

Case C-192/21**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:**

26 March 2021

Referring court:

Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castile and Leon, Spain)

Date of the decision to refer:

9 February 2021

Appellant:

Clemente

Respondent:

Comunidad de Castilla y León (Dirección General de la Función Pública) (Autonomous Community of Castile and Leon, Directorate-General for the Civil Service)

Subject matter of the main proceedings

Claim for a civil servant who became a member of the civil service through a process of consolidation of a temporary position to be awarded the grade that reflects the position he occupied while working as an interim civil servant.

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

The purpose of the present request for a preliminary ruling is to decide on the equivalence between work performed by an interim civil servant and a career civil servant in order to determine whether the two employees are comparable pursuant to Clause 4(1) of the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed to Council Directive 1999/70 of 28 June 1999. The issue under particular consideration is their equivalence for the purposes of the

promotion of a civil servant who previously worked as an interim civil servant and whose temporary employment had already been taken into account to enable him to become a career civil servant.

Questions referred

A) Must the concept of ‘comparable permanent worker’ in Clause 4(1) of the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed to Council Directive 1999/70 of 28 June 1999 be interpreted as meaning that, for the purposes of consolidating a personal grade, a period of service as an interim civil servant undertaken by a permanent civil servant before he or she obtained permanent status must be accorded the same treatment as service undertaken by another career civil servant?

B) Must Clause 4(1) of the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed to Council Directive 1999/70 of 28 June 1999 be interpreted as meaning that both (i) the fact that the period in question has already been taken into account to enable the individual to become a career civil servant and (ii) the design of the civil service career progression arrangements established in national legislation, are objective grounds that justify why a period of service as an interim civil servant undertaken by a permanent civil servant before he or she obtained permanent status should not be taken into account for the purposes of consolidating the individual’s personal grade?

Provisions of EU law relied upon

Clause 3 and Clause 4(1) of the framework agreement on fixed-term contracts concluded on 18 March 1999 between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed to Council Directive 1999/70 of 28 June 1999 (‘the Framework Agreement’).

Judgment of 8 September 2011, *Rosado Santana* (C-177/10, ‘the *Rosado Santana* judgment’, EU:C:2011:557), paragraphs 46, 47, 66, 80 and 84.

Judgment of the Court of Justice of the European Union of 20 June 2019, *Daniel Ustariz Aróstegui* (C-72/18, EU:C:2019:516, paragraphs 47 and 50).

Provisions of national law relied upon

Decreto 17/2018, de 7 de junio, por el que se regula la consolidación, convalidación y conservación del grado personal (Decree 17/2018 of 7 June 2018 governing the consolidation, recognition and retention of personal grades) (BOCyL No 113 of 13 June 2018), Articles 3, 4, 5 and 6.

Ley 7/2005, de 24 de mayo, de la Función Pública de Castilla y León (Law 7/2005 of 24 May 2005 on the Civil Service of Castile and Leon) (BOE No 162 of 8 July 2005), Article 48(2), Article 64 and Article 69(1).

Real Decreto Legislativo 5/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público (Royal Legislative Decree 5/2015 of 30 October 2015 approving the consolidated text of the Law on the basic regulations relating to public servants (BOE No 261 of 31 October 2015), Article 16(1), Article 24 and ninth additional provision.

Judgment of the Tribunal Supremo (Supreme Court) of 7 November 2018 in appeal 1781/2017 (3744/2018, ES:TS:2018:3744).

Judgment of the Supreme Court of 20 January 2003 in appeal 6/2002 (193/2003, ES:TS:2003:193).

