Case C-550/19

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:

17 July 2019

Referring court:

Juzgado de lo Social n.º 14 de Madrid (Social Court No 14, Madrid, Spain)

Date of the decision to refer:

4 July 2019

Applicant:

EV

Defendants:

Obras y Servicios Públicos, S.A.

Acciona Agua, S.A.

Subject matter of the main proceedings

An application by which EV seeks for his period of service to be recognised as beginning to run from his first contract with Obras y Servicios Públicos, S.A. and for that employment relationship to be recognised as permanent.

Purpose and legal basis of the request for a preliminary ruling

The request addresses two issues: first, whether Article 24 of the convenio colectivo del sector de la construcción (collective agreement for the construction sector) is compatible with Clause 4(1) of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, given that the abovementioned article establishes, in derogation from national legislation, that workers on a fixed-term contract for a specific construction project may not acquire the status of permanent workers; and, secondly, whether Article 27 of the abovementioned collective agreement is compatible with Article 3(1) of Directive 2001/23, given

that it establishes, in derogation from national legislation, that where workers are transferred due to a change in contractor, in the case of workers on a fixed-term contract for a specific construction project, the new employing undertaking or entity need respect only the workers' rights and obligations contained in the workers' most recent contract with the previous employer.

Questions referred

– The first question:

Must Clause 4(1) of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, incorporated into EU law by Council Directive 1999/70 and Directive 2001/23, be interpreted to the effect that there is no objective ground to justify the collective agreement for the construction sector (Article 24(2) of which provides that the first paragraph of Article 15(1)(a) of the Estatuto de los Trabajadores ('Workers' Statute') is not to apply, irrespective of the length of the general project contract for a given construction project, and that workers are to retain the status of 'workers on a fixed-term contract for a specific construction project', both in the circumstances referred to in that provision and where one undertaking succeeds another, as provided for in Article 44 of the Workers' Statute, or in the case of the transfer of workers under Article 27 of the collective agreement) contravening Spanish national legislation (under which, pursuant to Article 15(1)(a) of the Workers' Statute, '*such contracts may not be for a period of more than 3 years, which may be extended by up to 12 months by a national sectoral collective agreement or, if there is no such agreement, by a lower-level sectoral collective agreement. On the expiry of those periods, workers shall acquire the status of permanent workers of the employer*')?

– The second question:

Must Clause 4(1) of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, incorporated into EU law by Council Directive 1999/70 and Directive 2001/23, be interpreted to the effect that there is no objective ground to justify the collective agreement for the construction sector (Article 24(5) of which provides that where a worker is hired for different work positions on two or more fixed-term contracts for a specific construction project with the same undertaking or group of undertakings within the period and for the duration laid down in Article 15(5) of the Workers' Statute, the said worker is not to acquire the status provided for in Article 15(5) of the Workers' Statute, both in the circumstances referred to in that provision and where one undertaking succeeds another, as provided for in Article 44 of the Workers' Statute, or in the case of the transfer of workers under Article 27 of the collective agreement) contravening Spanish national legislation (under which Article 15(5) of the Workers' Statute provides that '*Without prejudice to the provisions of paragraphs 1(a), 2 and 3, workers who have been engaged, with or without interruption, for longer than 24 months over a period of 30 months in the same or*

a different work position with the same undertaking or group of undertakings on two or more temporary contracts, regardless of whether the workers have entered into the contracts directly or have been supplied by temporary employment agencies or whether the same or different fixed-term conditions apply to the said contracts, shall acquire the status of permanent workers. The provisions of the previous paragraph shall also apply where one undertaking succeeds another or in the case of the transfer of workers in accordance with provisions laid down by statute or in collective agreements')?

– The third question:

Must Article 3(1) of Directive 2001/23 be interpreted as precluding a situation in which, under the collective agreement for the construction sector, the rights and obligations that are to be respected by the new employing undertaking or entity that is taking on the contracted activities **are to be restricted solely to those arising under the last contract** concluded by the worker with the outgoing undertaking, and as meaning that that does not constitute an objective ground that justifies the collective agreement for the construction sector contravening Spanish national legislation, under which, pursuant to Article 44 of the Workers' Statute, all rights and obligations of the previous employer are transferred, not merely those arising under the most recent contract?

