

Case C-715/20

Request for a preliminary ruling

Date lodged:

18 December 2020

Referring court:

Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (Poland)

Date of the decision to refer:

11 December 2020

Applicant:

KL

Defendant:

X, a limited liability company in G.

[...]

Order

11 December 2020

The Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie IV Wydział Pracy i Ubezpieczeń Społecznych (District Court for Kraków-Nowa Huta in Kraków, 4th Labour and Social Insurance Division, Poland)

[...]

having examined on 11 December 2020 in Kraków

in closed session

the claim for compensation brought by the applicant KL

against X, a limited liability company in G.,

hereby

1. refers the following questions to the Court of Justice of the European Union for a preliminary ruling:
 1. Is Article 1 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, and also Clauses Nos 1 and 4 of that framework agreement, to be interpreted as precluding provisions of national law obliging employers to state in writing the reasons for a decision giving notice of termination of an employment contract only in relation to employment contracts of indefinite duration, and consequently subjecting to judicial review the well-foundedness of the reasons for the notice of termination of contracts of indefinite duration, without at the same time imposing such an obligation on employers (that is to say, an obligation to state the reasons justifying the notice of termination) in relation to fixed-term employment contracts (as a result of which only the issue of the compliance of the notice of termination with the provisions on termination of contracts is subject to judicial review)?
 2. May the parties to a dispute before a court of law, in which private parties appear on both sides, rely on Clause No 4 of the abovementioned framework agreement and the general EU-law principle of non-discrimination (Article 21 of the Charter of Fundamental Rights of the European Union), and consequently do the rules referred to above have horizontal effect?
2. [...]

Grounds for the order of 11 December 2020

Request for a preliminary ruling

Referring court

Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie IV Wydział Pracy i Ubezpieczeń Społecznych (District Court for Kraków-Nowa Huta in Kraków, 4th Labour and Social Insurance Division, Poland)

Parties to the main proceedings

Applicant: KL

Defendant: X, a limited liability company in G

Subject matter of the dispute in the main proceedings and relevant facts

- 1 The proceedings in the case concern a claim for payment of compensation for notice of termination, by the employer, of a fixed-term employment contract

between the parties given in breach of the provisions on termination of contracts of that kind (Article 50 § 3 of the Kodeks pracy (Labour Code)). The applicant and the defendant entered into a fixed-term employment contract for the period from 1 November 2019 to 31 July 2022, on a half-time basis. On 15 July 2020, the employer gave the applicant a written declaration of notice of termination of the employment contract between the parties, with a one-month notice period that expired on 31 August 2020. The employer did not provide an explanation for the notice of termination in the above declaration, that is to say, it did not tell the applicant the reasons for its decision to give notice of termination of the employment contract. Firstly, in the grounds of his claim for the award of damages, the applicant has claimed that the employer's declaration of 15 July 2020 is vitiated by formal errors giving rise to defects which confer a right to (the award of) damages.

- 2 Secondly, the applicant has indicated that he is aware that, under the applicable provisions of the Labour Code, a declaration of intent to terminate a fixed-term employment contract does not require a statement of reasons as in the case of notice of termination of an employment contract of indefinite duration or termination of an employment contract without notice. At the same time however, the applicant has observed that, in his view, in the case of the notice of termination at issue there has been an infringement of the rules on non-discrimination – both EU rules in the form of the general principle of EU law [Or. 2] prohibiting discrimination based on the kind of employment contract concerned, and those arising from the provisions of Polish law, namely Article 18^{3a} of the Labour Code. The applicant has questioned the unlimited possibility of terminating fixed-term employment contracts.
- 3 In the light of the foregoing, the applicant has addressed the issue of whether the notice of termination given to him was well founded, requesting that the court carry out an assessment in this respect.
- 4 In response to the application, the defendant has requested that the action be dismissed, indicating inter alia that Article 30 § 4 of the Labour Code requires a statement of reasons for termination only in the case of notice of termination of an employment contract of indefinite duration or termination of an employment contract without notice. Thus, in the view of the defendant, giving the applicant notice of termination of the fixed-term employment contract without stating reasons cannot be regarded as discrimination against the applicant on the ground of his being employed for a fixed term. The defendant acted in accordance with the provisions of the Labour Code, which, in the above respect, distinguishes between the situation of workers employed on the basis of employment contracts of indefinite duration and those employed on the basis of fixed-term employment contracts, in the same way that it distinguishes between the situation of workers in terms of the duration of the notice period having regard to the length of service with the employer concerned. The defendant is not responsible for this distinction between these respective legal situations since such an action is not contrary to the applicable labour law. The defendant cannot bear consequences for complying

