

A NEW JUDGMENT FROM THE COURT OF JUSTICE OF THE EUROPEAN UNION ON TEMPORARY HIRING IN SPANISH PUBLIC EMPLOYMENT, BASED ON ABUSE OF LAW

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I. INTRODUCTION

The Court of Justice of the European Union (ECJ) has made public the long-awaited judgment on accumulated cases *Sánchez Ruiz* and *Fernández Álvarez* (judgment March 19, 2020, C-103/18 and C-429/18). The issue addressed in the judgment refers to abuse of temporary hiring of temporary public servants in Spain.

This is a particularly important pronouncement, because the ECJ's saga of judgments on temporary hiring in the public sector in Spain is long, and at times, contradictory. The key aspects this judgment brings may shed light on future judgments by Spanish courts and accelerate the reform process for Spanish law. The healthcare emergency and the state of alarm caused by COVID-19 in Spain and other European countries, along with this judgment, which resolves cases of healthcare-service employees, are elements that may contribute to regulating abusive hiring situations for a high percentage of healthcare staff in Spain, and to reassess the work carried out by this staff in Europe and the world.

There are several litigation issues, but the newest and with the greatest scope addresses interpretation of clause 5 of the Framework Agreement on fixed-term employment. In short, the Court of Justice generously interprets this clause. While the clause requires the existence of successive temporary contracts or fixed-duration employment relationships to consider the existence of possible abuse in temporary hiring, the judgment rules that two appointments of a temporary civil servant may lead to classification of this relationship as temporary. This is achieved thanks to the Framework Agreement's practical effectiveness.

The "a contrario" and complementary reading of the guidance that this judgment provides to national judges, and that is carried out in this study,

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aims to contribute to the resolution of an endemic problem of temporary hiring in the Spanish public sector.

Let's start with the main keys to the judgment more carefully.

II. THE KEYS TO THE JUDGMENT

The judgment's origins lie in preliminary rulings by the Supreme Courts of Justice (Autonomous Community or regional in scope) of Spain. In them, the Spanish courts request that the Court of Justice of the European Union clarify how to interpret certain provisions in the aforementioned Framework Agreement.

The keys to the judgment are:

1. The extensive interpretation of clause 5 of the Framework Agreement. Letter a) of Clause 5 supposes that the existence of "objective reasons justifying the renewal of said contracts or labour relations" may act as a basis for one of the measures to prevent abuse in these cases.

The ECJ verifies the state of the Spanish code¹ and determines that, indeed, when the Administration hired the appealing parties, it did so by following the objective reasons set forth in "ad hoc" Spanish law.²

However, despite provisions in this law, in the case backlog of the ECJ Judgment, all plaintiffs held replacement, sporadic or temporary positions with temporary contracts for periods from 12 to 17 years, carrying out duties identical to those of permanent statutory staff. Spanish law correctly identifies the objective grounds to appeal the temporary hiring, but partially suspends, since the period during which these contracts may remain in force is not duly limited, thus meeting permanent and stable needs. This is the doctrine set forth in the extensive operative part of para. 2 of the judgment.

2. The Spanish Public Administration as an employer has failed to comply with the legal deadline established to definitively fill a position provisionally occupied by a public employee with a fixed-duration service relationship. The ECJ observes that, in practice, the Spanish Public Administration has not complied with deadlines in art. 70.1 of the Basic Public Employee Statute (EBEP, in Spanish) to organise public procurement offers.³ The ECJ is very firm when it adds that, under these circumstances,

1. To this end, art. 2.3 of the EBEP, in regulating its scope of application, sets forth that statutory staff of Health Services are governed by specific law handed down by the State and autonomous communities. However, some parts of the General Statute shall be applicable to the aforementioned staff. The Special law regulating the legal system for this staff is Law 55/2003 of December 16, from the Framework Statute on statutory healthcare staff, "BOE (Official State Gazette)" no. 301 of 17/12/2003. <https://www.boe.es/buscar/act.php?id=BOE-A-2003-23101>. Its article 9 targets "temporary statutory staff," which may be used by healthcare services "For reasons of necessity, urgency or to implement temporary, circumstantial or extraordinary programmes..."

2. The aforementioned Law 55/2003 of December 16, from the Framework Statute on statutory healthcare staff.

3. Basic Public Employee Statute Law (B.O.E. 2015, 261) (approving the revised text of the Basic Public Employee Statute Law).

