary employment contracts, concerning the amount of compensation payable to them by that company, in respect of days of paid annual leave not taken and the corresponding holiday bonus pay, on account of the termination of their employment relationship.

Legal context

European Union law

Framework agreement on part-time work

3 Clause 4, entitled 'Principle of non-discrimination' of the framework agreement on part-time work, concluded on 6 June 1997, which is set out in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10) ('the framework agreement on part-time work'), states, in paragraph 1 thereof:

'In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.'

Framework agreement on fixed-term work

4 Clause 4, entitled 'Principle of non-discrimination', of the framework agreement on fixed-term work, concluded on 18 March 1999, which is set out in 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) ('the framework agreement on fixed-term work'), provides, in paragraph 1 thereof:

'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.'

Directive 2008/104

5 Recitals 1, 10 to 12 and 15 of Directive 2008/104 read as follows:

‘(1) This Directive respects the fundamental rights and complies with the principles recognised by the Charter of Fundamental Rights of the European Union … In particular, it is designed to ensure full compliance with Article 31 of the Charter [of Fundamental Rights], which provides that every worker has the right to working conditions which respect his or her health, safety and dignity, and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

…

(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.

(11) Temporary agency work meets not only undertakings’ needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

…

(15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.’

6 Article 1 of that directive, entitled ‘Scope’, provides, in paragraph 1 thereof:

‘This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.’

7 According to Article 2 of that directive, entitled ‘Aim’:

‘The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.’

8 Article 3 of Directive 2008/104, entitled 'Definitions', provides in paragraph 1(f) thereof:

'For the purposes of this Directive:

…

(f) "basic working and employment conditions" means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:
  (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
  (ii) pay.'

9 Article 5 of that directive, entitled 'The principle of equal treatment', states:

'1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

…

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

…'

Portuguese law

10 Article 185 of the Código do Trabalho (Labour Code), as approved by Lei n.º 7/2009 (Law No 7/2009) of 12 February 2009 (*Diário da República*, 1st series, No 30, of 12 February 2009) ('the Labour Code'), entitled 'Working conditions of temporary agency workers', provides, in paragraph 6 thereof:

'Temporary agency workers are entitled, in proportion to the duration of their contract, to leave, to holiday bonus pay and to a Christmas bonus, as well as other regular and periodic benefits to which the user undertaking's workers are entitled for equal work or work of equal value'.

11 Under Article 237 of the Labour Code, entitled 'Leave entitlement':

'1. For each calendar year, workers are entitled to a period of paid leave, which accrues on 1 January.

2. As a general rule, leave entitlement reflects service during the previous calendar year, but is not dependent on workers' presence or performance.

…'

12 Article 238 of that code, entitled 'Duration of leave', states in paragraph 1 thereof:

'The period of annual leave must be at least 22 working days.

…'

13 Under Article 239 of that code, entitled 'Duration of leave in special cases':

'1. During the year in which the employment relationship commences, workers are entitled to two working days' leave for each month of the contract's duration, up to a maximum of 20 days, which may be taken after six full months of contract performance.

2. In the event that the calendar year ends before completion of the period referred to in the previous paragraph, leave may be taken until 30 June of the following year.

3. Where the provisions in the previous paragraphs apply, no more than 30 working days' leave may be taken during the same calendar year, without prejudice to the terms of any collective employment agreement.

…'

14 Article 245 of the Labour Code, entitled 'Effect of the termination of an employment contract on leave entitlement', provides:

'1. In the event of the termination of their employment contract, workers are entitled to receive holiday pay and holiday bonus pay:

(a) in respect of any accrued leave which has not been taken;

(b) in proportion to the period of service in the year in which the contract is terminated.

2. In the case referred to in subparagraph (a) of the preceding paragraph, periods of leave must be taken into account for calculating length of service.

