

The CJEU's judgment regarding compensation payable upon expiry of temporary employment contracts in Spain

Introduction

The Court of Justice of the European Union has handed down a judgment which could revolutionise the way compensation payable to employees upon the expiry of their temporary contracts are determined in Spain. The Spanish laws currently in force which deny them indemnification at the conclusion of an interim contract have been judged as contravening European law, and therefore compensation must be paid when such interim contract end.

The judgment also leaves the door open to the possible need to increase the compensation amount paid when fixed-term contracts end due to the expiry of their term, to 20 days of salary per year of service, as currently established in the case of a permanent employee's termination on objective grounds. Thus, we consider it is of interest to analyse the contents of this judgment and make an initial assessment of the implications this decision may have on labour relations in Spain.

1. Analysis of the Judgment

The Tenth Chamber of the Court of Justice of the European Union ("CJEU") handed down a [judgment](#) (the "**Judgment**") on 14 September 2016 which will impact the very basis of the system currently used to calculate the compensation payable to employees upon the

expiry of fixed-term employment contracts established in Spanish labour law.

The CJEU has replied to four questions referred to it for a preliminary ruling by the High Court of Justice of Madrid, with the aim of analysing the case of interim employment contracts expiring where no compensation is due. In particular, the CJEU analysed whether Spanish labour law and,

Key issues

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specifically, Article 49.1.c) of the Spanish Workers' Statute, is compatible with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work (the "**Directive**").

Article 4 of the Directive states as follows: "*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.*"

In this context, the Madrid Court referred four questions to the European Court for a preliminary ruling, in order to know if: (i) compensation due to the expiry of temporary contracts is included within the concept of "*employment conditions*" referred to in Article 4 of the Directive; (ii) if the reply to that is yes, if the compensation to be received by employees whose fixed-term contract ends must be the same as that received by indefinite (i.e. permanent) employees whose contract terminates for objective reasons; (iii) if it can be concluded that both temporary and indefinite employees are entitled to receive the same compensation, if Article 49.1.c) of the Workers' Statute is discriminatory and contrary to the Directive; and (iv) if the distinction made in the Workers' Statute between temporary employees (*trabajadores temporales*) and employees with an interim contract (*trabajadores con contrato de interinidad*) regarding the compensation paid upon the conclusion of the fixed-term contract is discriminatory .

Regarding the first question, the CJEU has clearly concluded that the concept of "*employment conditions*" referred to in Article 4 of the Directive does include compensation due to the expiry of fixed-term employment contracts. However, the CJEU has failed to clearly and

directly answer each of the remaining questions referred to it, issuing instead a joint reply to all three questions, adapted to the specific case at hand. This is significant, since the CJEU has thus avoided expressly giving a straight answer to question (ii) and, therefore, does not definitively or unequivocally say if, in general, the compensation to be paid to an employee whose fixed-term contract expires must be the same as that paid to an indefinite employee whose contract ends for objective reasons, although that this conclusion may be reached based on the Judgment's points of law.

Specifically, the CJEU has established that **there is a difference in the way employees with interim contracts are treated, as they are not entitled to receive any compensation whatsoever upon the expiry of their contract, compared to indefinite employees**; a difference which, according to the Directive, could only be justified if there were objective reasons for this and in relation to "*comparable permanent workers*".

In this regard, the CJEU considers that the difference in treatment would be contrary to the Directive, unless such difference were associated with "different situations" involving "non-comparable" employees because of the type of work carried out. In its Judgment, the CJEU seems to relate this "comparability" to the type of work or duties performed by the different employees, interpreting here that employees with interim contracts are doing work similar to that of indefinite employees. The Judgment goes on to examine whether objective grounds exist for this difference in treatment, deeming that the fact that a national law or collective bargaining agreement establishes such difference does not suffice as an objective reason, as neither does the merely temporary nature of the labour relationship.

Consequently, the Judgment states that **any law which denies employees any compensation upon the expiry of their interim contract, whereas it meanwhile does grant compensation to indefinite employees who are considered "comparable" to the former, is contrary to Article 4 of the Directive.**

However, regarding question (iv), the CJEU does not consider that the differences between the compensation granted to temporary employees and those holding interim contracts are contrary to the principle of non-discrimination established in the Directive.