with the law, and its conduct, in accordance with the applicable provisions of labour law, cannot be regarded as discrimination against the worker. This is because an impermissible distinction between the respective legal situations of workers on the basis of prohibited and negative criteria is regarded as discrimination in employment. In view of the fact that the provisions of the Labour Code differentiate between workers employed on the basis of a fixed-term employment contract and those employed on the basis of an employment contract of indefinite duration as regards the obligation to state the reasons for notice of termination of an employment contract, it must be held that a failure to state reasons, as a differentiation permitted by the provisions of the Labour Code, does not constitute discrimination against workers employed on the basis of a fixed-term employment contract. [...]

Subject matter and legal basis of the reference for a preliminary ruling

- 5 Interpretation of Article 21 of the Charter of Fundamental Rights of the European Union, Article 1 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement [Or. 3] on fixed-term work concluded by ETUC, UNICE and CEEP, Clauses Nos 1 and 4 of that framework agreement.
- 6 Article 30 of the Charter of Fundamental Rights of the European Union.
- 7 Article 267 of the Treaty on the Functioning of the European Union.

EU legislation and case-law

- 8 Articles 21 and 30 of the Charter of Fundamental Rights of the European Union, recital 14 and Article 1 of [Directive 1999/70,] and Clauses Nos 1 and 4 of [the] framework agreement [on fixed-term work concluded by ETUC, UNICE and CEEP].
- 9 Judgments of the Court of Justice of the European Union of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152); of 19 April 2016, *DI* (C-441/14, EU:C:2016:278); of 25 July 2018, *Gardenia Vernaza Ayovi* (C-96/17, EU:C:2018:603); of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631); and of 22 January 2019, *Cresco* (C-193/17, EU:C:2019:43).

National legislation and case-law

- 10 Article 30 of the Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy (Law of 26 June 1974 establishing the Labour Code) (consolidated text: *Dziennik Ustaw* of 2020, item 1320, as amended) ('the Labour Code'):

§ 1. A contract of employment shall be terminated:

(1) by agreement between the parties;

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

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

(4) *on expiry of the period for which it was concluded. [Or. 4]*

[...]

[...]

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

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

...

11 Article 44 of the Labour Code:

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

12 Article 45 of the Labour Code:

§ 1. Where it is found that the notice of termination of an employment contract of indefinite duration is unfounded or is in breach of the provisions on termination of employment contracts, the labour court shall – if so requested by the worker – declare the notice of termination void and, if the contract has already been terminated, order reinstatement of the worker on the same conditions or payment of compensation.

...

13 Article 50 of the Labour Code:

§§ 1 and 2 ...

§ 3. Where the notice of termination of a fixed-term employment contract is in breach of the provisions on termination of such a contract, the worker shall be entitled only to compensation.

[...]

14 Article 18^{3a} of the Labour Code:

§ 1. Workers should be treated equally with respect to the establishment and termination of an employment relationship, employment conditions and promotion conditions, as well as access to training in order to improve professional qualifications, in particular regardless of gender, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, creed, sexual orientation, and regardless of whether they are employed for a fixed term or for an indefinite term or on a full-time or part-time basis.[Or.5]

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

...