3. Where a contract is terminated during the calendar year following the calendar year in which the employment relationship commenced, or where the duration of a contract is less than 12 months, the total amount of annual leave or pay in lieu to which workers are entitled may not exceed the total arrived at by calculating the annual leave due in proportion to the duration of the contract.

…'

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

15 ES and GD concluded, on 9 and 29 October 2017 respectively, temporary employment contracts with Luso Temp, under which they were made available for an assignment at the user undertaking at issue in the main proceedings.

16 That assignment ended on 8 October 2019 in the case of ES and on 28 October in the case of GD.

17 Following the termination of their temporary employment relationship, the applicants in the main proceedings brought an action against Luso Temp before the referring court, the Tribunal Judicial da Comarca de Braga, Juízo do Trabalho de Barcelos (Braga District Court, Barcelos Labour Court, Portugal), seeking recovery of sums allegedly unpaid in respect of days of paid leave and the corresponding holiday bonus pay owed for the period during which they were employed by that company.

18 According to the order for reference, the parties to the main proceedings disagree as to the method of calculation to be used to determine the number of days of paid leave and the amount of the corresponding holiday bonus pay to which the applicants in the main proceedings are entitled.

19 The applicants in the main proceedings submit that that number of days and that amount should be determined in accordance with the general rules on paid leave provided for in Articles 237 to 239 and 245 of the Labour Code. Thus, ES and GD consider that, pursuant to those provisions, they are entitled to a payment equivalent to 65 and 67 days' paid leave respectively, together with the corresponding holiday bonus pay, namely:

– to 2 days' leave for each month worked during the year of entry into service, pursuant to Article 239(1) of that code, which equates to 4 days for the 2 months of work which they carried out during 2017;

– to 22 days per year worked, under Article 237(1) and Article 238(1) of that code, accrued on 1 January 2018 and 1 January 2019, giving a total of 44 days; and

– to the number of days of leave calculated on a pro-rata basis to the time worked during the year in which their employment relationship was terminated, namely 2019, pursuant to Article 245(1)(b) of that code, and thus, to 17 days in the case of ES and to 19 days in the case of GD.

20 Luso Temp contends, by contrast, that the calculation method to be used to determine the number of days of paid leave and the amount of the corresponding holiday bonus pay to which the applicants in the main proceedings are entitled is that provided for in the special rules on paid leave applicable to temporary agency workers, laid down in Article 185(6) of the Labour Code, according to which the entitlement of temporary agency workers to paid leave and to the corresponding holiday bonus pay must be calculated in proportion to the duration of their contract. Accordingly, each of the applicants in the main proceedings is entitled to only 44 days of paid leave corresponding to the two years worked.

21 The referring court states that Article 185 of that code is a specific rule applicable to temporary employment contracts, so it takes precedence over the general rules laid down by that code for most employment contracts. Given that it has been systematically incorporated into that code, it is clear that the intention of the legislature was to set aside the application of the general rules on leave.

22 That court is uncertain as to the compatibility of Article 185(6) of the Labour Code with Article 3(1)(f) and Article 5(1) of Directive 2008/104.

23 According to that court, Article 185(6) of that code introduces a difference in treatment between, on the one hand, temporary agency workers assigned to a user undertaking for a period greater than or equal to 12 months or for a period beginning during one calendar year and not ending until two calendar years or more after that date, and, on the other, workers who have been recruited directly by that user undertaking since the entitlement of temporary agency workers to paid leave and to the corresponding holiday bonus pay is always calculated in proportion to the duration of their contract while workers directly recruited by that user undertaking and occupying the same job there could, under the same circumstances, benefit from the more favourable general rules provided for in Articles 237 to 239 and 245(1) of that code.

24 In the present case, the consequence of that is that the applicants in the main proceedings are entitled to fewer days of paid leave and a lesser amount of the corresponding holiday bonus pay than they would be entitled to had they been recruited directly by the user undertaking at issue in the main proceedings for the same period of time and for the same job.