Spanish regulations are insufficient to prevent and duly sanction abusive use of these service relationships, and, finally, to eliminate the consequences of the *infraction* against Union Law, since, as indicated by reference courts, its application would have no negative effect for this employer (para. 97).⁴

3. The ECJ declares opposition to national regulation and case law with clause 5 of the Framework Agreement, precisely because, in addition to the existence of objective reasons (Law 55/2003 above, art. 9.2), another proportionate, effective and dissuasive measure must be added to prevent renewing appointments of temporary staff to meet permanent and stable needs.⁵ As such, the existence of these objective reasons are not contrary to EU Law, but they do oppose the possible non-existence (which national judges must verify) of added measures to avoid corrupting this temporary hiring.⁶

In this judgment dated March 19, 2020, the operative part contains five points and bears on the analysis of *three* legal measures in the Spanish code (not just administrative-contentious) which, at the ECJ's criteria, are not sufficiently effective nor dissuasive to fight abuse in public temporary hiring on the following grounds:

Consolidation of temporary employment set forth in the *Fifth transitional provision* EBEP. The ECJ dismisses the effectiveness of this measure because it is set forth in optional terms for public administrations and is not an obligation, which does occur in the text of art. 70 EBEP. In addition to the aforementioned, application to these vacancies is permeable, such that not only individuals who have suffered abuse in temporary hiring are referenced by the ECJ, but rather all those who meet requirements.⁷

4. Emphasis added.

5. Operative part 2 of the judgement declares that “Clause 5 of the Directive should be interpreted in the sense that it opposes national regulations and case law, in light of which the successive renewal of relations for a service of determined duration is considered justified by “objective reasons,” pursuant to paragraph 1, letter a) of said clause, by the mere motive that such a renewal falls under the grounds for appointment set forth in that regulation; meaning, reasons of necessity, urgency or to implement temporary, circumstantial or extraordinary programmes, to the extent that said national regulations and case law do not prevent the employer in question from meeting, in practise, and through these renewals, permanent and stable staff needs.” Joined Cases C-103/18 & C-429/18, Sánchez Ruiz, Fernández Álvarez, ECLI:EU:C:2020:219 (Mar. 19, 2020).

6. Regarding other types of measures that must be adopted by States pursuant to provisions in this clause 5, see Case C-212/04, Adeneler & Others v. Ellinikos Organismos Galaktos, ECLI:EU:C:2006:443, ¶ 94 (July 4, 2006); Case C-53/04, Cristiano Marrosu & Gianluca Sardino v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate, ECLI:EU:C:2006:517, ¶ 51 (Sept. 7, 2006); Case C-180/04, Andrea Vassallo v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate, ECLI:EU:C:2006:518, ¶ 36 (Sept. 7, 2006); Case C-362/13, Maurizio Fiamingo & Others v. Rete Ferroviaria Italiana SpA, ECLI:EU:C:2014:2044, ¶ 62 (July 3, 2014) (see also C-363/13 and C-407/13); Case C-86/14, Marta León Medialdea v. Ayuntamiento de Huétor Vega, ECLI:EU:C:2014:2447, ¶ 44 (Dec. 11 2014).

7. Professor Eduardo Rojo regrets that nothing is mentioned in the judgment regarding the merits that could be assessed to “prioritise” the presentation of civil servants who suffered abuse in hiring, and who could account for a high percentage in the final numbers. <http://www.eduardorjotorrecilla.es/2020/03/>.

Compensation for unfair dismissal, set forth in the Spanish legal-labor code, is also insufficient to make the Directive effectively useful, as it does not specify that this compensation's purpose is to sanction the abuse.

The transformation of this temporary relationship into a permanent, indefinite contract, a status created by Spanish case law, would face the same fate as previous measures. Indeed, at a certain point it would be possible to amortise the position held by the affected employee or dismiss this employee if this vacancy were awarded to a member of permanent statutory staff. In light thereof, we believe the reason making this measure ineffective is especially important. This argument, when read "a contrario," can provide the definitive outline of the sort of measures that the national judge must find.⁸

In short, on one hand, national courts have no obligation to not apply a national regulation that is not compliant with European Union law. On the other hand, national judges must look into whether there are measures in Spanish legislation to prevent and sanction abuse in temporary hiring, since the measures consulted by courts referring preliminary rulings are inadequate.