15 Article 18^{3b} of the Labour Code:

§ 1. An employer treating a worker differently on one or more of the grounds referred to in Article 18^{3a} § 1 shall be considered to be in breach of the principle of equal treatment in employment, subject to §§ 2 to 4, where the effects of such a difference in treatment include, in particular:

(1) a refusal to enter into, or the termination of, an employment relationship;

(2) establishing disadvantageous remuneration for work or other disadvantageous terms of employment, the employee not being selected for promotion or not being granted other work-related benefits;

(3) ...

- unless the difference in treatment is justified by objective considerations demonstrated by the employer.

...

16 Judgment of the Trybunał Konstytucyjny (Constitutional Court) of 2 December 2008, P 48/07.

17 Judgments of the Sąd Najwyższy (Supreme Court) of 22 May 2012, II PK 245/11, and of 8 May 2019, I PK 41/18.

Reasons for the request for a preliminary ruling

18 When hearing the action brought by KL, the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta in Kraków) has experienced doubts (in the context of the national legislation cited above and the rulings of the Trybunał Konstytucyjny and the Sąd Najwyższy) as to the interpretation of Article 1 of [Directive 1999/70] and Clauses Nos 1 and 4 of [the] framework agreement [on fixed-term work concluded by ETUC, UNICE and CEEP], and also the possibility of parties directly invoking the provisions of the

above directive and agreement before a national court in a dispute between private parties.

- 19 Under the above provisions of the Labour Code, when giving notice of termination of an employment contract of indefinite duration the employer is obliged to state the reasons for taking such a **[Or. 6]** decision (Article 30 § 4 of the Labour Code). That obligation does not exist where the employer gives notice of termination of a fixed-term employment contract. Consequently, where a worker appeals against a notice of termination of an employment contract of indefinite duration not only the formal conditions (compatibility with the provisions on termination of contracts of that kind) but also the well-foundedness of the reason stated for the notice of termination are subject to judicial review. In the case of fixed-term contracts, the court does not examine whether the reason underlying the employer's decision to give notice of termination is well founded and no claim may be made by the worker on the ground that that decision is not well founded.
- 20 [History of Article 30 § 4 of the Labour Code] [...]
- 21 [...] [In] the case of notice of termination of a fixed-term contract the employer [...] is not under an obligation to state the reason for the notice of termination of the fixed-term employment contract.
- 22 In 2008 the Trybunał Konstytucyjny delivered a judgment in Case P 48/07 in which [Article 30 § 4 of the Labour Code] was subjected to constitutional review in the context of the different requirements for giving notice of termination depending on the kind of employment contract being terminated, that is to say, depending on whether that contract is a fixed-term contract or a contract of indefinite duration.
- 23 The Trybunał Konstytucyjny ruled that Article 30 § 4 of [the Labour Code], in so far as it disregards the obligation to state a reason justifying the notice of termination in the employer's declaration of notice of termination of a fixed-term employment contract, and Article 50 § 3 thereof, in so far as it disregards the worker's right to compensation on the ground of a failure to state reasons for the notice of termination of a fixed-term employment contract, are not inconsistent with Article 2 (that is to say, with the principle of a democratic State based on the rule of law) and Article 32 (establishing the principle of equality before the law and non-discrimination in political, **[Or. 7]** social or economic life for any reason) of the Constitution of the Republic of Poland.
- 24 [Grounds for the judgment of the Trybunał Konstytucyjny in relation to Article 32 of the Constitution] [...]
- 25 [The Trybunał Konstytucyjny ultimately held that there is nothing to support a finding that the differentiation established on the basis of the length of employment is not reasonably justified in nature] [...]