25 The referring court notes that there is no such difference in treatment, however, where the duration of the temporary employment relationship is less than 12 months or where it begins during one calendar year and ends during the following calendar year. In such situations, the number of days of paid leave and the amount of the corresponding holiday bonus pay for workers falling within the scope of the general rules is also calculated in proportion to the duration of their employment contract, pursuant to Article 245(3) of the Labour Code, so that, in practice, there are no differences in treatment in such cases.

26 In those circumstances, the Tribunal Judicial da Comarca de Braga, Juízo do Trabalho de Barcelos (Braga District Court, Barcelos Labour Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do Article 3(1)(f) and Article 5(1) of Directive [2008/104] preclude a provision of law such as that in Article 185(6) of the [Labour Code], under which temporary agency workers are, in all cases, entitled to paid [leave] and the corresponding holiday bonus pay only [in proportion] to the period of service in the user undertaking, even where their employment relationship commences in one calendar year and ends [two calendar years or more] later, whereas a worker recruited

directly by the user undertaking who occupies the same job for the same period of time will be subject to the general [rules on leave] meaning that he or she will be entitled to a longer period of paid [leave] and more holiday bonus pay since these are not [in proportion] to the period of service?'

Consideration of the question referred

27 By its question, the referring court asks, in essence, whether the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof, must be interpreted as precluding national legislation under which the compensation to which temporary agency workers are entitled, in the event of the termination of their employment relationship with a user undertaking, in respect of days of paid annual leave not taken and the corresponding holiday bonus pay, is lower than the compensation to which those workers would be entitled, in the same situation and on the same basis, if they had been recruited directly by that user undertaking to occupy the same job for the same period of time.

The concept of 'basic working and employment conditions', within the meaning of the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof

28 In the first place, it is necessary to examine whether compensation which is payable in the event of the termination of a temporary employment relationship, in respect of days of paid annual leave not taken and the corresponding holiday bonus pay, is covered by the concept of 'basic working and employment conditions', within the meaning of the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof.

29 According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 28 October 2021, *Magistrat der Stadt Wien (Grand Hamster – II)*, C-357/20, EU:C:2021:881, paragraph 20 and the case-law cited).

30 First, although the first subparagraph of Article 5(1) of Directive 2008/104 does not indicate whether the concept of 'basic working and employment conditions' referred to therein must be interpreted as including such compensation or not, that concept refers, in accordance with the definition given in Article 3(1)(f) of Directive 2008/104, to both leave and pay.

31 Since that definition expressly refers to leave and since it is clear from recital 1 of Directive 2008/104 that that directive is designed to ensure full compliance with Article 31 of the Charter of Fundamental Rights, which provides, inter alia, that every worker is entitled to an annual period of paid leave, the right to paid annual leave forms part of the 'basic working and employment conditions' within the meaning of the first subparagraph of Article 5(1) of that Directive, read in conjunction with Article 3(1)(f) thereof.

32 Secondly, as regards the context of which that provision forms part, it must be borne in mind that Directive 2008/104 was adopted to supplement the regulatory framework established by Directive 97/81/EC, as amended by Directive 98/23 and by Directive 1999/70, on the basis of Article 137(1) and (2) EC, which empowered the EU institutions to adopt, by means of directives, minimum

requirements for gradual implementation relating, inter alia, to working conditions (judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)*, C-681/18, EU:C:2020:823, paragraph 39).

33 The Court has held, as regards the framework agreement on fixed-term work, that the expression ‘employment conditions’ should be understood to mean the rights, entitlements and obligations that define a given employment relationship, including both the conditions under which a person takes up employment and those concerning the termination of that relationship (judgment of 20 December 2017, *Vega González*, C-158/16, EU:C:2017:1014, paragraph 34).

34 The Court has also held that the concept of ‘employment conditions’, within the meaning of clause 4(1) of that framework agreement, includes the compensation that the employer must pay to an employee on account of the termination of his or her fixed-term employment contract (judgment of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 32).

