insecurity of public employees in the light of that situation, must the national judicial authorities proceed to order the conversion of an abusive temporary relationship into a permanent relationship which differs from that of a career civil servant but which gives the victim of the abuse job security to prevent that abuse from going unpunished and the undermining of the objectives of clause 5 of the Framework Agreement, even though such a conversion is not provided for in the domestic legislation, provided that the temporary relationship concerned was preceded by a selection process that was open to the public and complied with the principles of equality, merit and ability?

Case C-331/22, Fixed-Term Work

HM, VD – v – Generalitat de Catalunya, reference lodged by the Juzgado de lo Contencioso-Administrativo No 17 de Barcelona (Spain) on 19 May 2022

1. [The referring court wishes to ascertain] whether the measures endorsed in Spanish Supreme Court judgments Nos 1425/2018 and 1426/2018 of 26 September 2018, which express a position – still maintained today (30 November 2021) – the effect of which is to keep a public employee who has been a victim of [the] abuse [of successive fixed-term contracts] in the same abusive situation of insecure employment until such time as the employer administration determines whether there is a structural need [for the post in question to be made permanent] and issues a notice of competition for the relevant selection procedure with a view to filling the post with a permanent or career public employee, are measures which fulfil the requirements governing the prescription of penalties laid down in clause 5 of the framework agreement annexed to Directive 1999/70;
2. or whether, conversely, those measures have the effect of perpetuating insecurity and the lack of protection until such time as the employer administration decides at random, with a view to filling a post with a permanent employee, to issue a notice of competition for a selection procedure the outcome of which is uncertain inasmuch as such procedures are also open to candidates who have not been victims of such abuse, and are measures which cannot be construed as dissuasive punitive measures for the purposes of clause 5 of the framework agreement and do not guarantee that the objectives they pursue will be attained.
3. Where a national court, pursuant to its obligation to penalise the abuse established in any event (the penalty is 'essential' and 'immediate'), arrives at the conclusion that the principle that national law must be interpreted in conformity with EU law makes it impossible for it to give effect to the Directive without adopting a contra legem interpretation of domestic law, precisely because the domestic law of the Member State in question has not introduced any punitive measures in order to give effect to clause 5 of the framework agreement in the public sector, must it apply the findings contained in the judgment of 17 April 2018 in Egenberger, or in the judgment (of the Grand Chamber) of 15 April 2008 in Case No C-268/2006, to the effect that Articles 21 and 47 of the Charter of [Fundamental] Rights of the European Union allow any provisions of domestic law that make it impossible to give full effect to Directive 1999/1970/EC to be excluded, even if they have constitutional status?
4. Does it therefore have a duty to convert an abusive temporary relationship into a permanent relationship identical to and on a par with that of comparable permanent employees, thus giving stability of employment to the victim of the abuse, in order to ensure that such abuse does not go unpunished and the objectives and effectiveness of clause 5 of the agreement are not undermined, even if such a conversion is prohibited by domestic legislation and the case-law of the Spanish Supreme Court, or might be contrary to the Spanish Constitution?
5. [The referring court wishes to ascertain] whether, given that the CJEU held in its judgments of 25 October 2018 in Case C-331/17, and of 13 January 2022 in Case C-382/19, that clause 5 of the framework agreement precludes national legislation which excludes certain public employees from the application of provisions that penalise the abusive use of successive fixed-term contracts, if the domestic legal system contains no other effective measure for penalising such an abusive measure, and, given that Spanish law does not contain any measure for penalising abuse in the public sector that is applicable to the temporary staff who have brought this action, whether the application of that case-law of the CJEU and of the Community principle of equivalence imposes an obligation to convert temporary public employees who have been victims of abuse into permanent or career public employees, making them subject to the same grounds for dismissal and termination of the employment relationship as those that apply to the latter, in so far as, in the private sector, Article 15 of the Regulatory Code for Workers lays down an obligation to convert into permanent staff temporary workers who, over a period of 30 months, have accrued more than 24 months' continuous service for the same employer, and in so far as Article [87(5)] of Law 40/2015 [of 1 October 2015] on [the legal framework governing] the public sector, as amended by Law 11/2020 on the general State budget for 2021, operates, pursuant to national law, to allow private-sector workers of undertakings and entities that move across to

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the public sector to perform the same duties as career civil servants, with the right to remain in post until the end of their working lives, thus making them subject to the same grounds for termination of employment as the latter.

