

**Case C-418/24 [Obadal]<sup>i</sup>****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:**

12 June 2024

**Referring court:**

Tribunal Supremo (Spain)

**Date of the decision to refer:**

30 May 2024

**Appellant:**

TJ

**Respondent:**

Comunidad de Madrid

**Subject matter of the main proceedings**

Public servant bound to the government by a fixed-term employment relationship – Claim seeking to have the fixed-term employment relationship made a permanent employment relationship

**Subject matter and legal basis of the request**

Article 267 TFEU – Request for a preliminary ruling on interpretation – Directive 1999/70/EC – Framework agreement on fixed-term work – Clause 5 – Successive fixed-term employment contracts or relationships – Judgment of the Court of Justice of 22 February 2024, *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid and Others* (C-59/22, C-110/22 and C-159/22, EU:C:2024:149) – Divergent interpretations by different Spanish courts – Appropriate penalties for the abusive use of successive fixed-term employment

<sup>i</sup> The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

contracts or relationships – Article 45 TFEU – Free movement of workers within the Union

### **Questions referred for a preliminary ruling**

1. First. **Is the case-law which, defending the principles of equality, merit, ability and non-discrimination in the free movement of workers, refuses to confer the status of permanent workers in the public sector on workers who have non-permanent contracts of indefinite duration contrary to Clause 5 of the Framework Agreement?**

2. Secondly. If the answer to the above question is in the affirmative: **May entitlement on the part of workers who have non-permanent contracts of indefinite duration to dissuasive compensation when their employment relationship is terminated be regarded as an adequate measure to prevent and, where appropriate, penalise abuses resulting from the use of successive temporary contracts in the public sector, in accordance with Clause 5 of the Framework Agreement?**

### **Provisions of European Union law relied on**

- Treaty on the Functioning of the European Union, Articles 20 and 45.
- Charter of Fundamental Rights of the European Union, Articles 20 and 21
- Framework agreement on fixed-term work, concluded on 18 March 1999 ('the Framework Agreement'), which is annexed to 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), Clauses 2, 3 and 5.
- Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

### **Provisions of national law relied on**

The Spanish legislation referred to is exactly the same as that appearing in the judgment of the Court of Justice of 22 February 2024, *Consejería de Presidencia, Justicia e Interior de la Comunidad de Madrid and Others* (C-59/22, C-110/22 and C-159/22, EU:C:2024:149; 'the judgment in C-59/22').

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

- 1 The appellant has been providing her services as a member of the contract staff of the Comunidad de Madrid (Autonomous Community of Madrid; 'the CAM') since 2 March 2016, in the category of technical specialist, carrying out duties involving caring for children in a state-funded educational establishment.
- 2 The parties have entered into the following contracts of employment:
  - (a) Fixed-term temporary contract, of 2 March 2016.
  - (b) Fixed-term temporary contract, of 28 April 2016.
  - (c) Fixed-term temporary contract, of 27 March 2017.
  - (d) Fixed-term temporary contract, of 26 April 2017.
  - (e) Fixed-term temporary contract, of 12 May 2017.
  - (f) Fixed-term temporary contract, of 8 September 2017.
- 3 In those circumstances, the worker brought a claim on 19 July 2021, seeking to have the employment relationship declared permanent or, alternatively, declared a non-permanent employment relationship of indefinite duration.
- 4 By a judgment of the Juzgado de lo Social n.º 13 de Madrid (Social Court No 13, Madrid, Spain) of 13 March 2023, the claim was upheld in part and the employment relationship was declared a non-permanent employment relationship of indefinite duration, because it had continued for more than three years without the employer having filled the post occupied by the worker.
- 5 By a judgment of 27 November 2023, in appeal no 228/2023, the Sala de lo Social del Tribunal Superior de Justicia de Madrid (Social Division of the High Court of Justice, Madrid, Spain) dismissed the appeal lodged by the worker and upheld the judgment of the Social Court.
- 6 The worker has brought a further appeal against that judgment, before the Sala de lo Social del Tribunal Supremo (Social Division of the Supreme Court, Spain), seeking to unify the case-law.