35 Moreover, it is clear from the Court’s case-law relating to the framework agreement on part-time work that, with regard to a worker who has not been able, for reasons beyond his or her control, to exercise his or her right to paid annual leave before termination of the employment relationship, the compensation in lieu to which he or she is entitled must be calculated so that the worker is put in a position comparable to that which he or she would have been in had he or she exercised that right during his or her employment relationship (judgment of 11 November 2015, *Greenfield*, C-219/14, EU:C:2015:745, paragraph 51 and the case-law cited).

36 Furthermore, as the Advocate General has, in essence, stated in points 59 and 60 of his Opinion, the first subparagraph of Article 5(1) of Directive 2008/104 is intended to provide effective protection for atypical and precarious workers in an even more targeted manner than clause 4(1) of the framework agreement on part-time work and clause 4(1) of the framework agreement on fixed-term work, so a solution similar to that adopted in the case-law cited in paragraphs 33 to 35 above concerning the interpretation of the concept of ‘employment conditions’ within the meaning of those clauses is necessary, a fortiori, in order to determine the scope of the concept of ‘basic working and employment conditions’, within the meaning of that Article 5.

37 Under Article 5, which establishes the principle of equal treatment, ‘the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job’, whereas, in accordance with clause 4 of each of the abovementioned framework agreements, both of which lay down the principle of non-discrimination, fixed-term and part-time workers ‘shall not be treated in a less favourable manner’ than, respectively, comparable permanent workers and comparable full-time workers.

38 Lastly, the Court has held that, on termination of the employment relationship and when therefore it is no longer possible to take paid annual leave, Article 7(2) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) provides that the worker is entitled to compensation in lieu in order to prevent this impossibility leading to a situation in which the worker loses all enjoyment of that right, even in pecuniary form (judgment of 20 July 2016, *Maschek*, C-341/15, EU:C:2016:576, paragraph 26 and the case-law cited).

39 Therefore, the context of the first subparagraph of Article 5(1) of Directive 2008/104 supports the interpretation that the concept of 'basic working and employment conditions' referred to in that provision must be interpreted as including compensation payable by the employer on account of the termination of a temporary employment relationship in respect of days of paid annual leave not taken and the corresponding holiday bonus pay.

40 As regards, thirdly, the objectives pursued by Directive 2008/104, that directive, as indicated in paragraph 31 above, is designed to ensure full compliance with Article 31 of the Charter of Fundamental Rights, paragraph 1 of which establishes in general terms the right of every worker to working conditions that respect his or her health, safety and dignity. The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) indicate, in that regard, that the expression 'working conditions' must be understood in accordance with Article 156 TFEU. However, that provision merely refers, without any further definition, to 'working conditions' as being one of the areas of the European Union's social policy in which the European Commission may intervene to encourage cooperation between Member States and facilitate the coordination of their action. In the light of the objective of that directive to protect the rights of temporary agency workers, that lack of precision supports a broad interpretation of the concept of 'working conditions' (judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)*, C-681/18, EU:C:2020:823, paragraph 54).

41 Furthermore, it is clear from recitals 10 and 12 of Directive 2008/104 that, given that there are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union, that directive is intended to establish a protective framework for those workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations. Accordingly, under Article 2 of that directive, the purpose of that directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to those workers and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of that type of work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working (judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)*, C-681/18, EU:C:2020:823, paragraph 40).

42 Furthermore, it must be pointed out that recital 11 of Directive 2008/104 states that that directive is intended to meet not only undertakings' needs for flexibility, but also employees' need to reconcile their working and private lives and thus contributes to job creation and to participation and integration in the labour market. That directive is therefore designed to reconcile the objective of flexibility sought by undertakings and the objective of security corresponding to the protection of workers (judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)*, C-681/18, EU:C:2020:823, paragraph 50).