6. Given that the conditions relating to termination of the employment relationship and the requirements for terminating an employment contract form part of the 'employment conditions' set out in clause 4 of the framework agreement, according to the judgments of the CJEU of 13 March 2014 in Case C[-]38/13, Nierodzik, paragraphs 27 and 29, and of 14 September 2016 in Case C-596[/14], Ana de Diego Porras, paragraphs 30 and 31), [the referring court] seeks from the CJEU, in the event that the answer to the previous question is in the negative, a ruling as to whether stabilising the employment of temporary public-sector staff who have been victims of abuse by applying to them the same grounds for termination of employment and dismissal as apply to comparable career civil servants or permanent employees, without granting them that status, is a measure which the national authorities have an obligation to discharge pursuant to clauses 4 and 5 of the framework agreement annexed to Directive 1999/70 and the principle that national law must be interpreted in conformity with EU law, since the national legislation prohibits only staff who do not fulfil certain requirements from acquiring permanent or career employee status, and stabilising the employment of such staff in the manner described does not entail the grant of that status.
7. In so far as Article 15 of the Regulatory Code for Workers lays down a maximum period of duration for temporary contracts of two years, it being understood that, on the expiry of that period, the need met is no longer temporary or exceptional but routine and regular, in which event employers in the private sector are obliged to make the temporary relationship indefinite, and, in so far as, in the public sector, Article 10 of the Estatuto Básico del Empleado Público (Basic Regulatory Code for Public Employees) (EBEP) lays down the obligation to include vacant posts occupied by interim/temporary staff in the list of public- sector vacancies for the year of appointment and, if this is not possible, that is to say within the maximum period of two years, in the list for the following year, with a view to ensuring that the post is filled by a permanent or career civil Servant, [the referring court wishes to ascertain] whether it must be concluded that the abuse consisting in the conclusion of successive temporary contracts in the public sector arises as soon as the employer administration fails to fill a post occupied by a temporary public employee with a permanent or career employee within the time limits laid down in the Spanish legislation, that is to say by including that post in a list of public-sector vacancies within a maximum period of two years as from the appointment of the interim/temporary employee, thereby entering into an obligation to terminate the latter's employment by filling the public-sector vacancy within the maximum period of three years laid down in Article 70 of the EBEP.
8. [The referring court wishes to ascertain] whether Spanish Law 20/2021 of 28 December 2021 infringes the Community principles of legality and the non- retroactivity of penalties contained in, inter alia, Article 49 of the Charter of Fundamental Rights of the EU, inasmuch as it provides, as a penalty for abuse in connection with temporary employment, for selection procedures which are triggered even if the actions or omissions constituting the infringement – and, therefore, the abuse – and the reporting thereof took place and were committed prior to – years before – the enactment of Law 20/2021[.]
9. [The referring court wishes to ascertain] whether Law 20/2021, in providing as a punitive measure for the issue of notices of competition for selection procedures and compensation available only to victims of abuse who are unsuccessful in such a procedure, infringes clause 5 of the framework agreement and Directive 1999/70/EC, since it prescribes no penalties for abuse arising in respect of temporary public employees who have been successful in such selection procedures, notwithstanding that a penalty must always be provided for and the successful completion of such a selection procedure is not a punitive measure which fulfils the requirements of the Directive, as the CJEU states its order of 2 June 2021 in Case C-103/2019.
10. In other words, [the referring court wishes to ascertain] whether Law 20/2021, in limiting the award of compensation to staff having been victims of abuse who are unsuccessful in a selection procedure, thus excluding from that right employees having been the subject of abuse who acquired permanent staff status, through such selection procedures, subsequently, infringes Directive 1999/70/EC and, in particular, the ruling given in the order of the CJEU of 2 June 2021, paragraph 45, according to which, although the organisation of selection procedures open to public employees who were abusively appointed under successive fixed-term employment relationships allows such employees to apply for a permanent and stable post and, therefore, for access to permanent public employee status, this does not relieve Member States of the obligation to establish a suitable measure for properly penalising the abusive use of successive fixed-term employment contracts and relationships.
11. [The referring court wishes to ascertain] whether Law 20/2021, in providing that selection procedures aimed at reducing temporary employment in the public sector must take place within a period of three years, by 31 December 2024, and in laying down as a penalty compensation receivable upon the termination of employment or dismissal of the victim of abuse, infringes clause 5 of the framework

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agreement, in the light of the order of the CJEU of 9 February 2017 in Case C-446/2016 or the judgments of the CJEU of 14 December 2016 in Case C-16/15 and of 21 November 2018 in Case C-619/2017, inasmuch as it has the effect of perpetuating or prolonging an abused employee's position as a victim of abuse, lack of protection and insecurity of employment, thus undermining the effectiveness of Directive 1999/70 until such time as the worker is finally dismissed and qualifies for the aforementioned compensation.