- 26 A dissenting opinion [was expressed] regarding the above judgment [:] [...] under Article 30 § 4 and Article 50 § 3 of the Labour Code, there is discrimination against workers employed on the basis of fixed-term employment contracts under Article 18^{3a} § 1 of the Labour Code, which in turn implements Directive 1999/70. **[Or.8]**
- 27 [...] [For its part,] in [the] judgment [...] of 22 May 2012 in Case II PK 245/11 [...] the Sąd Najwyższy held that a labour court may assess the notice of termination of an employment contract concluded for a probationary period or for a fixed term as regards its compliance with the rules of social conduct or its socio-economic purpose (Article 8 of the Labour Code) and there are no grounds for refusing to permit a labour court to examine the reasons for the notice of termination of a fixed-term employment contract in a situation where it is necessary to determine whether those reasons are discriminatory. It is apparent from Article 18^{3b} § 1(1) of the Labour Code that an employer treating a worker differently on one or more of the grounds referred to in Article 18^{3a} § 1 of that code (that is, inter alia, on the grounds of gender) is to be considered to be in breach of the principle of equal treatment in employment where the effects of such a difference in treatment include the termination of an employment relationship, regardless of whether that relationship was established on the basis of an employment contract of indefinite duration or a contract with a fixed term. Consequently, in the particular situation described above, the Sąd Najwyższy accepted the possibility of reviewing and assessing the reasons for the notice of termination of a fixed-term contract, despite the fact that the employer is still not obliged to state such reasons in the declaration of notice of termination of a fixed-term contract.
- 28 [...] The Sąd Najwyższy [also stated] [...] that there are doubts as to the correct implementation in the Polish legal order of Directive 1999/70 (in this case Clause No 4(1) of the framework agreement [on fixed-term work concluded by ETUC, UNICE and CEEP]) and consequently that there are serious doubts as to whether Article 30 § 4 of the Labour Code is contrary to EU law. At the same time [...] the Sąd Najwyższy stated [...] that an entity which is not an emanation of the State (the defendant employer) cannot bear liability for unlawfulness in the form of incorrect implementation of Directive 1999/70, and consequently the Sąd Najwyższy found that it is not entitled to disregard Article 30 § 4 of the Labour Code in the case under consideration since even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons [...]. **[Or. 9]**
- 29 At the same time, the court hearing the present case states that the Court of Justice of the European Union has also ruled on a number of occasions on the issue of discrimination based on the kind of employment contract concerned.
- 30 In its judgment of 25 July 2018 in *Gardenia Vernaza Ayovi*, C-96/17, the Court of Justice held that the concept of ‘employment conditions’ within the meaning of Clause No 4(1) of the framework agreement [on fixed-term work concluded by

ETUC, UNICE and CEEP] also covers conditions relating to termination of a fixed-term employment contract. Consequently, the court hearing the case considers that the above clause applies in the present case.

- 31 The Court of Justice expressed a similar view in its judgment of 13 March 2014 in *Nierodzik*, C-38/13.
- 32 [Subject matter of the reference for a preliminary ruling in Case C-38/13 and the operative part of the judgment] [...].
- 33 [...]. [After the Court of Justice delivered its judgment in *Nierodzik*, C-38/13, amendments were made to the Polish Labour Code]
- 34 It is also worth emphasising that, under Article 30 of the Charter of Fundamental Rights of the European Union, every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices. **[Or. 10]** By contrast, in the case of fixed-term contracts the national legislation at issue in principle excludes the possibility of a labour court examining whether the dismissal of a worker employed on the basis of such a contract is justified and consequently excludes the right to protection arising from Article 30 of the Charter.
- 35 In relation to the issue of the horizontal effect of Directive 1999/70, the court hearing the case points to the judgment of the Court of Justice [...] of 22 January 2019 in *Cresco*, C-193/17. In that ruling the Court of Justice [...] referred, in the first place, to its settled case-law, according to which a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 76 and the case-law cited). However, if, because of the unequivocal wording of the provisions of national law, it is not possible to interpret them in a manner compatible with EU law, the Court of Justice [...] found that the national court would nevertheless be obliged to guarantee individuals the legal protection afforded under Article 21 of the Charter and to guarantee the full effect of that article.
- 36 Similarly, in its judgment of 19 April 2016 in *DI*, C-441/14, the Court of Justice ruled that EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting

discrimination on the ground of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he or she has been wronged by the application of a provision of national law [**Or. 11**] that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.