43 That twofold objective thus gives expression to the intention of the EU legislature to bring the conditions of temporary agency work closer to 'normal' employment relationships, especially since, in recital 15 of Directive 2008/104, the EU legislature has expressly stated that employment contracts for an indefinite term are the general form of employment. That directive therefore also aims to stimulate temporary agency workers' access to permanent employment at the user undertaking. The principle of equal treatment, as laid down in Article 5(1) of that directive, contributes to that twofold objective (judgment of 14 October 2020, *KG (Successive assignments in the context of temporary agency work)*, C-681/18, EU:C:2020:823, paragraphs 51 and 52).

44 As the Advocate General noted in point 39 of his Opinion, the balance between the promotion of employment and security on the labour market can only be achieved if that principle of equal treatment is fully respected.

45 Consequently, an interpretation of the concept of 'basic working and employment conditions' which excludes the compensation that an employer must pay to a temporary agency worker on account of the termination of his or her employment relationship from the scope of the first subparagraph of Article 5(1) of Directive 2008/104 is contrary to the objectives pursued by that directive which are set out in paragraphs 40 to 44 above.

46 First, such an interpretation would limit the scope of the protection granted to temporary agency workers as regards equal treatment in disregard of one of the objectives assigned to that provision (see, by analogy, judgment of 14 September 2016, *de Diego Porras*, C-596/14, EU:C:2016:683, paragraph 30).

47 Secondly, that interpretation would have the consequence that the principle of equal treatment would cease to apply upon termination of the temporary agency worker's contract, with the result that it would favour the termination of temporary contracts over the implementation of the objective pursued by Directive 2008/104, as recalled in paragraph 43 above, of stimulating temporary agency workers' access to permanent employment.

48 In the light of the foregoing, the concept of 'basic working and employment conditions' within the meaning of the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof, must be interpreted as including the compensation that an employer must pay to a worker on account of the termination of his or her temporary employment relationship in respect of days of paid annual leave not taken and the corresponding holiday bonus pay.

The scope of the principle of equal treatment referred to in the first subparagraph of Article 5(1) of Directive 2008/104

49 In the second place, as regards the scope of the principle of equal treatment, in accordance with the first subparagraph of Article 5(1) of Directive 2008/104, the basic working and employment conditions of temporary agency workers must be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

50 It is therefore for the referring court to determine, first, the basic working and employment conditions which would apply to the temporary worker if he or she had been recruited directly by the user undertaking to occupy the same job as that which he or she actually occupies there for the same period of time and, more specifically, in the present case, the compensation to which he or she would be entitled, on account of the termination of his or her temporary employment relationship, in respect of days of paid annual leave not taken and the corresponding holiday bonus pay. That court must, secondly, compare those basic working and employment conditions with those which are actually applicable to that temporary agency worker during the period of his or her assignment at that user undertaking, as the Advocate General stated, in essence, in point 60 of his Opinion, in order to ascertain, on the basis of all the relevant circumstances at issue in the main proceedings, whether or not the principle of equal treatment has been complied with in the case of that temporary agency worker.

51 In the present case, the referring court states, inter alia, that temporary agency workers who enter the service of a user undertaking in one calendar year and do not cease their activity until two calendar years or more after that entry into service are in a less favourable situation, for the duration of their assignment at that user undertaking, than they would have been if they had been recruited directly by the user undertaking to occupy the same job for the same period of time.

52 According to the referring court, temporary agency workers are entitled, in accordance with Article 185(6) of the Labour Code, only to leave and to holiday bonus pay calculated in proportion to their period of service while workers recruited directly by a user undertaking are entitled to paid leave under the general rules laid down in Articles 237 to 239 and 245 of that code. That means that, in the present case, each of the applicants in the main proceedings is entitled to 44 days' paid leave whereas, if they had been recruited directly by the user undertaking at issue in the main proceedings to occupy exactly the same job for the same period of time, GD would be entitled to 67 days' paid leave and ES would be entitled to 65 days' paid leave.

