Case C-942/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

31 December 2019

Referring court:

Tribunal Superior de Justicia de Aragón (High Court of Justice of Aragon, Spain)

Date of the decision to refer:

17 December 2019

Appellant:

Servicio Aragonés de la Salud

Respondent:

LB

Subject matter of the main proceedings

The dispute in the main proceedings concerns whether LB, a member of the permanent regulated staff of the Servicio de Salud de Aragón (Aragon Health Service; 'the health service'), is entitled to voluntary leave of absence by reason of employment in the public sector.

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

The request for a preliminary ruling concerns whether Spanish legislation which permits voluntary leave of absence by reason of employment in the public sector only if the post to be taken up is permanent is compatible with clause 4 of the framework agreement on fixed-term work. The legal basis is Article 267 TFEU.

Questions referred for a preliminary ruling

1) Must clause 4 of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, annexed to Directive 1999/70/EC, be interpreted as meaning that the right, derived from obtaining a post in the public sector, to the conferral of a particular administrative status in relation to the post — also in the public sector — which was held up until then is a *condition of employment* in respect of which temporary workers and permanent workers may not be treated differently?

2) Must clause 4 of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, annexed to Directive 1999/70/EC, be interpreted as meaning that justification on objective grounds for the different treatment between fixed-term workers and permanent workers includes the aim of preventing serious failings and harm as regards the instability of workforces in a field as sensitive as the provision of healthcare, which falls under the constitutional right to the protection of health, such that it can serve as the basis for refusal to grant a particular type of leave of absence to those who obtain a temporary post but not to those who obtain a permanent post?

3) Does clause 4 of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, annexed to Directive 1999/70/EC, preclude a rule such as that laid down in Article 15 of [Royal Decree 365/1995], which excludes posts held as a temporary civil servant or as a temporary staff member from being part of the posts which give entitlement to the status of on leave of absence by reason of employment in the public sector, when that status must be granted to those who take up a permanent post in the public sector and that status is more advantageous for a public servant than the other alternative administrative statuses which that public servant would have to request in order to be able to take up a new post to which he or she has been nominated?

Provisions of EU law relied on

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) (‘Directive 1999/70’), Articles 1 and 2.

Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (‘framework agreement’), clause 4(1).

Judgment of the Court of Justice of 14 September 2016, *De Diego Porras* (C-596/14, EU:C:2016:683).

Judgment of the Court of Justice of 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014, paragraphs 31 and 34) and point 1 of the operative part.

Order of the Court of Justice of 22 March 2018, *Centeno Meléndez* (C-315/17, EU:C:2018:207, paragraph 65).

Provisions of national law relied on

Ley 30/1984, de 2 de Agosto, de medidas para la reforma de la Función Pública (Law 30/1984 of 2 August 1984on measures to reform the civil service) (BOE No 185 of 3 August, p. 22629), Article 29(3).

Ley 53/1984, de 26 de diciembre, de Incompatibilidades del Personal al Servicio de las Administraciones Públicas (Law 53/1984 of 26 December 1984 on incompatibilities for staff working for the public authorities) (BOE No 4 of 4 January, p. 165), Article 1.

Ley 55/2003, de 16 de diciembre, del Estatuto Marco del personal estatutario de los servicios de salud (Law 55/2003 of 16 December 2003 on the framework regulations for public servants working in the health service) (BOE No 301 of 16 December, p. 44742), Articles 2(1) and (2), 3, 62, 66(1) and (3) and 67(1) to (3).

Ley del Estatuto Básico del Empleado Público, cuyo texto refundido fue aprobado por el Real Decreto Legislativo 5/2015, de 30 de (Law on the basic regulations governing public servants, the consolidated version of which was approved by Royal Legislative Decree 5/2015 of 30 October 2015) (BOE No 261 of 31 October, p. 103105) ('EBEP'), Articles 2(1), (3), (4) and (5), 85(1), 88(1), (3) and (4), and 89(1) and (2).

Real Decreto 365/1995, de 10 de marzo, por el que se aprueba el Reglamento de Situaciones Administrativas de los Funcionarios Civiles de la Administración General del Estado (Royal Decree 365/1995 of 10 March 1995 approving the rules on the administrative statuses of civil servants in the General State Administration) (BOE No 85 of 10 April, p. 10636), Article 15.

Succinct presentation of the facts and the procedure in the main proceedings

1 LB obtained a position as a member of the permanent regulated staff of the health service, a position which she held from 14 December 2010 to 20 December 2017.

2 LB was nominated for a temporary position as a lecturer following a call for applications by a university; that nomination was signed off on 25 October 2017. LB was therefore sent the employment contract and was requested to take up that position on 21 December 2017.