**The essential arguments of the parties in the main proceedings**

- 7 The worker is seeking to be recognised as a permanent worker, because the employment relationship has lasted for more than three years since it began on 2 March 2016, through various temporary contracts to cover vacant posts until they could be filled on a permanent basis. With regard to the relevance of the judgment in C-59/22 to giving a decision in the present case, the worker argues

that that judgment is unequivocal and that its content indicates that the employment relationship must be classified as permanent.

- 8 The CAM disputes that claim, maintaining that the employment relationship must be classified as a non-permanent employment relationship of indefinite duration, since the employer is a public sector entity whose staff members are only able to acquire permanent status when their recruitment has been formalised through the relevant selection procedure, in accordance with the principles of equality, merit and ability. With regard to the relevance of the judgment in C-59/22 to giving a decision in the present case, the CAM submits that that judgment indicates that classifying the employment relationship as a non-permanent employment relationship of indefinite duration, with the consequent payment of compensation amounting to twenty days' [salary] per year of service when the employment relationship is terminated on account of the post having been filled [on a permanent basis], is a sufficient and appropriate measure to comply with the requirements of Clause 5 of the Framework Agreement.

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

- 9 The application of the recent judgment in C-59/22 by the Spanish courts has given rise to numerous and disparate interpretations. In fact, the very court which requested the preliminary ruling [in that case] has given its final ruling in the dispute and has held that that judgment does not create an obligation to declare the employment relationship permanent, but rather that, on the basis of that judgment, classifying the employment relationship as a non-permanent employment relationship of indefinite duration may be regarded as appropriate and sufficient to comply with the requirements arising from Clause 5 of the Framework Agreement, in accordance with the legal rules attributed to that concept in the national case-law.
- 10 For the reasons set out below, the Supreme Court also has doubts regarding how the above-mentioned judgment should be applied. It is, therefore, necessary for the Court of Justice to clarify whether the case-law of the Supreme Court, which limits recognition of the status of permanent employee in the public sector to those who access public employment having passed a selection procedure, in accordance with the principles of equality, merit and ability, and which, conversely, classifies the employment relationship of a temporary worker who is recruited by a public employer unlawfully or by abusing fixed-term contracts as a non-permanent employment relationship of indefinite duration, is consistent with Clause 5 of the Framework Agreement.
- 11 To make the thread of the argument clearer, it is worth first setting out its main points, which we will then develop:
  - (1) Access to public employment on a permanent basis in Spain must comply with the principles of equality, merit and ability.

- (2) Free movement of workers includes the possibility of taking part in the selection procedures organised for accessing permanent employment in the public sector.
  - (3) The work done by the appellant is not among the posts excluded from free movement.
  - (4) The concept of a non-permanent employment relationship of indefinite duration is a response to the abuse of temporary employment in the public sector and seems to be supported, indirectly, by the case-law of the Court of Justice. Some judgments of the Court of Justice seem to have endorsed it, more or less implicitly.
  - (5) The case-law of the Supreme Court has placed the rights of staff having non-permanent contracts of indefinite duration on the same level as those of permanent employees (remuneration, career advancement, incentives, etc.), notwithstanding that the public sector employer may be required to invite applications for the post in a competitive public recruitment process.
  - (6) In addition to the rules relating to liability on the part of those who commit abuses in public sector recruitment, Spanish case-law has, where appropriate, been awarding, to individuals having non-permanent contracts of indefinite duration and who have been dismissed for failing to pass the selection tests held [to fill the post on a permanent basis], compensation equivalent to that of individuals dismissed on account of financial crisis.
  - (7) The dismissal of a worker having a non-permanent contract of indefinite duration for any reason other than that stated above is treated like that of a permanent employee.
  - (8) The dismissal of a worker having a non-permanent contract of indefinite duration on the basis that the end of a temporary term (which is non-existent) has been reached results in the dismissal being declared null and void (with the obligation to reinstate the worker).
  - (9) In recent years, various pieces of legislation have been passed regarding the stabilisation or consolidation of temporary employment, the objectives of which include regularising situations resulting from the abusive nature of the use of fixed-term contracts.
- 12 Consequently, the declaration in Spanish law that an individual is to be regarded as having a non-permanent contract of indefinite duration: a) protects that individual's right to continue working (even though he or she was only given the post on a temporary basis); b) requires the employer to invite applications for the post; c) establishes compensation equivalent to that for dismissal due to business problems in the event that the selection tests held are not passed; d) rules out the possibility of relying on an end date to terminate the contract; and e) extends all of

