THE CJEU CORRECTS THE *DE DIEGO PORRAS* DOCTRINE ON COMPENSATION DUE TO THE TERMINATION OF FIXED-TERM EMPLOYMENT CONTRACTS

The Grand Chamber of the Court of Justice of the European Union ("**CJEU**") has handed down two new judgments which analyse the compensation system applicable to two temporary employees upon the termination of their respective temporary interim and relief employment contracts, rectifying the legal doctrine that had been previously established by the Tenth Chamber on 14 September 2016 (i.e. the *De Diego Porras* doctrine).

The *CJEU* understands that the Spanish legislation denying any compensation to interim employees and which establishes a lower compensation for relief workers upon the expiry of their contract, is not contrary to the principle of non-discrimination set forth in Clause 4(1) of the Framework Agreement on fixed-term work, dated 18 March 1999.

This therefore invalidates the *De Diego Porras* doctrine, in the sense that employees with fixed-term contracts (specifically, relief and interim workers) will be entitled to compensation equivalent to 12 days' salary per year of service upon the expiry of the term of their contracts, and not 20 days' salary per year of service, as such doctrine established.

Key issues:

1. BACKGROUND: THE *DE DIEGO PORRAS* DOCTRINE (CASE C-596/14)

On 14 September 2016, the CJEU handed down a judgment which raised many doubts regarding the interpretation of the compensation applicable upon the expiry of fixed-term employment contracts.

Specifically, the Tenth Chamber of the CJEU considered that Spanish labour legislation was not consistent with Clause 4(1) of the of the Framework Agreement, as it denied any compensation upon the expiry of an interim contract, whereas it permitted compensation to be granted to permanent workers due to the termination of their contract for objective reasons.

The CJEU understood there to be a difference of treatment between workers with an interim contract (who are not entitled to receive any compensation whatsoever upon the expiry of their contract, pursuant to Article 49.1 of the Workers' Statute) and those with a permanent contract, a difference that, according to the Framework Agreement, could only be justified in the event that *objective grounds* existed, and in relation to *comparable permanent workers*.

In particular, the CJEU considered that the interim worker performed certain work or duties similar to those of a comparable permanent worker and that there were no objective grounds that would enable it to be verified if the inequality was in response to an authentic need that might permit the envisaged purpose to be achieved, stating that the fact that a national law or collective agreement would make such a difference is not sufficient objective grounds, nor is the mere temporary nature of the labour relationship.

This led to several judgments from the Spanish courts establishing that workers with fixed-term contracts (including interim contracts) are entitled to compensation of 20 days' salary per year of service, with a maximum of 12 months upon expiry of the temporary contracts, applying the compensation regime envisaged for dismissals for objective reasons.

2. NEW CJEU DOCTRINE

In this context, on 5 June 2018 the Grand Chamber of the CJEU issued two new judgments that correct the well-known and controversial *De Diego Porras* doctrine on the compensation applicable to the temporary workers due to expiry of the term established or conclusion of the work or service to which the contract referred, maintaining that there is an objective reason that allows for different treatment in terms of compensation for permanent workers due to termination of their contract for objective reasons and temporary workers due to the expiry of their contracts.

The preliminary questions submitted addressed the interpretation of the principle of non-discrimination envisaged in Clause 4(1) of the Framework Agreement, which reads:

In respect of employment conditions, fixed-term workers shall not 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.

What is essentially at issue is whether said Clause 4(1) of the Framework Agreement should be interpreted as meaning that it precludes national legislation: (i) that does not envisage payment of any compensation to interim workers, upon expiry of the term for which the contracts were concluded, but does grant compensation to permanent workers upon termination of their contract of employment for objective reasons (Case C-677/16); and (ii) that envisages lower compensation (i.e. 12 days' salary per year of service) for workers with fixed-term contracts entered into to cover the working hours that were no longer to be worked by a worker taking partial retirement (i.e. relief workers), upon expiry of the term for which these contracts were concluded, than the compensation granted to workers with permanent contracts due to termination of their contract of employment for objective reasons (Case C-574/16).

2.1. CJEU Judgment of 5 June 2018 (Case C-677/16)

This new Case resolves a request for a preliminary ruling submitted by Labour Court no. 33 in Madrid, in relation to an interim contract entered into in order to substitute a permanent employee.

The Labour Court asked whether Clause 4(1) of the Framework Agreement must be interpreted as precluding national legislation which does not provide for any compensation to be paid to workers employed under a fixed-term contract concluded in order to cover a post temporarily while the selection or promotion procedure to fill the post permanently takes place, on expiry of the term for which that contract was concluded, whereas compensation is payable to permanent workers where their employment contract is terminated for objective reasons.

