Case C-133/21

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:

3 March 2021

Referring court:

Efeteio Athinon (Greece)

Date of the decision to refer:

9 March 2020

Appellants:

VP

CX

RG

TR

and Others

Respondent:

Elliniko Dimosio

Subject matter of the main proceedings

Application for the payment of differences in wages that result from workers with fixed-term contracts being subject to different treatment for wage purposes on the basis solely of the criterion of differentiation that their contracts are classified by their employer or by law as fixed-term contracts for work.

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

Interpretation of clause 4 of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Council Directive 1999/70/EC of 28 June 1999), Article 267 TFEU

Questions referred

Is national legislation, such as that at issue, which imposes different treatment for wage purposes on workers with fixed-term contracts within the meaning of clause 1 of Directive 1999/70/EC as compared to the comparable permanent worker, on the basis of the sole criterion of differentiation that their contracts are classified by their employer or by law as fixed-term contracts for work, compatible with clause 4 of Directive 1999/70/EC?

In particular, is national legislation under which different treatment of workers for wage purposes is justified on the ground that they provided their work under fixed-term contracts in the knowledge that they were covering fixed and permanent needs of the employer compatible with clause 4 of Directive 1999/70/EC?

Relevant provisions of EU law

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

Relevant provisions of national law

Proedriko diatagma 164/2004, Rythmiseis gia tous ergazomenous me symvaseis orismenou chronou sto dimosio tomea (Presidential Decree 164/2004 regulating workers with fixed-term contracts in the public sector)

Nomos 3205/2003, Misthologikes rythmiseis leitourgon kai ypallilon tou Dimosiou, [Nomikon Prosopon Dimosiou Dikaiou (N.P.D.D.)] kai [Organismon Topikis Autodioikisis (O.T.A.)], monimon stelechon ton Enoplon Dynameon kai antistoichon tis Ellinikis Astynomias, tou Pyrosvestikou kai Limenikou Somatos kai alles synafeis diataxeis (Law 3205/2003 regulating the pay of servants and employees of general government, public-law legal entities and local authorities of permanent members of the Armed Forces, and of those of the Hellenic Police, the Fire Brigade and the Port Police, and related provisions)

Nomos 3320/2005, Rythmiseis thematon gia to prosopiko tou Dimosiou kai ton nomikon prosopon tou evryterou dimosiou tomea kai gia tous O.T.A. (Law 3320/2005 regulating staff of the public sector and of legal entities in the broader public sector, and local authorities)

Brief summary of the facts and procedure

1 The appellants were recruited by the Elliniko Dimosio (the Greek State) on various dates between 2001 and 2008. Between then and when the application was lodged in 2010 (see paragraph 3 below), they worked continuously and without interruption as primary and secondary school cleaners, initially under successive employment contracts or relationships classified by the respondent as 'contracts for work' and subsequently, from December 2006 and January 2007, under private-law employment contracts of indefinite duration.

2 In response to various requests submitted by them, it was found, by an act adopted in 2005 by the Kentriko Ypiresiako Symvoulio Dioikitikou Prosopikou (Central Service Council for Administrative Staff) of the Ypourgeio Ethnikis Paideias kai Thriskevmaton (Ministry of Education and Religious Affairs, 'the Ministry') and subsequently by an act adopted by the Anotato Symvoulio Epilogis Prosopikou (ASEP) (Supreme Council for Civil Personnel Selection), that they fulfilled the requirements for the application to them of Article 11 of Presidential Decree 164/2004. Following those decisions, they were allocated to permanent posts with the respondent by decisions adopted by the Ministry in 2006 and 2007.

3 On the basis of those facts, the appellants lodged an application with the Monomeles Protodikeio Athinon (Court of First Instance (single judge), Athens) on 10 June 2010, by which they requested that the court order the respondent to pay them sums of money corresponding to the difference between the wages they received between 2001 and 2008 and the wages provided for by law for comparable workers with the same skills employed by the respondent, including for the period in which they had worked under contracts classified as contracts for work.

