Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 31 May 2018 [1]

**Case C-245/17**

**Pedro Viejobueno Ibáñez,**
**Emilia de la Vara González**
**v**
**Consejería de Educación de Castilla La Mancha**

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha, Spain))

(Request for a preliminary ruling — Social policy — Fixed-term employment — ETUC-UNICE-CEEP — Framework agreement on fixed-term work — Principle of non-discrimination — Interim civil servants and established civil servants within the meaning of Spanish law — Teachers employed as interim civil servants — Early dismissal at the end of the school term — Difference in treatment in relation to comparable permanent workers — Objective ground for different treatment)

## I. Introduction

1. With budgets in many Member States continuing to come under strain, public authorities are also being forced to cut their costs. In response to this challenge, schoolteachers in Member States are being employed less frequently as civil servants or permanent workers and more often as fixed-term contract staff. In that context, a number of Member States have already started employing some teachers not for a full academic year but during a school term only. [2]

2. In Spain, the law on public servants provides for the possibility of appointing 'interim civil servants' [3] instead of established civil servants, on grounds of necessity and urgency. In the Spanish teaching profession, interim civil servants employed on this basis in order to deal with teacher shortages have previously been appointed for a full academic year.

3. It was on this basis that Mr Pedro Viejobueno Ibáñez and Ms Emilia de la Vara González, the appellants in the main proceedings, were themselves appointed to the teaching staff of the Autonomous Community of Castilla-La Mancha, Spain for the 2011/2012 academic year. At the end of the school term, at the start of the summer holidays, however, the education authority stated that their employment was no longer necessary or urgent and the two teachers were dismissed with immediate effect.

1 Original language: German.

2 As in certain German *Länder*, Belgium and the United Kingdom.

3 Spanish: funcionarios interinos.

4. It is against this background that the Court is asked in this case whether the competent education authority discriminates against interim civil servants on fixed-term contracts by comparison with permanently employed established civil servants in dismissing the former prematurely at the end of the school term. This raises the further question of whether interim civil servants are disadvantaged by the fact that, having been dismissed at the beginning of the summer holidays, they can no longer take their leave as actual rest days and are entitled only to a reduced pro-rata allowance in lieu.

5. The category of interim civil servant provided for under Spanish law has already been the subject of a number of the Court's judgments.[4] The present proceedings will give the Court a further opportunity to clarify the effects of the principle of non-discrimination against fixed-term workers on that category of public servant.

## II. Legal framework

### *A. EU law*

6. The EU-law framework for this case is made up of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP[5] ('Directive 1999/70'). According to Article 1 thereof, that directive puts into effect the framework agreement on fixed-term work (also referred to as 'the Framework Agreement') which was concluded on 18 March 1999 between three general cross-industry organisations (ETUC, UNICE and CEEP) and is annexed to the directive.

7. The Framework Agreement aims, inter alia, to 'improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination'.[6] Underlying it in this regard is the consideration 'that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers'.[7] At the same time, however, the Framework Agreement recognises that fixed-term employment contracts 'are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers'.[8]

8. On the scope of the Framework Agreement, clause 2(1) thereof provides:

'This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.'

9. Clause 3 of the Framework Agreement contains the following 'definitions':

'1. For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event;

4 Judgments of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819); of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557); of 9 July 2015, *Regojo Dans* (C-177/14, EU:C:2015:450); and of 20 December 2017, *Vega González* (C-158/16, EU:C:2017:1014); as well as orders of 9 February 2012, *Lorenzo Martínez* (C-556/11, not published, EU:C:2012:67), and of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725).

5 OJ 1999 L 175, p. 43.

6 Recital 14 of Directive 1999/70.

7 Second paragraph in the preamble to the Framework Agreement; see also paragraph 6 of its general considerations.

8 Paragraph 8 of the general considerations of the Framework Agreement; see also the second paragraph in its preamble.

2. For the purpose of this agreement the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. …'

10. Clause 4(1) of the Framework Agreement carries the heading 'Principle of non-discrimination' and reads 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.'