Provisions of EU law cited

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).

Framework agreement on fixed-term work, contained in the Annex to Directive 1999/70. Clause 4(1).

Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16). Article 1 and Article 3(1) and (3).

Judgments of the CJEU:

of 14 September 2000, *Collino and Chiappero*, C-343/98, EU:C:2000:441, paragraphs 51 and 52;

of 20 January 2011, *CLECE*, C-463/09, EU:C:2011:24, paragraphs 29, 35, 36 and 39;

of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 75 and the case-law cited;

of 12 December 2013, *Carratù*, C-361/12, EU:C:2013:830;

of 19 October 2017, *Securitas*, C-200/16, EU:C:2017:780, paragraphs 23, 24, 26, 27 and 28;

of 11 July 2018, *Somoza Hermo and Ilunión Seguridad*, C-60/17, EU:C:2018:559.

Provisions of national law cited

Ley del Estatuto de los Trabajadores (Law on the Workers' Statute), the consolidated text of which was approved by Royal Legislative Decree 2/2015 of 23 October 2015 (BOE No 255 of 24 October 2015) ('Workers' Statute'). Article 15(1) and (6) and Article 44.

Convenio Colectivo del Sector de la Construcción (Collective Agreement for the Construction Sector) (BOE No 232 of 26 September 2017, p. 94090) ('the Agreement'). Article 24(2) and (5) and Article 27.

Brief summary of the facts and the main proceedings

1 From 8 January 1996 EV concluded a series of temporary full-time contracts with Obras y Servicios Públicos. From 24 January 1997 these contracts continued without interruption. His most recent contract was signed on 1 January 2014 and has not yet expired. Obras y Servicios Públicos deem that EV's period of service began on 1 January 2014.

2 On 3 October 2017 EV was transferred to Acciona Agua, S.A. when it was awarded the contract entitled 'Urgent renovation and repair work to the supply and reuse system of Canal de Isabel II Gestión SA' ('the Contract').

3 Previously, on 5 September 2017, EV filed a claim against his employer, Obras y Servicios Públicos, and against Acciona Agua, seeking for his period of service to be recognised as having begun on 8 January 1996 and for that employment relationship to be recognised as permanent.

Main arguments of the parties in the main proceedings

4 The request for a preliminary ruling does not set out the parties' arguments.

Brief summary of the basis for the request for a preliminary ruling

5 The present case concerns fixed-term contracts for a specific construction project, which are temporary contracts specific to the construction sector. These contracts are entered into for the purpose of carrying out a specific project, regardless of the project's duration. They constitute an exception to the normal provisions

governing contracts for a project or service set out in Article 15(1) of the Workers' Statute and the general provisions governing temporary contracts set out in Article 15(5) of the Workers' Statute, which lay down a maximum duration for contracts and provide that once that maximum duration has been exceeded, the worker becomes a permanent employee (on an contract for an indefinite period). In addition, under fixed-term contracts for a specific construction project, there is a limit on the length of service of a worker that is recognised in the event of a transfer of undertakings, which is also a matter of dispute in the present case.

6 Before addressing the questions referred, the referring court raises the question of whether Directive 1999/70 applies in the present case. In the view of the referring court, that directive does apply, since a 'fixed-term contract for a specific construction project' is a fixed-term contract, and the court notes that in the *Carratù* judgment it was held that Clause 4(1) of the framework agreement is, so far as its subject matter is concerned, unconditional and sufficiently precise for individuals to be able to rely upon it before a national court.

7 With regard to the first question referred, as far as Directive 2001/23 is concerned, the referring court considers that Article 1(1) should be interpreted as meaning that that directive applies to a situation where a contract has been concluded with an undertaking to provide construction services for a fixed price and, in order to provide those services, a new contract has been concluded with another undertaking which, under a collective agreement, takes over a major part, in terms of their numbers and skills, of the employees assigned by the previous undertaking to that task, and the activity concerned is essentially labour-intensive.