3 In order to take up that position, which was incompatible with the one she held, LB made a written request on 1 December 2017 to be granted the status of on

leave of absence by reason of employment in the public sector from the position which she held in the health service.

4 That request was refused by decision of 4 December 2017 of the director of the Zaragoza III sector of the health service, on the ground that, in accordance with Article 15 of Royal Decree 365/1995, permanent regulated staff and career civil servants cannot be granted leave of absence by reason of employment in the public sector where the other public authority post is to be held on a temporary basis.

5 In order to be able to take up the temporary lecturer position, LB requested voluntary leave of absence for personal reasons by letter of 17 December 2017, and this was granted to her by decision of the director of the Zaragoza III sector of the health service of 20 December 2017.

6 In addition, LB appealed against the decision of 4 December; that appeal was dismissed by order of the Regional Department of Health of 16 March 2018.

7 LB brought proceedings against that order before Juzgado de lo Contencioso-Administrativo n.º 4 de Zaragoza (Administrative Court No 4, Zaragoza, Spain), which found in her favour by judgment of 9 May 2019. The judgment states that the decision that LB was ineligible for the administrative status of employment in the public sector on the grounds that the second post was temporary and not permanent breached the principle of non-discrimination between permanent workers and fixed-term workers laid down in clause 4 of the framework agreement.

8 The health service brought an appeal against that judgment before the referring court.

Essential arguments of the parties to the main proceedings

9 In her application, LB sought a declaration that the contested decisions were null and void from the outset or, in the alternative, voidable. She also claimed that her entitlement to leave of absence from her job with the health service by reason of employment in the public sector should be recognised as a personal legal status with retroactive effect as from 1 December 2017.

10 LB claims that the contested decisions breached the principles of equality and non-discrimination provided for in clause 4 of the framework agreement and that the application of Article 15 of Royal Decree 365/1995 also infringes that clause.

11 The health service denied that the contested decisions infringed clause 4 of the framework decision because no comparable situations existed and because there were objective reasons for the different treatment between fixed-term workers and permanent workers, in particular the need to ensure the stability of the service provided by the health service of Aragon.

12 As regards the making of a reference for a preliminary ruling, LB submits that it is not necessary because the case can be resolved by relying on national provisions alone.

13 LB further submits that there is no need for a reference for a preliminary ruling because the case-law of the Court of Justice of the European Union is sufficiently clear and gives rise to the view that refusal to grant her the status of on leave of absence by reason of public sector employment in relation to the position which she had been performing, due to the fact that the job she intends to take up is a temporary position, is contrary to the prohibition of less favourable treatment laid down in Directive 1999/70, which would result in the dismissal of the appeal on the basis of the principle of the primacy of EU law.

14 The health service did not express a view on the making of a reference for a preliminary ruling.

Succinct presentation of the reasoning in the request for a preliminary ruling

15 As a preliminary point, the referring court sets out the legislative framework, which is summarised below.

16 In the first place, it is necessary to establish which legislation is applicable to regulated staff. In that connection, the main legislation applicable is Law 55/2003; the EBEP, Laws 30/1984 and 53/1984, and Royal Decree 365/1995 apply on a supplementary basis.

17 In the second place, it is necessary to specify the set of rules governing the administrative statuses at issue in the present case.

18 First, LB asked to be granted the status of on leave of absence by reason of employment in the public sector (as it is called in Law 55/2003 (Articles 62 and 66); in the EBEP it is referred to as employment with other public authorities (Articles 85 and 88); while Royal Decree 365/1995 refers to it as voluntary leave of absence by reason of employment in the public sector (Article 15)). That status is granted, inter alia, where a regulated member of staff transfers to work ‘in another regulated staff category, as a civil servant or a temporary staff member, in any public authority, unless that member of staff has obtained the proper compatibility authorisation’ (Article 66(1) of Law 55/2003).

19 According to the presentation of national law set out by the referring court, that status has the following features:

– It cannot be refused on the grounds of service needs, and persons who enjoy that status retain their status as civil servants in the public authority of origin and the right to participate in calls for applications to fill posts launched by that public authority;

– The period of service with the public authority to which such persons are posted will count as active service with their public authority of origin;

– Persons who obtain that status are not entitled to receive payments from the public authority of origin and the period during which they retain that status will be recognised for the purposes of three-yearly increments and career advancement, where appropriate, when they return to active service with the public authority of origin;

– In addition, there is no requirement to hold that status for a minimum period.

20 Second, the health service did not grant LB that status and instead took the view that the status applicable to her was that of voluntary leave of absence for personal reasons (Article 67(1)(a) of Law 55/2003). According to the presentation of national law set out by the referring court, that status has the following features:

– The person must have been employed in public authorities during the five years preceding the grant of the status;

– The status can be refused on the grounds of service needs;

– Persons who enjoy that status are not entitled to receive payments from the public authority of origin, and nor will the period during which they retain that status count for the purposes of career advancement and three-yearly increments;

– Persons who obtain that status must retain it for at least two years before they can return to their former job.