53 The Portuguese Government disputes that interpretation of national law, arguing, in essence, that, since Article 185 of the Labour Code does not define specific methods or rules for calculating the number of days of leave for temporary agency workers or the effect that the termination of their employment relationship has on their leave entitlement, it is necessary to fall back on the general rules set out in Articles 237 to 239 and 245 of that code, which apply irrespective of the nature of the contractual relationship, including to temporary agency workers, and which provide for specific cases regarding the calculation of the number of days of paid leave and the effect that the termination of those workers' employment contracts has on their leave entitlement.

54 In that regard, it should be recalled that, in the context of the procedure provided for in Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, only the national courts may establish and assess the facts of the dispute in the main proceedings and determine the exact scope of national laws, regulations or administrative provisions (judgment of 13 January 2022, *Benedetti Pietro e Angelo and Others*, C-377/19, EU:C:2022:4, paragraph 37 and the case-law cited).

55 Lastly, although the Member States may, under Article 5(2) to (4) of Directive 2008/104, provide for the possibility, under certain specific conditions, of derogating from the principle of equal treatment, the order for reference and the documents before the Court contain no information regarding the implementation of any such derogation in Portugal.

The consequences to be drawn by the referring court

56 In the third place, the Court of Justice has consistently held that a national court, when hearing a case 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 that directive in order to achieve an outcome consistent with the objective pursued by the directive (judgments of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 38 and the case-law cited; of 4 June 2015, *Faber*, C-497/13, EU:C:2015:357, paragraph 33; and of 17 March 2022, *Daimler*, C-232/20, EU:C:2022:196, paragraph 76).

57 However, 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 national law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (judgment of 17 March 2022, *Daimler*, C-232/20, EU:C:2022:196, paragraph 77 and the case-law cited).

58 In the light of the foregoing considerations, the referring court will have to ascertain, in particular, whether, as the Portuguese Government argued, in essence, in its written observations and as noted in paragraph 53 above, the general rules on leave provided for in Articles 237 to 239 and 245 of the Labour Code are applicable, in the present case, in so far as the expression 'in proportion to the duration of their contract', used in Article 185(6) of that code, should not be read automatically and exclusively in conjunction with the provisions of Article 238(1) of that code but also with the other provisions of those general rules in order to determine the amount of compensation to which the applicants in the main proceedings are entitled, in respect of days of paid annual leave not taken and the corresponding holiday bonus pay, on account of the termination of their temporary employment relationship with Luso Temp.

59 In that scenario, it cannot be considered that temporary agency workers, such as the applicants in the main proceedings, for the duration of their assignment at a user undertaking, enjoy basic working and employment conditions which are not at least equal to those that would apply if they had been recruited directly by that user undertaking to occupy the same job for the same period of time so it cannot be concluded that there has been an infringement of the first paragraph of Article 5(1) of Directive 2008/104.

60 It follows from the foregoing that the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof, must be interpreted as precluding national legislation under which the compensation to which temporary agency workers are entitled, in the event of the termination of their employment relationship with a user undertaking, in respect of days of paid annual leave not taken and the corresponding holiday bonus pay, is lower than the compensation to which those workers would be entitled, in the same situation and on the same basis, if they had been recruited directly by that user undertaking to occupy the same job for the same period of time.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Sixth Chamber) hereby rules:

The first subparagraph of Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, read in conjunction with Article 3(1)(f) thereof, must be interpreted as precluding national legislation under which the compensation to which temporary agency workers are entitled, in the event of the termination of their employment relationship with a user undertaking, in respect of days of paid annual leave not taken and the corresponding holiday bonus pay, is lower than the compensation to which those workers would be entitled, in the same situation and on the

same basis, if they had been recruited directly by that user undertaking to occupy the same job for the same period of time.

[Signatures]