Due to all the aforementioned, the importance of this 2020 judgment is clear. The task of revising the Spanish code under this guidance, as is to be expected, is delegated to internal legal bodies.⁹ However, the judgment also bears aspects that can be extended to other Member States that are worthy of analysis. As it has been stated before, the judgment declares that clause 5 of the Framework Agreement does not permit national courts to cease applying a national provision if understood to be contrary to said clause. Pursuant to

8. In this regard, we must remember that, in accordance with ECJ case law, clause 5 of the Framework Agreement does not impose a general obligation on Member States to transform fixed-duration work contracts into permanent contracts. Indeed, clause 5, paragraph 2, of the Framework Agreement, in principle, allows Member States the authority to determine under which conditions contracts or labor relations of fixed duration are considered as permanent. The result is that the Framework Agreement does not establish under which conditions fixed-duration contracts may be used. *See* Case C-212/04, *Adeneler & Others v. Ellinikos Organismos Galaktos*, ECLI:EU:C:2006:443, ¶ 91 (July 4, 2006); Case C-53/04, *Cristiano Marrosu & Gianluca Sardino v. Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, ECLI:EU:C:2006:517, ¶ 47 (Sept. 7, 2006); *Joined Cases C-378/07 to C-380/07, Angelidaki & Others*, ECLI:EU:C:2009:250, ¶ 145, ¶ 183 (Apr. 23, 2009); Case C-362/13, *Maurizio Fiamingo & Others v. Rete Ferroviaria Italiana SpA*, ECLI:EU:C:2014:2044, ¶ 65 (July 3, 2014) (*see also* C-363/13 and C-407/13); Case C-86/14, *Marta León Medialdea v. Ayuntamiento de Huétor Vega*, ECLI:EU:C:2014:2447, ¶ 47 (Dec. 11 2014).

9. Ana De La Puebla Pinilla, *Principio y Fin de la Doctrina "de Diego Porrás", o de cómo, en Ocasiones, "el Sueño de la Tutela Multinivel Produce Monstrous"*, no. 7 REVISTA DE INFORMACIÓN LABORAL 17 (2018), in relation to other ECJ judgments, foreshadowed that this court's referral to the national judge "may create new uncertainties, mainly within the scope of temporary hiring in the public sector" which, unlike the private sphere, where temporary hiring modalities, barring temporary contracts, have maximum duration limits, "which prevents courts from assessing whether temporary hiring has been excessively prolonged, or not." *See also* Xavier Boltaina Bosch, *Trabajadores y Funcionarios Interinos Vinculados a la Cobertura de la Plaza: Totum Revolutum Sobre el Derecho a la Indemnización*, no. 8 LA ADMINISTRACIÓN PRÁCTICA: ENCICLOPEDIA DE ADMINISTRACIÓN MUNICIPAL 37 (2018) ("the ECJ transfers the responsibility of deciding whether this prolonged temporary employment is correct or not to each Spanish court or judge").

the judgment, this clause is not sufficiently clear for a national judge to displace a national provision.

III. PROPOSALS FOR LEGAL INTERPRETATION GIVEN UNEXPECTED SPANISH LEGAL INTERVENTION: THE PROBABLY EFFECTS OF THIS JUDGMENT

Reaching the conclusion, we understand that the ECJ referenced in this commentary lays forth sufficiently clear guidelines for national courts to know how to interpret Spanish law on this matter, pursuant to clause 5 of the Framework Agreement.

The ECJ clears the way for creativity or legal engineering for legal operators, but also gives certain hints that must be addressed for the useful purpose of the Directive (Framework Agreement) as an essential reference.

Pursuant to canons in Civil Law (art. 7 Civil Code, CC),¹⁰ we observe the incurring in abuse of law shall entitle the party to the *pertinent compensation and the adoption of legal or administrative* measures to prevent the persistence of the abuse.¹¹ The coordinating conjunction, instead of the disjunctive conjunction, invites us to at least consider requiring the employer pay compensation (as applicable) to compensate the other party for the abuse, in addition to adopting different sorts of measures to paralyse this abuse observed by the ECJ in Spanish practise.¹²

Spanish contentious-administrative courts have progressively taken control over administrative action, not only based on the letter of the law, but going much beyond, based on institutional or regulatory principles of the legal code. However, their effective estimation, which appears to be fairly limited, is a different matter. The doctrine explains this response through the excessive and denaturalised recourse to this figure when the party cannot find support in a regulation to invalidate the action of the counterpart.¹³

In light of the aforementioned, and with national Courts' distrust still at play, an *a contrario* and complementary reading of the guidance provided by the ECJ to national judges would produce the following scenarios, with nuance regarding the nature of the possible compensation.