- 37 At the same time, it should be noted that in both the cases cited above the impermissible criteria for differentiating between workers (namely religion in the case of *Cresco* and age in the case of *DI*) are referred to expressly in Article 21 of the Charter, as the Court of Justice explicitly emphasises when stating the grounds for its position on the horizontal effect of the provisions of Directive 2000/78. However, employment on the basis of a fixed-term contract is not mentioned in Article 21 of the Charter as a discriminatory criterion. In this respect, the first paragraph of that provision establishes a prohibition on any discrimination but the criteria mentioned therein do not constitute an exhaustive list, as is clear from the use of the wording ‘*Any discrimination based on any ground such as ... shall be prohibited.*’
- 38 The abovementioned national legislation and case-law [...], in combination with the cited rulings of the Court of Justice [...] and in particular the differences, resulting from them, in the assessment of whether or not there is discrimination on the ground of the kind of employment contract concerned, and also as regards the possibility of private parties relying directly on the provisions of Directive 1999/70 and the [framework] agreement [on fixed-term work concluded by ETUC, UNICE and CEEP] in a dispute before a national court, make it necessary for the national court to refer the present questions to the Court of Justice [...] for a preliminary ruling, pursuant to Article 267 of the Treaty on the Functioning of the European Union. In the view of the referring court, answers to these questions are necessary in order to give a judgment in the present case because they will determine, firstly, whether it is possible for that court to apply directly the abovementioned provisions of EU law, and will subsequently define the scope of the review of whether the notice of termination given to the applicant was correct since under national law failure to provide an explanation for the notice of termination (where required by law) renders it defective and provides a basis for granting the worker inter alia a right to compensation, but only in relation to contracts of indefinite duration. In addition, the answer to the first question referred in the present case will resolve nationwide the issue of the scope of a labour court’s review of the correctness of a notice of termination of a fixed-term contract, that is to say, the issue of whether the review must be limited to the formal requirements alone or whether it is also to cover the well-foundedness and correctness of the reasons for the notice of termination and also the claims which can be made by virtue of such a defective notice of termination. At the same time employers will receive clear guidance [**Or. 12**] on how to formulate declarations of intent to terminate a fixed-term contract so that those declarations comply with the law and do not expose those employers to negative consequences in disputes before the courts.

- 39 Furthermore, the need to ask the second question arises from the very fact that the Court of Justice is asked to answer the first question. If the Court of Justice answers the first question in the affirmative, without clarifying the issue of the horizontal effect of the EU rules under examination, two separate regimes for giving notice of termination of fixed-term contracts would begin to operate under Polish law, that is to say, in the case of those contracts concluded by employers constituting, in a broad sense, an emanation of the State, the employer would be obliged to tell the worker of the reasons justifying the notice of termination of the contract (and consequently the well-foundedness of the notice of termination would be subject to judicial review), but private employers would still be under no obligation to state the reasons for declarations of notice of termination and their workers would be deprived of the possibility of challenging the well-foundedness of the notices of termination given to them before a labour court.

The questions referred

- 40 In the light of the uncertainties set out above, the Sąd Rejonowy dla Krakowa Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta in Kraków) has decided to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Is Article 1 of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, and also Clauses Nos 1 and 4 of that framework agreement, to be interpreted as precluding provisions of national law obliging employers to state in writing the reasons for a decision giving notice of termination of an employment contract only in relation to employment contracts of indefinite duration, and consequently subjecting to judicial review the well-foundedness of the reasons for the notice of termination of contracts of indefinite duration, without at the same time imposing such an obligation on employers (that is to say, an obligation to state the reasons [Or. 13] justifying the notice of termination) in relation to fixed-term employment contracts (as a result of which only the issue of the compliance of the notice of termination with the provisions on termination of contracts is subject to judicial review)?

2. May the parties to a dispute before a court of law, in which private parties appear on both sides, rely on Clause No 4 of the abovementioned framework agreement and the general EU-law principle of non-discrimination (Article 21 of the Charter of Fundamental Rights of the European Union), and consequently do the rules referred to above have horizontal effect?