the rights of permanent employees to the individual having a non-permanent contract of indefinite duration.

- 13 In conclusion, i) both the right to non-discrimination and [the right] to free movement of any individuals wishing to try to access the public post held by an individual who should only have held it on a temporary basis are at stake and ii) there are numerous guarantees and safeguards to protect those individuals who have a non-permanent contract of indefinite duration, without granting them the post held on a permanent basis.
- 14 In order to give a definitive decision in the dispute, it is, therefore, considered necessary for the Court of Justice to clarify whether EU law precludes the concept of a non-permanent employment relationship of indefinite duration.
- 15 It must, moreover, be taken into account that the judgment of 3 June 2021, *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario* (C-726/19, EU:C:2021:439; ‘the judgment in IMIDRA’), appears to accept that the conversion of the employment relationship into a non-permanent employment relationship of indefinite duration may be a suitable measure for penalising the abusive use of fixed-term contracts where the employer is a public entity. Indeed, that judgment states that, ‘in that context, it must be observed that the Court has held that, to the extent that, in respect of staff employed in the public authorities under administrative law, there is no other equivalent and effective protective measure, which it is for the referring court to determine, the assimilation of that fixed-term staff with “workers having non-permanent contracts of indefinite duration” could constitute a measure capable of penalising abuse resulting from use of fixed-term employment contracts and eliminating the consequences of infringement of the provisions of the Framework Agreement’.

*Access to public employment on a permanent basis in Spain must comply with the principles of equality, merit and ability*

- 16 Where the worker’s employer is a private undertaking which does not form part of the public sector, the legal measures contained in Article 15 of the Estatuto de los Trabajadores (Workers’ Statute) and in Real Decreto 2720/1998 (Royal Decree 2720/1998) of 18 December 1998 satisfy the requirements of Clause 5 of the Framework Agreement, for the purposes of preventing abuses resulting from the use of successive fixed-term contracts. That is the case for the following reasons: a) from the moment of their formalisation, temporary contracts which are in any way non-compliant or unlawful are regarded as being of indefinite duration; b) the use of successive temporary contracts, which considered individually would be in compliance with the law, is limited to a period of twenty-four months in a thirty-month period; and c) the duration of the selection procedures to fill a post for which an interim worker has been recruited is limited to a maximum of three months.