8 Pursuant to Article 1(1)(a) of Directive 2001/23, the directive is to apply to any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger.

9 The referring court maintains that there is settled case-law to the effect that the scope of that article cannot be determined on the basis of a purely literal interpretation. Thus, Directive 2001/23 is applicable whenever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the undertaking and entering into the obligations of an employer towards employees of the undertaking. Thus there is no need, in order for Directive 2001/23 to be applicable, for there to be any direct contractual relationship between the transferor and the transferee: the transfer may take place through the intermediary of a third party.

10 Moreover, under Article 1(1)(b) of Directive 2001/23, in order for the directive to be applicable, the transfer must involve an 'economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'.

11 The Court of Justice has held that, in order to determine whether that condition is in fact met, it is necessary to consider all the facts characterising the transaction in

question, including the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion will necessarily vary according to the activity carried on and the production or operating methods employed in the undertaking, business or part of a business.

12 Thus, inasmuch as, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis.

13 Therefore, in the view of the referring court, an activity such as that at issue in the main proceedings can be regarded as essentially a labour-intensive activity and, therefore, a group of workers engaged on a permanent basis in the joint activity of renovation and repair works may constitute an economic entity.

14 The identity of that entity must nonetheless be retained after the transfer in question. The referring court states that, as the worker had worked for Obras y Servicios Públicos since 1996 and was transferred to Acciona Agua, which took over the workers employed for the purposes of the Contract, the identity of an economic entity such as that at issue in the main proceedings, which is essentially labour-intensive, can be retained if the alleged transferee has taken over a major part of that entity's staff. Given that that is the case here, Directive 2001/23 is fully applicable, by analogy with the *Somoza Hermo and Ilunión Seguridad* judgment.

15 With regard to the second question, the referring court has the following comments. First, it notes that the dispute arises among temporary workers, who must be considered comparable for the purposes of applying Clause 4 of [of the framework agreement].

16 Secondly, it notes that the matter under comparison constitutes a working condition: if Article 15 of the Workers' Statute were to apply to the temporary construction workers, the applicant's length of service would have to begin to run from the first contract rather than from the latest contract, which is the position under Article 24(5) of the collective agreement, and he would have to be given permanent employee status.

17 The Court of Justice has already ruled that the purpose of Directive 2001/23 is to ensure, as far as possible, that contracts or employment relationships continue unchanged with the transferee, in order to prevent workers being placed in a less favourable position solely as a result of the transfer, and to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other.

18 In interpreting that balance, the Court of Justice held, in paragraph 51 of the judgment in *Collino and Chiappero*, that in calculating rights of a financial nature, the transferee must take into account the entire length of service of the employees transferred, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship.

19 The collective agreement therefore restricts the right of workers to sustainable employment, by failing to apply the provisions in Article 15(1) of the Workers' Statute, contrary to the requirements of Directive 1999/70.

20 The first paragraph of Article 3(1) of Directive 2001/23 sets out the principle that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall be transferred to the transferee. The second paragraph of Article 3(1) stipulates that Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

21 In this regard, Article 44(1) of the Workers' Statute stipulates that '*the transfer of an undertaking, business or independent production unit of an undertaking shall not, in itself, terminate the employment relationship; the new employer shall take over the former employer's rights and obligations in respect of the employment contract and social security, including commitments with regard to pensions, on the conditions laid down by the applicable specific legislation, and, in general, all obligations in the sphere of additional social protection that were borne by the transferor*'. Consequently, in the view of the referring court, Article 24 of the collective agreement is contrary to the first paragraph of Article 3(1) of Directive 2001/23 since it excludes the transferee's obligations in respect of employees' rights concerning length of service, because the collective agreement only acknowledges the employee's last contract, rather than the entire employment relationship inherent in the contract of employment entered into for the purpose of performing the Contract. In addition, the second paragraph allows for the transferor and the transferee to be made jointly and severally liable, making a response from the Court of Justice necessary.