The first conclusion reached by the Grand Chamber is that, compensation such as that involved in the dispute in question, is included within the concept of *employment conditions*, within the meaning of Clause 4(1) of the Framework Agreement.

After concluding that the situation of a worker with a fixed-term contract is comparable to that of a permanent worker, the Court considers that, essentially, there is an *objective ground* justifying the fact that expiry of an interim contract does not entitle the fixed-term worker concerned to payment of compensation, whereas a permanent worker receives compensation when dismissed on one of the grounds set out in Article 52 of the Workers' Statute, for the following reasons:

- The termination of the interim contract took place in a significantly different context, from a factual and legal point of view, to that in which the employment contract of a permanent worker is terminated on one of the grounds set out in Article 52 of the Workers' Statute.
- A temporary worker knows, from the moment of conclusion of the contract, the date or event which determines its end; by contrast, the termination of a permanent employment contract on one of the grounds set out in Article 52 of the Workers' Statute, on the initiative of the employer, is the result of circumstances arising which were not foreseen at the date the contract was entered into and which disrupt the normal continuation of the employment relationship.
- The compensation of 20 days' remuneration per year of service envisaged in Article 53.1.b) ET is in order to compensate for the unforeseen nature of the termination of the employment relationship and, and, accordingly, the frustration of any legitimate expectation the worker may have had at that date as regards the stability of that relationship.
- Article 53(1)(b) of the Workers' Statute provides for statutory compensation equivalent to twenty days' remuneration per year of service to be paid to a worker, irrespective of whether his employment contract is for a fixed-term or for an indefinite duration.

As a result, the CJEU considers that the object of the compensation for dismissal established in Article 53.1.b) of the Workers' Statute, like the particular context in which such compensation is paid, constitute an *objective ground* justifying the different treatment in question and, as such, Clause 4, section 1, of the Framework Agreement does not preclude the Spanish legislation.

2.2. CJEU Judgment of 5 June 2018 (Case C-574/16)

This new Case answers a request for a preliminary ruling submitted by the High Court of Galicia, in relation to a relief contract signed to cover the hours that were no longer to be worked by a worker who was taking partial retirement.

The High Court asked whether Clause 4(1) of the Framework Agreement must be interpreted as precluding national legislation which envisages payment of lower compensation to relief workers, upon expiry of the term for which the contracts were concluded, than that paid to workers on a permanent contract when their contracts are terminated for objective reasons.

The Grand Chamber of the CJEU analysed the application of the principle of non-discrimination following the same line of argument as Case C-677/16, ruling that: (i) the compensation in question is an *employment condition* within the meaning of clause 4(1) of the Framework Agreement; (ii) the relief worker is in a *comparable situation* to that of workers hired for an indefinite period by the same employer for the same period of time; (iii) there is an *objective ground* which justifies the difference in treatment, for the same reasons set out in Case C-677/16.

Therefore, the Court ruled that the specific object of the compensation envisaged in Article 49.1.c) of the Workers' Statute and Article 53.1.b) of the Workers' Statute, respectively, payment of which forms part of fundamentally different contexts, constitutes an *objective ground* justifying the difference in treatment, meaning that Clause 4, section 1, of the Framework Agreement does not preclude the Spanish legislation.

3. CONCLUSIONS

The Grand Chamber of the CJEU has given a new twist to the *De Diego Porras* doctrine, correcting the conclusions reached by the Tenth Chamber of the CJEU in the judgment handed down on 14 September 2016. The new development means that now, an *objective ground* is deemed to exist, allowing for different treatment in terms of compensation for permanent workers due to termination of their agreement for objective reasons and temporary workers whose contracts reach the end of their term.

Moreover, the Court highlights that there is no difference of treatment in the case of termination for objective reasons of indefinite or fixed-term contracts, as both forms of contract are entitled to the same compensation (established in Article 53.1.b) of the Workers' Statute) provided that any of the circumstances envisaged in Article 52 of the Workers' Statute exists.

Therefore, even though the new Cases address situations in which the workers had signed interim and relief contracts, the conclusion reached by the Court can be extended to other fixed-term contracts, as the arguments cited by the CJEU are fully applicable.

Summing up, the new CJEU judgments represent a return to the *status quo* prior to the *De Diego Porras* doctrine, meaning that we can conclude that (i) compensation for the termination of fixed-term contracts should be 12 days' salary per year of service and (ii) the absence of compensation due to expiry of an interim contract is justified.

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