12. [The referring court wishes to ascertain] whether Law 20/2021 infringes the principle of equivalence, since it confers rights under the directive which are inferior to those that flow from domestic law, inasmuch as:

13. – Law 11/2020 on the general State budget for 2021, in amending Article [87(5)] of Law 40/20[15], operates, pursuant to domestic law, to allow private-sector workers of undertakings that move across to the public sector to perform the same duties as career civil servants, while remaining subject to the same grounds for termination of employment, even if they have not successfully completed a selection procedure, with the right to remain in post until the end of their working lives, whereas Law 20/2021, pursuant to EU law, does not allow workers who have been selected in accordance with selection procedures subject to principles of equality, publicity and free competition to continue to perform the same duties as career civil servants and to remain subject to the same grounds for termination of employment.

14. – Article 15 of the Regulatory Code for Workers, as amended by Law 1/1995 of 24 March 1995, that is to say prior to the adoption of Directive 1999/70, operates – pursuant to domestic law – to allow private-sector workers who have been working for the same employer for more than two years to become permanent employees, whereas, pursuant to the Directive, public-sector workers who have been victims of abuse qualify only for compensation equal to 20 days per year of service up to a limit of [the equivalent of] 12 monthly salary payments, with no right to become permanent employees.

15. – The provisions of Article 32 et seq. of Law 40/2015 on the legal framework governing the public sector […] establish the principle of full reparation, which imposes on the administrative authorities an obligation to provide compensation for any loss and damage caused to the victims of their actions, and yet, pursuant to Community law, compensation for victims of abuse is restricted by a prior upper limit, in terms of both amount – 20 days per year of service – and time –12 monthly salary payments.

16. [The referring court wishes to ascertain] whether Law 20/2021, in providing as the only genuine punitive measure for compensation equal to 20 days per year of service for victims of abuse who have been unsuccessful in a selection procedure, infringes the case-law established by the CJEU in its judgment of 7 March 2018 in Santoro, according to which, in the public sector, in order to comply with the Directive, compensation alone is not sufficient, but must be accompanied by other additional, effective, proportionate and dissuasive punitive measures.

17. [The referring court wishes to ascertain] whether Law 20/2021, in fixing the compensation available to victims who are unsuccessful in a selection procedure at 20 days per year of service up to a limit of [the equivalent of] 12 monthly salary payments, infringes the Community principles of adequate and full compensation and proportionality, in that it excludes loss of earnings and other heads of indemnification or compensation such as, for example, those arising from the loss of opportunities (as referred to in the judgment of the CJEU in Santoro); the impossibility of acquiring permanent staff status because no notices of competition for selection processes are issued within the time limits laid down in the domestic legislation, or the inability to secure promotion or progression; the non-material damage arising from the lack of protection attendant upon any insecure employment; termination of the employment of a victim of abuse whose age and sex (a woman over the age of 50, for example) deprives them of an alternative labour market; or the reduction of the retirement pension?

18. [The referring court wishes to ascertain] whether Law 20/2021, in providing for compensation capped at 20 days per year of service and [the equivalent of] 12 monthly salary payments, infringes the Community legislation, in the light of the judgments of the CJEU of 2 August 1993 in Case C-271/91, Marshall, and of 17 December 2015 in Case C-407/14, Arjona, according to which EU law precludes reparation for the loss and damage sustained by a person as a result of dismissal from being restricted by a prior upper limit.

Case C-377/22, Other Forms of Free Movement

LR – v – Ministero dell'Istruzione, Ufficio scolastico regionale Lombardia, Ufficio scolastico regionale Friuli Venezia Giulia, reference lodged by the Tribunale Amministrativo Regionale per il Lazio (Italy) on 10 June 2022

Without prejudice to the possibility of considering the years of service completed by the applicant in the United Kingdom under EU law, notwithstanding the United Kingdom's withdrawal from the European Union, must Article 45(1) and (2) TFEU and Article 3(1)(b) of Regulation (EU) No 492/2011 be interpreted as pre-

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