- 17 Such rules show that the Spanish legal system places a limit on the maximum total duration of successive temporary contracts, as well as any possible renewals of those contracts in that period, providing for the conversion of the employment relationship into one of indefinite duration as a penalty for non-compliance with those rules. In such a case, the application of the rules of national law leads to an employment relationship arranged by means of the abuse of temporary recruitment being classified as one of indefinite duration for all relevant purposes. It is an effective measure for avoiding and, where appropriate, penalising the abusive use of successive fixed-term contracts.
- 18 Spanish law allows public entities to recruit contract staff in accordance with the ordinary provisions of employment law contained in the Workers' Statute. The doubts with regard to the application of the judgment in C-59/22 arise when analysing what the appropriate response to that same question has to be where the employer is a public sector entity, given that, unlike private undertakings, the recruitment of contract staff by public entities is subject to the obligation to comply with the principles of equality, merit and ability which govern access to public employment. That prevents the status of permanent worker in the public sector from being conferred on an individual who has not passed the selection procedures which must be carried out to fill such posts, in accordance with the above-stated principles, in order to safeguard the right of all citizens to access public employment under the same conditions.
- 19 The principles of equality, merit and ability are applicable to all means of accessing public employment, both to civil servants and to contract staff. In that regard, there is no discrepancy between the case-law of the Supreme Court and that of the Tribunal Constitucional (Constitutional Court, Spain). The Constitutional Court has itself expressly stated that Article 14 of the Constitución (Spanish Constitution) also guarantees citizens equal legal status with regard to accessing public employment in a non-civil servant role, thereby providing protection which is equally applicable to any rules or acts affecting contract staff, regardless of whether the staff concerned are civil servants or contract staff (ground 8, Constitutional Court judgment 236/2015, of 19 November 2015).
- 20 In that regard, as noted in paragraph 43 of the judgment of 20 June 2019, *Ustariz Aróstegui* (C-72/18, EU:C:2019:516), the Member States have discretion as regards the organisation of their own public administrations and may, 'without acting in a manner contrary to Directive 1999/70 or the Framework Agreement, lay down conditions for becoming career civil servants together with conditions of employment for those civil servants'. That implies accepting that the Member States enjoy a wide margin of discretion to regulate the requirements and conditions for access to public employment.
- 21 In that context and within that margin of discretion enjoyed by the Member States, in accordance with Spanish law, compliance with the principles of equality, merit and ability constitutes a requirement for access to the status of permanent contract

employee in the public sector and it is not possible to acquire that status without those principles being complied with.

*Free movement of workers includes participation in the selection procedures organised for accessing permanent employment in the public sector*

- 22 In addition to all of the above, Article 45 TFEU guarantees the right to the free movement of workers within the Union. Moreover, Article 20 of the Charter of Fundamental Rights of the European Union enshrines the right to equality before the law and Article 21 of the Charter protects the right to non-discrimination on the basis of nationality. All of those rights would be violated if citizens of other Member States were deprived of the possibility of accessing public employment under the same conditions as the nationals of the Member State in question.
- 23 It is true that Article 45(4) TFEU excludes employment in the public service from the right to free movement. However, the Court of Justice has defined the scope of that exception and has ruled that it does not include situations, such as that occurring in the present case, in which the post, despite falling within the scope of the public service, does not involve the exercise of public powers implying direct or indirect participation in the exercise of public authority associated with the general interests of the State.
- 24 It follows from the above that access to public employment must not only comply with the principles of equality, merit and ability guaranteed by the Spanish Constitution, but also with the free movement of workers in accordance with the rules of EU law. Accordingly, compliance with Spanish rules and also, where the post is not excluded from the free movement of workers, those of the European Union, requires that access to public employment on a permanent basis should only be possible if applications have previously been invited for the post in an open competitive process, so that EU citizens who wish to and who satisfy the necessary requirements may apply for it.

*The concept of a non-permanent employment relationship of indefinite duration is a response to the abuse of temporary employment in the public sector. It seems to be supported, indirectly, by the case-law of the Court of Justice*

- 25 The case-law of the Supreme Court has configured the concept of a non-permanent employment relationship of indefinite duration as a solution to the problems arising in cases in which a public entity has recruited workers by means of fixed-term contracts which prove to be unlawful, on account of being contrary to the rules governing temporary recruitment, or which are abusive, on account of the use of successive temporary contracts, given the legal impossibility of conferring on that worker the status of permanent contract staff.
- 26 The consequence of the above is that non-compliant fixed-term contracts are converted into non-permanent contracts of indefinite duration from their start date. That prevents the fixed-term contract from being terminated and has the legal



effect of keeping the contractual bond in place until the post is filled on a permanent basis. At that point (when the post is filled), the non-permanent employment relationship of indefinite duration will be terminated and the worker will be paid compensation amounting to twenty days' salary per year of service – to which, however, he or she would not be entitled if the fixed-term contracts were lawful and not abusive.