4 By its final judgment No 2198/2011, the Court of First Instance (single judge), Athens, dismissed the application as unfounded in law. Following an appeal against the judgment at first instance which the appellants lodged with the Efeteio Athinon (Court of Appeal, Athens), the referring court delivered judgment No 1189/2016 allowing the appeal, upholding the action in part and ordering the respondent to pay the appellants the sums requested in the application together with statutory interest.

5 Both the Greek State and the appellants appealed to the Areios Pagos (Court of Cassation, Greece), further to which the Court of Cassation delivered judgment No 570/2018, by which it set aside judgment No 1189/2016 of the Court of Appeal, Athens, in so far as it awarded the aforesaid wage differences for the period of time before the appellants were allocated to established posts, and referred the case back to the Court of Appeal, Athens, for further adjudication.

Principal arguments of the parties to the main proceedings

6 The appellants argue that they were hired as cleaners and worked as cleaners in the respondent's schools on the basis of contracts which the respondent classified as contracts for work. They contend that the fact that their work was a form of employment, its duration, and the right of management of them possessed by their employer (the Greek State), whose representatives stipulated where, when and how they were to work, follow from their employment conditions.

7 Taking the view that they have been subject to discrimination in terms of the wages they received, as they were not paid the wage provided for by Law 3205/2003 for government workers with a private-law employment contract of indefinite duration, the appellants contend that, as that discrimination is not justified on any objective ground, the question arises as to the application of clause 4 of the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP ('the Framework Agreement') appended to Directive 1999/70, which is directly applicable.

Brief summary of the grounds for the reference

8 By its aforesaid judgment No 570/2018, the Court of Cassation held that such wage differences cannot be based on Article 1 of Law 3320/2005. Furthermore, with regard to the question of the compatibility of Article 1(4)(a) of Law 3320/2005 with clause 4 of the Framework Agreement, it held that that provision does not conflict with the provisions of Directive 1999/70, and in particular with clause 4(1) of the Framework Agreement, which states that, in respect of employment contracts, fixed-term workers are not to be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.

9 By its aforesaid judgment, the Court of Cassation further held that, in this particular case, the requirement of that clause, that there must be comparability between the employment conditions at issue – which is determined on the basis of all the factors, such as the nature of the work, training, and working conditions – had not been fulfilled. Consequently, the appellants cannot be regarded as being in a comparable situation to workers with an employment contract of indefinite duration and, therefore, clause 4 does not apply, given that the different treatment concerns different situations. It does not suffice that the appellants' pay did not correspond to that received by colleagues on the respondent's permanent staff, even though they had the same skills and worked on the same conditions; a particular category of workers with employment contracts of indefinite duration and the activities and duties of each of the two categories must be specifically mentioned in order for the above comparability requirement to be fulfilled.

10 Furthermore, the Court of Cassation notes that the legislative provision concerning the drawing up of fixed-term contracts for work in respect of the

cleaning of schools, inasmuch as it dates back to the time after the period for harmonising domestic legislation with Directive 1999/70 had expired (10 July 2002), is not arbitrary, but is justified by the particular nature of the duties for the performance of which the contracts were concluded and by the inherent characteristics of those contracts, for the purposes of clause 5(1)(a), as those services are a necessary activity to cover fixed and permanent needs in connection with education (cleaning school buildings), an activity which does not require the Greek State to hire permanent staff under employment contracts of indefinite duration but can be achieved equally well by drawing up contracts for work, whether they are concluded with legal entities (e.g. cleaning companies) or with private individuals. That is because, even where it happens repeatedly and/or permanently, the drawing up of successive renewable fixed-term employment contracts or contracts for work, provided it is justified by objective reasons within the meaning of [clause] (5)(1)(a) of the Framework Agreement, as in this case, does not fall within the protective scope of the directive, which seeks to prevent abuse arising from the use of successive fixed-term employment contracts or relationships within the meaning of [clause] [1][(b)] of the Framework Agreement.