Brief statement of the facts and the main proceedings

- 1 The appellant occupied the position of Veterinary Coordinator in the Administration of the Autonomous Community of Castile and Leon (level 24), as an interim civil servant, from 28 May 2001 to 21 January 2008.
- 2 Order PAT/334/2006 of 7 March 2006 published a competition notice stating that selection tests would be held for entry into the Senior Specialist Cadre, Health Scale (Veterinary Surgeons) of the Administration of the Autonomous Community of Castile and Leon as part of the process of consolidating temporary employment and providing stability of employment for health staff. Under Clause 7(2)(a) of the Order, periods of service as interim staff in posts forming part of the Senior Specialist Cadre, Health Scale (Veterinary Surgeons) are allotted a value of 0.25 points for each complete month of service, up to a maximum of 40 points.
- 3 The appellant successfully completed the process, obtaining a permanent position at level 22.
- 4 On 18 March 2019 the appellant submitted a written application to the Administration of the Autonomous Community of Castile and Leon (Directorate-General for the Civil Service) seeking a consolidated personal grade of level 24, on the grounds that he had occupied a post at that level as an interim civil servant.
- 5 As the Administration refused his application, the appellant brought an administrative-law action against the decision, in which judgment was given on 13 January 2020. The judgment partially upheld the claim, in that it acknowledged only his right to a consolidated personal grade of level 22, rather than level 24, on the grounds that the former grade reflected the level of the permanent post he had obtained as a career civil servant.

Main arguments of the parties to the main proceedings

- 6 The appellant brought a legal action against the decision of the Directorate-General for the Civil Service of the Autonomous Community of Castile and Leon, in reliance on the principle of non-discrimination enshrined in Clause 4(1) of the Framework Agreement and a judgment of the Supreme Court which, in a similar case, recognised that, under the aforesaid Clause 4(1), periods of service as an interim civil servant must be taken into account for the purposes of consolidating personal grades.
- 7 The Administration maintains, first, that according to the Supreme Court, the level of posts occupied on an interim or provisional basis cannot be consolidated, and, secondly, that the grade of the permanent position held by the appellant after his success in the selection process is lower than the grade requested (level 22 as compared with level 24).
- 8 It adds that Clause 4 of the Framework Agreement does not guarantee equal treatment between interim and career civil servants, but rather prohibits any difference that is not justified, and in this case there are grounds to justify the difference in treatment since personal grades relate to career progression arrangements, that is to say, a civil servant's progress within the administrative structure.
- 9 In its view, if consolidation of the personal grade were to be permitted, it would mean that career civil servants would suffer discrimination as compared with interim civil servants, since posts occupied by career civil servants on a provisional basis are not taken into account for grade consolidation purposes.

Brief statement of the reasons for the request for a preliminary ruling

First reason

- 10 Clause 4(1) of the Framework Agreement prohibits all unjustified discrimination in respect of employment conditions between fixed-term workers and comparable permanent workers.
- 11 According to the case-law of the European Court, all aspects relating to 'employment', in that they equate to an employment relationship between a worker and his employer, must fall within the concept of employment conditions; these specifically include 'periods of service to be completed in order to be classified in a higher salary grade ...' and 'the taking into account, in the context of a selection procedure for internal promotion, of periods of service previously completed as an interim civil servant' (*Rosado Santana* judgment, paragraphs 46 and 47).
- 12 The appellant is a career civil servant, and he believes that this clause has been infringed because his period of service as an interim civil servant is not taken into

account for the purposes of consolidating his personal grade, whereas he contends that the service would have been taken into account if he had undertaken it as a career civil service.

- 13 While consolidation of a personal grade could be considered an employment condition, the court considers that, in order to examine whether the non-discrimination principle referred to in Clause 4(1) of the Framework Agreement should apply, the situations must be comparable.
- 14 Paragraph 66 of the *Rosado Santana* judgment states that ‘in order to assess whether the persons concerned are engaged in the same or similar work for the purposes of the framework agreement, it must first be determined, in accordance with clauses 3(2) and 4(1) of that agreement, whether, in the light of a number of factors, such as the nature of the work, training requirements and working conditions, those persons can be regarded as being in a comparable situation’.
- 15 In the present case, a career civil servant and the appellant when employed as an interim civil servant can be considered to be in the same position in terms of the duties carried out, qualifications required, arrangements, location and other employment conditions.
- 16 The judgment of the Spanish Supreme Court of 7 November 2018 in appeal 1781/2017 had regard to the *Rosado Santana* judgment (and others) in concluding that service by an interim civil servant is to be taken into account for the purposes of consolidation of a personal grade. However, this court has doubts as to whether we are dealing with comparable workers in the present case, for the following reasons:
 - a) The appellant is not seeking the right to consolidation of his personal grade when he was an interim civil servant but rather, now that he has been appointed as a career civil servant, he is seeking to have that previous service taken into account in order to consolidate his grade at level 24.
 - b) Where a career civil servant is temporarily employed in a higher-grade position, his consolidated grade is that of his permanent position, not that of the higher-grade position in which he is temporarily employed.