- 27 It should be added to the above that, for the duration of the employment relationship, the case-law confers on workers having non-permanent contracts of indefinite duration the same rights as permanent workers, in every area of the employment relationship (remuneration, career advancement, incentives, etc.). Moreover, if, after his or her status as a worker having a non-permanent contract of indefinite duration has been declared, the worker is dismissed with the employer relying on the fact that the end of a non-existent temporary term has been reached, the dismissal will be regarded as null and void and the employer will be obliged to reinstate the worker. Workers having non-permanent contracts of indefinite duration are also entitled to the same compensation as permanent workers in the event of unfair dismissal, if the termination of the employment relationship is unlawful and is not due to the post held by the worker in question being filled on a permanent basis.
- 28 According to the case-law of the Supreme Court, that transformation of the employment relationship into a non-permanent employment relationship of indefinite duration can occur in two different ways. The first is where the fixed-term contract is unlawful and inherently so, because, from the start, it has failed to comply with the rules governing the form of contract used. The second and more usual way, as occurs in the present dispute, is where the fixed-term contract is initially valid, because its purpose is to cover a vacancy until it is filled on a permanent basis, but an abuse of the use of temporary recruitment occurs because that situation continues for an unusually long period of time.
- 29 In the judgment in IMIDRA, the Court of Justice ruled that national legislation which permits the renewal of fixed-term contracts in order temporarily to fill a post within the administration pending the outcome of recruitment procedures for a permanent staff member is not contrary to the Framework Agreement (paragraph 57). It then observed that, in order for Clause 5(1)(a) of the Framework Agreement to be complied with, it must be specifically verified that the renewal of successive fixed-term employment contracts or relationships is intended to cover temporary needs (paragraph 59). That makes it necessary to consider in each case all the circumstances at issue, taking account, in particular, of the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term employment contracts or relationships, even those ostensibly concluded to meet a need for replacement staff, are not misused by employers (paragraph 60).
- 30 The judgment of the Supreme Court of 28 June 2021, in appeal no 3263/2019, immediately adopted the criteria set out in the judgment in IMIDRA. It

established a period of three years as the maximum amount of time available to public authorities to organise and conclude staff selection procedures. Where it continues beyond that period of three years, the employment relationship of a worker recruited lawfully on a provisional basis to cover that post then becomes a non-permanent employment relationship of indefinite duration, because exceeding that period of time implies that an abuse of the use of temporary recruitment has occurred.

- 31 It is once the employment relationship has become a non-permanent employment relationship of indefinite duration that the right arises to receive compensation amounting to twenty days' salary per year of service, at the time of its termination on account of the post being filled on a permanent basis. Consequently, the compensation of twenty days' salary per year of service is only received when the employment relationship has been transformed into a non-permanent employment relationship of indefinite duration on account of an unlawful use of temporary recruitment, or where an abuse in relation to the duration of the temporary recruitment has occurred because it has continued for more than three years.
- 32 As has already been mentioned, the judgment in *IMIDRA* appears to accept that the conversion of the employment relationship into a non-permanent employment relationship of indefinite duration may be a suitable measure for penalising the abusive use of fixed-term contracts.

*Legal status, basis and purpose of the compensation for the termination of a non-permanent employment relationship of indefinite duration*

- 33 In the first two points of its ruling, the judgment in *C-59/22* declares: 1) that a worker having a non-permanent contract of indefinite duration must be regarded as a fixed-term worker, within the meaning of the Framework Agreement, and, therefore, as falling within the scope of that agreement; 2) that the use of successive fixed-term contracts as referred to in the Framework Agreement encompasses workers having non-permanent contracts of indefinite duration who are retained in the post they occupy until the public authority in question organises a selection procedure to fill the post definitively, the workers' fixed-term contract with that authority being understood to be automatically extended in that case.
- 34 Neither of those first two conclusions clashes with the case-law of the Supreme Court defining the legal rules applicable to non-permanent contracts of indefinite duration. Both of them are perfectly compatible with the Spanish legal system, allowing them to be applied in conformity with EU law without requiring a *contra legem* interpretation of national law in order to do so.
- 35 The doubts regarding the scope of the judgment in *C-59/22* which have arisen for Spanish courts and which have already given rise to the existence of numerous conflicting judgments occur in relation to the ruling that Clause 5 of the Framework Agreement precludes national legislation which provides for the payment of limited compensation, equal to 20 days' salary for each year worked,