11. Reference must also be made to Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time,[9] which, under the heading 'Annual leave', contains the following provisions:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

### *B. National law*

12. Spanish Law 7/2007[10] ('the EBEP') governs the status of public servants within Spain's General State Administration and the country's Autonomous Communities.

13. According to Article 8 of the EBEP, there are four categories of public servant: established civil servants, interim civil servants, staff engaged under employment contracts, which may be fixed-term or of indefinite duration, and staff appointed *ad personam*.

14. Article 10 of the EBEP provides:

'1. Interim civil servants are persons who, for expressly justified reasons of necessity and urgency, are appointed as such to perform tasks of established civil servants in one of the following situations:

(a) the existence of vacancies which cannot be filled by established civil servants;

(b) the temporary replacement of staff in post;

(c) the implementation of temporary programmes;

(d) an excessive workload or a backlog of work, for a maximum of 6 months within a 12-month period.

…

3. The employment relationship of interim civil servants shall be terminated not only on the grounds provided for in Article 63 but also where the reason for their appointment ceases to apply.

9 OJ 2003 L 299, p. 9.

10 Ley 7/2007 del Estatuto básico del empleado público, EBEP (English: Basic Statute for Public Employees), BOE No 89 of 13 April 2007.

…

5. Interim civil servants shall, to the extent appropriate to the nature of their status, be governed by the general rules applicable to established civil servants.

15. Article 63 of the EBEP governs the grounds for loss of the status of civil servant.

16. Law 4/2011 on public employment in the Autonomous Community of Castilla-La Mancha [11] reproduces, in essence, the definition of 'interim civil servant' contained in Article 10(1) of the EBEP, which it expressly expands in providing that interim civil servants are to perform the tasks of established civil servants 'temporarily'.

17. Article 9(1)(b) of Law 4/2011 provides:

'1. The employment relationship of interim civil servants shall be terminated on the following grounds:

…

(b) the grounds of necessity and urgency on which the appointment was made cease to apply.

…'

18. An agreement between the Directorate-General of Personnel and Services of the Spanish Ministry of Education and the ANPE trade union of 10 March 1994, [12] which is applicable in the Autonomous Community of Castilla-La Mancha too, provides that interim civil servants who have been teaching for at least five and a half months on 30 June of a given year are to continue to perform their duties until the beginning of the new academic year and must therefore continue to be paid during the summer months.

19. The 13th Additional Provision of Law 5/2012 on General Budgets of Castilla-La Mancha [13] provides that, in the event of their dismissal, fixed-term employees are to receive an allowance in lieu of 22 untaken leave days if they have already worked for 12 months at the time of their dismissal. If they were appointed at the beginning of the academic year in September and are dismissed at the end of the school term in June, they are to be paid a pro-rata allowance in lieu of the corresponding number of leave days.

20. In accordance with Article 50(1) of the EBEP, established civil servants are entitled to paid annual leave of 22 working days.

## III. Facts, main proceedings and questions referred for a preliminary ruling

21. Mr Viejobueno Ibáñez and Ms de la Vara González, the appellants in the main proceedings, were employed as so-called interim civil servants on the teaching staff of the Autonomous Community of Castilla-La Mancha.

11 Ley 4/2011, de 10 de marzo, del Empleo Público de Castilla-La Mancha, BOE No 104 of 2 May 2011.

12 See Resolution of the Directorate-General for Personnel and Services of the Ministry for Education and Science of 15 March 1994, BOMEC of 28 March 1994.

13 Ley 5/2012, de 12 de julio, de Presupuestos Generales de la Junta de Comunidades de Castilla-La Mancha para 2012, BOE No 273 of 13 November 2012.

22. By decision of the competent Directorate-General for Human Resources and Educational Programming (Dirección General de Recursos Humanos y Programación Educativa) of the Ministry of Education, Culture and Sport of the Autonomous Community of Castilla-La Mancha of 13 September 2011, the appellants were appointed for the academic year 2011/2012 to vacant posts as secondary education teacher and vocational training teacher respectively in the provinces of Toledo and Cuenca. According to the information provided by the referring court, the 2011/2012 academic year ran from 15 September 2011 to 14 September 2012.