Second reason

- 17 Clause 4(1) of the Framework Agreement enshrines the principle of non-discrimination, unless different treatment is justified on objective grounds. In the present case, the referring court therefore has queries regarding two circumstances that could constitute objective grounds to justify why a period of service as an interim civil servant should not be taken into account for the purposes of consolidating the personal grade of a career civil servant.
- 18 The first circumstance has to do with the fact that the appellant’s period of service as an interim civil servant was already taken into account in the selection process

which led to his appointment as a career civil servant, and there could possibly be double counting if it is also taken into account for grade consolidation purposes. Such double counting could be incompatible with the principle established in Clause 4(1), since that clause is designed to prevent discriminatory treatment but does not permit preferential treatment.

- 19 The second objective ground has to do with career progression for career civil servants. In the court's view, it is not clear that it is compatible with that system to take periods of service as an interim employee into account so as to enable consolidation of a personal grade at the level corresponding to the interim position, for the following reasons:
- a) career progression is progressive, meaning that in order to achieve consolidation of a higher personal grade there must have been consolidation of a previous grade;
 - b) career progression is a consequence of the administrative structure itself, in which civil servants are organised hierarchically and classified according to their permanent position;
 - c) career progression provides an incentive for career civil servants which is also intended to improve performance.
- 20 The reason why it would be incompatible is that interim civil servants do not become members of any Cadre and are not classed within any Group, but are appointed to cover vacancies in various Cadres and Groups as the need arises, and they perform different jobs at different levels without obtaining a permanent position by going through a promotion process.
- 21 Were consolidation of a grade performed as an interim civil servant to be possible, this could lead to jumps and overtaking within the administrative career progression system, as an individual would be placed in a higher grade purely because he had occupied a higher-level position, without needing to satisfy any legal requirement other than possession of the necessary qualification; this would distort the career progression system.

Dissenting opinion

- 22 In order to consolidate a personal grade, the individual must have occupied one or more positions of employment on either a provisional or a permanent basis at the same or a higher level than that of the grade the individual is seeking to consolidate; he must have held those posts for a continuous period of 2 years or a non-continuous period of 3 years. The dissenting opinion therefore considers that the defining characteristic of consolidation of a personal grade is that the individual has, whether on a provisional or a permanent basis, occupied a particular position.

- 23 That being the case, it is a requirement of national legislation that, in addition to occupying a position on either a provisional or a permanent basis (in the case under consideration, at level 24), the individual must also hold a permanent position of employment at the same or a higher level than that of the grade to be consolidated. In other words, the individual must be a career civil servant and must have obtained the position of employment at the same or a higher level than that of the grade to be consolidated under one of the procedures established by legislation for obtaining permanent employment.
- 24 According to the case-law of the Court of Justice of the European Union (in particular the *Rosado Santana* judgment), Clause 4(1) of the Framework Agreement must be interpreted as precluding a situation in which periods of service completed by an interim civil servant in a Public Administration are not taken into account for the purposes of giving that individual, who has meanwhile become a career civil servant, access to an internal promotion which is only open to career civil servants, unless the exclusion is justified on objective grounds within the meaning of Clause 4(1). The mere fact that the interim civil servant has completed the periods of service in question under a fixed-term contract or employment relationship does not constitute an objective ground.
- 25 Therefore if, according to EU case-law, the fact that the interim civil servant has performed the work under a fixed-term employment relationship does not constitute objective grounds for different treatment, whether or not the appointment is permanent cannot constitute objective grounds either, since the determining factor is the particular nature of the duties to be performed and their inherent characteristics.