up to a limit of one year's pay, to any worker whose employer has abused non-permanent contracts of indefinite duration successively extended, 'where the payment of that end-of-contract compensation is independent of any consideration relating to the lawful or abusive nature of the use of those contracts'.

- 36 As has already been said, in Spanish law, conferral of the status of a worker having a non-permanent contract of indefinite duration, with the consequent entitlement to compensation amounting to twenty days' salary for each year of service, is a response to the abuse of temporary contracts in the public sector. It is a consequence of the unlawful and abusive manner in which fixed-term contracts have been used by public authorities, resulting, specifically, from the unlawful or abusive use of temporary recruitment.
- 37 It is possible for a fixed-term contract entered into with a public entity to be lawful and in compliance with the law, because it does not contain anything giving rise to non-compliance and the process for filling the post does not continue beyond the maximum period of three years. In that case, the employment relationship is a fixed-term relationship and is not transformed into a non-permanent employment relationship of indefinite duration. The fixed-term contract is terminated when the agreed period of time ends, without giving rise to the right to compensation amounting to twenty days' salary per year of service.
- 38 In that regard, in its judgment of 5 June 2018, *Montero Mateos* (C-677/16, EU:C:2018:393), the Court of Justice confirmed that Article 49(1)(c) of the Workers' Statute is consistent with the Framework Agreement when it declared that 'Clause 4(1) of the Framework Agreement must be interpreted as not precluding national legislation which does not provide for any compensation to be paid to workers employed under a fixed-term contract entered into in order to cover a post temporarily while the selection or promotion procedure to fill the post permanently takes place, such as the temporary replacement contract at issue in the main proceedings, on expiry of the term for which that contract was concluded, whereas compensation is payable to permanent workers where their employment contract is terminated on objective grounds.'
- 39 Therefore, the termination of a fixed-term contract which was entered into lawfully does not involve payment of the compensation amounting to twenty days' salary per year of service. That compensation is only possible where the fixed-term contract is unlawful or abusive and, therefore, such compensation is never independent of any consideration regarding the lawful or abusive nature of the contract. On the contrary, it is only appropriate to pay that compensation if the fixed-term contract is unlawful or has been used abusively, on account of having continued beyond the period of three years.
- 40 It should now be recalled that the Court of Justice has ruled that the application of Clause 5 of the Framework Agreement does not impose a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration. The obligation arising from that

clause for the Member States is to have another measure that is effective to prevent and, where relevant, penalise the abuse of successive fixed-term employment contracts (judgment of 19 March 2020, *Sánchez Ruiz and Others*, C-103/18 and C-429/18, EU:C:2020:219, paragraph 97).