21 The health service submits that leave of absence by reason of employment in the public sector cannot be granted because it is precluded by Article 15 of Royal Decree 365/1995, an implementing rule which provides that persons who ‘hold posts as temporary civil servants or as a temporary staff member do not qualify for’ that administrative status.

22 The dispute before the referring court is concerned primarily with whether Article 15 of Royal Decree 365/1995 is applicable for the purpose of resolving the dispute, since there is a discussion concerning whether that provision was repealed by the EBEP or whether it is applicable in the alternative as it implements Law 55/2003, which is a question of national law. The referring court takes the view that that article is in force and is applicable.

23 Therefore, the outcome of the dispute depends on whether the rules laid down in Article 15 of Royal Decree 365/1995 conflict with clause 4 of the framework agreement. The question that arises is whether the different treatment provided for in Article 15 of Royal Decree 365/1995, which precludes a public servant who

obtains another position on a temporary basis from qualifying for leave of absence by reason of employment in the public sector whilst providing that a person who obtains another position on a permanent basis does qualify for that status, is contrary to the principle of non-discrimination contained in the framework agreement and the relevant case-law of the Court of Justice of the European Union.

24 In the referring court's view, it is clear that a public servant who takes up another permanent post with a public authority is treated differently from a public servant who takes up a temporary post because, in the former case, he or she is entitled to request the administrative status of on leave of absence by reason of employment in the public sector, with the benefits that entails, but not in the latter case, in which he or she is obliged to take voluntary leave of absence for personal reasons, which entails different and less favourable treatment.

25 The less advantageous treatment which the legislation affords a public servant on leave of absence for personal reasons compared with that enjoyed by a public servant who is in the same situation on account of service with other public authorities or on account of employment in the public sector is derived from Articles 88(3) and (4) and 89 of the EBEP and Articles 66(3) and 67(1)(a) of Law 55/2003, respectively.

26 In order to determine whether those provisions are compatible with Directive 1999/70, it is necessary to establish whether the criteria for the application of the prohibition of discriminatory treatment laid down in the directive are met.

27 In the first place, it must be established whether, for the purposes of the directive, the status granted to the public servant as a result of the appointment to a new temporary post with a public authority is a *condition of employment* of the temporary post taken up.

28 In the cases on which the Court of Justice has ruled, the *condition of employment* examined was part of the post or job temporarily held. However, in the present case, the *less favourable condition* which must be examined is part of a temporary post which the respondent does not yet hold but which she intends to take up, and therefore, the referring court takes the view that the case-law of the Court of Justice cannot be applied.

29 In other words, it is necessary to decide whether the right, granted to a public servant as a result of obtaining a second post in the public sector, which consists of the conferral of a particular administrative status in the post held by that public servant until the date he or she obtained the second post, is a *condition of employment*.

30 In the second place, the referring court asks whether the reasons given by the public authority in the present case can be regarded as *objective reasons* which justify the different treatment between fixed-term workers and permanent workers.

31 The health service considers that that is the case. It asserts that granting permanent regulated staff the status of on leave of absence by reason of employment in the public sector, when the other employment relationship is temporary, would entail in the field of health serious failings and harm as regards the instability of workforces in an field as sensitive as the provision of healthcare, which falls under the constitutional right to the protection of health.

32 In the opinion of the health service, granting that status would mean, in practice, that a considerable number of permanent regulated staff members may avail themselves of a leave of absence to take up a temporary post, including a short-term post, and, each time that temporary employment relationship ends, those staff members would request temporary reinstatement to a position in their category, thereby creating instability in workforces.

33 The health service contends that it is constantly striving for and promoting the consolidation of permanent employment, inter alia by holding selection procedures for permanent regulated staff. The grant of leave of absence by reason of employment in the public sector in order to take up temporary posts means that posts obtained through those selection procedures are left vacant, which then necessitates a further selection procedure. Moreover, the reinstatement of staff placed on leave of absence by reason of employment in the public sector is temporary, which results in the departure of the longest-serving temporary staff members and creates the obligation to include the position temporarily filled by the reinstated person in a fresh selection procedure.

34 Accordingly, the referring court considers it necessary to determine whether the aim of preventing serious failings and harm as regards the instability of workforces in an field as sensitive as the provision of healthcare, which falls under the constitutional right to the protection of health, is an *objective reason* justifying the different treatment between temporary workers and permanent workers, such that it can serve as the basis for refusal to grant the former a particular status of leave of absence but not the latter.