2. Conclusions

In light of the many interpretations being made of the CJEU's Judgment, it is important to note that it contains only two clear and unequivocal replies, namely that: (i) the concept of "*employment conditions*" referred to in Article 4 of the Directive includes compensation due to the expiry of temporary contracts; and (ii) any law which denies employees compensation upon the expiry of their interim contracts, while meanwhile granting compensation to indefinite employees, is contrary to Article 4 of the Directive.

Unfortunately, it gives no conclusive reply to the question regarding whether it would be contrary to the Directive if the compensation payable to employees upon the expiry of their fixed-term contracts differed from that payable to employees whose indefinite contracts end, which is the case with contracts for the provision of a specific work or service or those contingent on production needs.

Therefore, **this Judgment will, in theory, directly impact the validity of Spanish law (Article 49.1.c) of the Workers' Statute), which currently establishes that employees**

with interim contracts are not entitled to receive compensation when their contract expires. As a result, the Spanish lawmaker will be required to adapt this Article to ensure that it is compatible with the Directive.

What compensation must be paid when an interim contract expires?

The first question arising is what compensation employees are entitled to receive when their interim contract ends. In this regard, we will have to wait and see what judgment is handed down by the High Court of Justice of Madrid in the case which gave rise to the questions referred to the CJEU for a preliminary ruling. It could possibly conclude that it is appropriate to pay the employee compensation consisting of 20 days of his or her salary per year of service, thereby attempting to equate this to the provisions on contractual termination due to the expiry of its term for the "objective reasons" set out in Articles 51 and 52 of the Workers' Statute.

Will it be necessary to increase the compensation payable upon the expiry of other temporary contracts to 20 days of salary per year of service?

This leads directly to a second question relating to the other fixed-term employment contracts which, unlike interim contracts, do include the payment of compensation upon their expiry, namely: whether the compensation of 12 days of salary per year of service currently established in Spanish law should be paid upon expiry of these contracts, or be increased to 20 days of salary per year of service, thereby applying the same compensation as that for termination on objective grounds, to temporary contracts ending due to the expiry of their term.

It is too early to make any predictions in this regard, and it is yet to be seen what decisions the Spanish courts make when applying this new

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doctrine, and how it becomes consolidated over time by the CJEU itself. The initial interpretations of legal scholars, however, suggest that the Spanish courts **could** opt to apply the compensation of 20 days of salary per year of service to all expiry scenarios of fixed-term contracts. It should be noted that this compensation already applies to temporary contracts which are terminated early on objective grounds, as the 12 days of compensation was only triggered when the contract expired at the end of its established term.

Will the effects of the Judgment be retroactive to last year?

The third question which arises refers to the channels and viability of possible court actions filed, claiming financial differences relating to potential higher compensation payments deriving from contracts which have already expired, taking as a reference the general statute of limitations of one year. It seems that applying or not this general statute of limitations in the case of these potential claims will prove a controversial issue from a legal point of view, as will be the eventual decision on which right applies to temporary employees in general, as regards payment of a specific compensation equal to that payable to indefinite employees.

As regards the potential retroactive effects of the doctrine established by the CJEU, certain recent Social Security precedents may be used as a reference, in which it was concluded that the date the judgment was published in Spain's Official State Gazette (BOE) should be taken as the date the new criterion adopted by the courts came into effect. An example of the foregoing is the Judgment handed down by the Third Chamber of the Spanish Supreme Court on 21 May 2013, which annulled Royal Decree 1707/2011, dated 18 November, governing

university student internships. In this regard, the Decision of the General Treasury of the Social Security dated 19 August 2013 resolved the controversy as to whether or not companies should make the corresponding contributions to the Social Security for the university students on a retrospective basis, concluding that it was not necessary to make any such backdated contributions, based on the principle of legal certainty established in Article 9 of the Spanish Constitution, as well as the principle of legitimate expectations.

In short, the CJEU Judgment represents an important change in the way compensation payable to employees upon the expiry of fixed-term contracts is determined in Spain, but at the same time it leaves several loopholes and uncertainties which will be resolved according to the criterion adopted by the courts in each specific case. It is a Judgment which is expected to have a great impact, not only on Spanish labour law, but also on other European Member States facing similar problems.

In any case, the Judgment requires changes to be made to Spanish law, not only to amend the aforementioned Article 49.1.c) of the Workers' Statute which the CJEU considers contravenes the Directive, but also to clarify the compensation system applicable to fixed-term contracts, thereby avoiding the legal loopholes and uncertainties which the Judgment has created in Spanish labour legislation.

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