- 41 Consequently, Clause 5 does not produce the legal consequence that non-compliant temporary recruitment of contract staff by public authorities and entities entails recognition of the employment relationship as permanent, where the national legislation provides for adequate measures to penalise the abusive use of successive fixed-term contracts.
- 42 It is, then, a question of examining whether Spanish law, as it has been interpreted in the case-law, offers solutions which make it possible to reconcile compliance with the obligations arising from Clause 5 of the Framework Agreement with the rules of national law which prevent the status of permanent employee in the public sector being conferred on workers who have not passed selection procedures organised for that purpose.
- 43 Here is where the doubts already set out with regard to the correct interpretation of the judgment in C-59/22 arise, in so far as that judgment appears to reject the notion that the classification of the employment relationship as a non-permanent employment relationship of indefinite duration, with the inherent legal consequences which the case-law attributes to that status, is an appropriate measure for complying with Clause 5 of the Framework Agreement.
- 44 The Supreme Court does not share the opinion of the referring court in that case, referred to in paragraph 94 of that judgment, that Spanish law does not lay down, for the category of non-permanent contracts of indefinite duration, any measure intended to prevent the abuse of those contracts.
- 45 As has been said, the classification of the employment relationship as a non-permanent employment relationship of indefinite duration is the legal consequence arising from the unlawful or abusive use of fixed-term contracts. It constitutes a guarantee for workers and a penalty for the public sector employer for such unlawful use and, therefore, it may be regarded as an equivalent and adequate legal measure for preventing and penalising the abusive use of temporary contracts by public authorities.
- 46 In that context, if the classification of the employment relationship as a non-permanent employment relationship of indefinite duration is a consequence of the unlawful or abusive use of temporary recruitment and entails the payment of compensation amounting to twenty days' salary per year of service, it may well be a legal measure equivalent to those laid down in Clause 5 of the Framework Agreement.

*Possible application of compensation for unfair dismissal*

- 47 Should the Court of Justice consider that compensation amounting to twenty days' salary per year of service, with a limit of twelve months' pay, is not an adequate measure for preventing and, where appropriate, in accordance with Clause 5 of the Framework Agreement, penalising abuses resulting from the use of successive temporary contracts, the secondary question arises of whether requiring payment of the maximum amount of compensation required by Spanish law at any given time for the unfair dismissal of permanent workers (currently, thirty days' salary per year of service, with a limit of twenty-four months' pay), which would place the legal situation of workers having non-permanent contracts of indefinite duration entirely on the same level as that of permanent workers in the public sector, could then be an adequate and dissuasive measure for those purposes.

*Rules regarding the stabilisation and consolidation of public employment. The organisation of selection procedures for accessing public employment*

- 48 On this point, too, the judgment in C-59/22 contains certain statements which raise doubts about its scope, since it states that Clause 5 of the Framework Agreement must be interpreted as precluding national legislation which provides for the organisation of procedures for the consolidation of temporary employment, by means of the publication of vacancy notices to fill the posts occupied by temporary workers, including non-permanent workers having contracts of indefinite duration, where that organisation is independent of any consideration relating to the abusive nature of the use of those temporary contracts.
- 49 As paragraph 117 of that judgment recalls, the Court of Justice has made clear that although the organisation of selection procedures provides workers who have been abusively employed the opportunity of attempting to gain access to stable employment, such a circumstance cannot relieve the Member States of their need to comply with the obligation to provide adequate measures to duly punish the abusive use of successive fixed-term employment contracts and relationships, since, as noted in that same paragraph, such procedures, the outcome of which is moreover uncertain, are in general also accessible to candidates who have not been victims of such abuse.
- 50 That led the Court to state, in paragraph 118, that 'accordingly, since such procedures are organised irrespective of any consideration as to the abusive use of fixed-term contracts, it does not appear to be an appropriate means of duly penalising the improper use of such relationships and of nullifying the consequences of the breach of EU law. It therefore does not appear to allow the purpose of Clause 5 of the Framework Agreement to be fulfilled'.
- 51 However, in the opinion of the referring court, the truth is that specific legislative measures have been enacted in Spanish law which are expressly aimed at complying with Clause 5 of the Framework Agreement from that perspective – measures which are precisely intended to ensure that the organisation of such

procedures is not in any way irrespective of any consideration as to the abusive use of fixed-term contracts.