Due to its lack of specificity, the ECJ dismisses the efficacy of compensation for unfair dismissal in art. 50.1 Workers' Statute (ET, in

10. Código Civil (Civil Code), art. 7, http://noticias.juridicas.com/base_datos/Privado/cc.html.

11. Luis Díez-Picazo, *El Abuso Del Derecho Y el Fraude de la Ley en el Nuevo Título Preliminar del Código Civil Español y el Problema de sus Recíprocas Relaciones*, no. 5 IUS ET VERITAS 5, 8 (1992).

12. Xavier Boltaina Bosch, *supra* note 9.

13. FEDERICO A. CASTILLO BLANCO, *La Teoría del Abuso del Derecho y su Aplicabilidad a la Actuación Abusiva de la Administración Pública*, in LA INTERPRETACIÓN Y APLICACIÓN DEL ORDENAMIENTO JURÍDICO PÚBLICO 73 (2008).

Spanish)¹⁴, and given that the Court exhorts national judges to examine national Law as a legal system¹⁵, I deem the compensation set forth in art. 50.1 c) ET more suitable than the compensation in art. 56 ET. This precept refers to the worker's voluntary termination based on the business owner's *gross failure to comply*, having dismissed force majeure. The compensation set forth in this precept (art. 50.2 ET) is for an unfair dismissal that cannot be added to other compensation for harm and damages (STS –Social- 11-3-2004, A. 3401), unless an infringement upon fundamental rights and freedoms has occurred (arts. 27 and 181 LRJS and STS –social- 20-9-2011, A. 7057).

Regarding the possible infringement upon fundamental freedoms and rights, it is not absurd to consider that the "temporary" situation has jeopardised the employee's skill set and competitiveness, as the training received, and the skill set proven upon joining the Administration through the merit contest may have undergone modifications.

There are two possible scenarios: the temporary employee remains in the job position (i) and possible termination of the employee on the grounds set forth in the law (ii).

(i) As long as Spanish law does not change, we propose that courts declare temporary civil servants whose successive appointments have been prolonged throughout an *unusually long* period as "permanent temporary civil servants."¹⁶ This indeterminate legal concept regarding "time" shall be established when the temporary situation is prolonged longer than the 3 years decreed by art. 70 EBEP.

(ii) If pursuant to Spanish law, this "permanent temporary civil servant" is dismissed, then the employee may demand a specific compensation, based on the employer's gross failure to comply, *in addition to* compensation for harm and damages caused to the employee by the situation.

To calculate these two compensations, provisions in art. 135 of the Spanish Constitution—changed following the mandate of the European Union—must be considered. According to that article, creation of a structural staff position was impeded by measures to contain the public deficit—contain

14. Workers' Statute Law art. 50.1 (B.O.E 2015, 255), http://noticias.juridicas.com/base_datos/Laboral/561075-et-2015.html.

15. Operative Part 3 of the judgment sets forth that "Clause 5 of the Framework Agreement on Fixed-Duration work, of 18 March 1999, in the annex to Directive 1999/70, must be interpreted in the sense that it bears upon the national jurisdictional body to appraise, *pursuant to the ensemble of regulations from its applicable national law*, whether the organisation of the hiring processes to definitively fill vacancies provisionally held by public employees appointed under the framework of service relations of a fixed duration, the transformation of said public employees into "non-fixed permanent" and granting these public employees a compensation equivalent to the compensation paid in the event of unfair dismissal, are suitable measures to prevent and, if applicable, sanction abuses stemming from the use of successive contracts or fixed-duration labour relations or equivalent legal measures, for the purposes of this provision." Joined Cases C-103/18 & C-429/18, Sánchez Ruiz, Fernández Álvarez, ECLI:EU:C:2020:219 (Mar. 19, 2020) (emphasis added).

16. Case C-574/16, Grupo Norte Facility SA v Angel Manuel Moreira Gómez, ECLI:EU:C:2017:1022, ¶ 64, (June 5, 2018).

expense and budget stability. As such, increasing vacancies or staff who provide services in the public sphere, given their specific statutory public-servant relationship, is affected by the amendment dated 27 September 2011 to art. 135 of the Spanish Constitution.¹⁷ This precept limited—and limits—the structural deficit and the volume of public debt to guarantee budgetary stability, and to reinforce Spain's commitment to the European Union. In my opinion, this mandate from the European Union would be a kind of “force majeure” that would modulate the calculation of compensation from 2011 onwards.¹⁸

17. C.E. B.O.E. n. 233, Sept. 27, 2011.

18. Remember here that art. 50.1 c) rules out the possibility of the employee receiving compensation for unfair dismissal in the event of force majeure.