11 According to the Court of Cassation, that is not altered by the fact that in the present instance the appellants were transferred to established posts under a private-law employment relationship of indefinite duration, in application of the transitional provision of Article 11 of Presidential Decree 164/2004, an enactment which transposed the directive. This is because Article 11, in referring for the purposes of its application solely to Article 5(1) of the Presidential Decree, which concerns the prohibition of the drawing up of successive fixed-term employment contracts, and not also to Article 5(2), which permits by way of exception the drawing up of successive fixed-term employment contracts where that is justified by objective reasons, as provided for by clause 5(1)(a) of the Framework Agreement, which, moreover, does not set any limitations in time, is more favourable for workers than the directive at that point.

12 The referring court notes that, in the present instance, the appellants have founded their application to be awarded payment of the difference in wages on the assertion that, on the basis of the correct classification in law of the legal relationship, they were, in fact, employed under conditions of employment rather than of work. Their request for higher wages follows directly from Law 3205/2003, the provisions of which were legally extended to workers with a private-law employment contract by joint ministerial decision.

13 Furthermore, according to clause 4 of the Framework Agreement, 'fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract'. That clause has already been transposed into national law, including by Article 4 of Presidential Decree 164/2004 in respect of the public sector.

14 In contrast to clause 5, which concerns prevention of the abuse of successive fixed-term contracts, clause 4 prohibiting discrimination is clear and precise and applies directly (judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 59 et seq.). In fact, the Court has consistently emphasised that clause 4 is fundamental and must be interpreted broadly, not narrowly. 'Workers' within the meaning of the directive is to be understood as including persons with a fixed-term employment contract or relationship, irrespective of whether the legislature classifies it as an employment contract or relationship or as a contract or relationship for work (judgment of 13 September 2007, *Del Cerro Alonso*, C-307/05, EU:C:2007:509, paragraph 29). Moreover, according to the case-law of the Court, the employment conditions referred to in clause 4 of the Framework Agreement concern unequal treatment in terms of the pay (remuneration) of workers with fixed-term employment contracts.

15 Consequently, any discrimination against fixed-term workers in terms of their remuneration, compared to permanent workers with identical or similar duties, is in principle contrary to clause 4 of the Framework Agreement, as already transposed into Greek law. However, in order to find whether clause 4 applies in this particular instance and to investigate whether or not it was infringed, it does not suffice that the appellants' pay did not correspond to that received by their colleagues on the respondent's permanent staff, even though they had the same skills and worked on the same conditions; it is necessary to consider specifically the particular category of workers with employment contracts of indefinite duration and the activities and duties of each of the two categories of workers.

16 In the present instance, it has been proven that the appellants worked under conditions of employment, that is to say, they were subject to the right of management of them possessed by their employer (the Greek State), whose representatives stipulated where, when and how they were to work. Consequently, the appellants in fact worked under employment contracts rather than contracts for work and, accordingly, they qualify as workers within the meaning of clause 1 of the Framework Agreement.

17 Therefore, the discrimination against them in terms of the wages that they received, as they were not paid the wage provided for by law for government workers with a private-law employment contract of indefinite duration, raises an issue as to the application of clause 4 of the Framework Agreement, as that discrimination is not justified on any objective ground.

18 On the question as to the existence of an objective ground, the Court of Cassation has held by recent judgments that different treatment of workers with fixed-term contracts until they are allocated a permanent established post in application of Article 11 of Presidential Decree 164/2004 and Article 1 of Law 3320/2005 is justified because they 'knowingly provided work to cover fixed needs'; however, it did not refer directly to clause 4 of the Framework Agreement. Consequently, it is reasonable to question whether this is a case of an objective ground which

justifies the prohibition of discrimination laid down in clause 4 of the Framework Agreement not being applicable.