- 52 Ley 20/2021, de 28 de diciembre, de medidas urgentes para la reducción de la temporalidad en el empleo público (Law 20/2021 of 28 December 2021 on urgent measures to reduce temporary employment in the public sector), explains that the level of temporary employment in the public sector in Spain has reached almost thirty per cent; it admits that successive attempts to regulate the matter have not succeeded in reducing that percentage and it acknowledges that selection procedures are not organised regularly enough. It also expressly mentions Clause 5 of the Framework Agreement and the case-law of the Court of Justice, accepting that that case-law creates the obligation to establish effective measures to dissuade and, where appropriate, clearly penalise the abuse of temporary employment, by adopting effective measures to prevent and penalise abuse and fraud in the use of temporary contracts.
- 53 In addition to the above, that law introduces a new provision into the Estatuto Básico del Empleado Público (Law on the basic regulations relating to public servants) which establishes a system of liability in the event of non-compliance with the measures introduced and listed previously. The content of that legislative reform is thus strengthened, such that non-compliant actions will give rise to the relevant liability being established, in accordance with the rules currently applicable to each public authority, constituting a proportionate, effective and dissuasive mechanism for complying with the duty to avoid abuses of temporary employment among the staff of the public authorities, in compliance with Clause 5 of the Framework Agreement.
- 54 The above-mentioned law provides for a process of stabilisation in relation to public employment, aimed at filling posts which are occupied on an interim basis, for which the selection system is one of competition based on qualifications and tests, forty per cent of the total mark being awarded to the selection stage based on qualifications, where experience in the body, scale, category or equivalent classification will mainly be taken into account, with it being understood that the selection stage based on tests may not be eliminatory, in the context of the collective bargaining.
- 55 It also regulates exceptional selection procedures, in the form of competitions based on qualifications for posts that meet the requirements laid down in Article 2(1) and were continuously occupied on a fixed-term basis before 1 January 2016. Those selection procedures, which will be organised only once, may be negotiated in each of the departments of the State administration, the Autonomous Communities and the local authorities. In order to avoid delays in those new procedures, vacancies relating to those stabilisation processes must be approved and published in the relevant official gazettes before 1 June 2022 and the notices relating to the respective selection procedures before 31 December 2022. The procedures must be finalised before 31 December 2024.

- 56 In the opinion of the referring court, this collection of legal measures shows that the organisation of selection procedures aimed, inter alia, at public servants who have been recruited abusively by means of fixed-term contracts is not independent of any consideration relating to the abusive nature of their recruitment, but rather, quite the contrary, it is inextricably linked to that situation and seeks to put an end to it by bringing all such public employment into compliance.
- 57 It is true that those procedures will be open to candidates who have not been victims of such abuse, but it is no less true that the formula provided for by the legislature, in order to secure the post, places decisive weight on prior experience and the time those workers have spent carrying out those tasks during their periods of temporary employment. That fact adequately makes up for the situation they have endured during those periods, by providing them, to a great extent and on very advantageous terms, with definitive access to the post.
- 58 Moreover, it cannot be forgotten that those workers accessed the post without being required to pass any kind of selection procedure for access to permanent public employment in accordance with the principles of equality, merit and ability. Nor did they have to compete with the majority of Spanish citizens and those of other Member States, who were deprived of the possibility of accessing a public post that was given to individuals who benefited from that non-compliant action on the part of the employer.
- 59 It should also be borne in mind that the above-mentioned legislation also provides for public authorities to be held liable. The legislation makes it possible, including by judicial means, to enforce timely compliance with those legal obligations, to require the employer to invite applications for the post and also to establish other forms of liability, including liability to contribute funds.
- 60 In short, the legal rules established for such selection procedures comply with Clause 5 of the Framework Agreement, in so far as the organisation of the selection processes has taken account of the abusive nature of the use of fixed-term contracts and aims to respond to the situation in which the abused workers find themselves, adequately weighing the redress to which they are entitled against the legitimate aspirations of other citizens to access public employment in accordance with the principles of equality, merit and ability and in compliance with freedom of movement.
- 61 One final consideration must be added to all of the above. The consequence of classifying as permanent all contract staff having a non-permanent contract of indefinite duration would be to relieve the relevant authority of the obligation to organise such selection procedures and deny other citizens the right to take part in them, as the consolidation of the posts occupied by those staff having a non-permanent contract of indefinite duration would make it unnecessary to invite applications for the posts, giving rise to an undeniable detriment to the potential and legitimate candidates for those posts.