23. On 29 June 2012, the last day of term before the summer holidays, the Education Coordinators for the provinces of Toledo and Cuenca ordered that the appellants be dismissed with effect from that same day.

24. The appellants began by raising an objection to that decision and then brought against it an action for, inter alia, annulment of the decision itself and a declaration that the appellants were entitled to remain in the posts to which they had been appointed until 14 September 2012.

25. That action was dismissed at first instance. By way of reasons for its decision, the Juzgado de lo Contencioso-Administrativo No 2 de Toledo[14] stated that, at the end of the school term, the grounds of necessity and urgency on which the interim civil servants had been appointed had ceased to apply, in accordance with Article 10(3) of the EBEP and Article 9 of Law 4/2011. According to the case-law of the Spanish courts, interim civil servants, because of the nature of their employment, have no entitlement to remain in post until a specific date. This is true even in cases where a specific termination date was set at the time of their appointment. In any event, however, the letters of appointment issued to the applicants did not mention a specific date, only the time period of the 2011/2012 academic year.

26. The appellants lodged an appeal against that decision before the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha, Spain). They claim, in particular, that their dismissal at the end of the school term infringes clause 4(1) of the Framework Agreement, since there is no objective justification for the difference in their treatment by comparison with that of teachers having the status of civil servants. The fact that their dismissal prevents them from actually taking their annual leave, for which they receive an allowance in lieu, constitutes a further difference in treatment. In accordance with Directive 2003/88, however, an allowance in lieu of leave is an exception.

27. It was in those circumstances that the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha) stayed its proceedings and, by order of 19 April 2017, received at the Court on 11 May 2017, referred the following questions to the Court for a preliminary ruling under Article 267 TFEU:

‘(1) May the ending of the teaching period in the academic year be regarded as an objective ground justifying different treatment for the above-mentioned interim teaching staff as compared with established teaching staff?

(2) Is the fact that interim civil-servant teaching staff whose employment is terminated at the end of the teaching period cannot take their leave on actual rest days, but are paid the remuneration corresponding thereto, compatible with the principle that such interim staff should not be discriminated against?

14 Administrative Court No 2, Toledo, Spain.

(3) Is an abstract rule like that contained in the 13th Additional Provision of Law 5/2012, which, among other measures, for reasons of budgetary savings and the fulfilment of deficit objectives, suspended the application of an Agreement between the Ministry of Education and Science and the ANPE trade union, so far as concerns paid leave in July and August for replacements of more than five and a half months and for coverage of vacant posts, and required payment to be made to interim non-university teaching staff in respect of leave corresponding to 22 working days if the interim appointment was for a full academic year, or for the days corresponding thereto on a proportional basis, compatible with the principle that there should be no discrimination against such staff, who fall within the category of fixed-term workers?'

28. In the proceedings before the Court, written observations have been submitted by the Consejería de Educación of Castilla-La Mancha, the Spanish Government and the European Commission. The same parties, together with Mr Viejobueno Ibáñez, were represented at the hearing on 11 April 2018.

## IV. Legal assessment

29. The three questions referred for a preliminary ruling are all concerned with the question in law of how the principle of non-discrimination against fixed-term workers affects the situation of 'interim civil servants' in the Spanish teaching sector who are appointed for a full academic year but are then dismissed at the end of the school term, that is to say at the end of June.

30. The first question has to do with the justification for early dismissal at the end of the school term per se, whereas the second and third questions look at the consequences of such dismissal on the leave entitlement of interim civil servants. For this reason, I shall deal with the first question separately from the second and third questions.

### *A. Lawfulness of dismissal at the end of the school term (first question)*

31. By the first question, the referring court wishes to ascertain, in essence, whether the Spanish practice whereby interim civil servants who are appointed on grounds of necessity and urgency for a full academic year are dismissed prematurely at the end of the school term is compatible with clause 4(1) of the Framework Agreement. In that regard, the referring court raises doubts as to whether the end of the school term may constitute an objective ground for the difference in treatment as between interim civil servants and teachers having the status of established civil servants.

#### *1. Admissibility of the first question referred*

32. The Kingdom of Spain takes the view that the first question is inadmissible, because the referring court is thereby asking, in essence, whether the end of the school term may be regarded as a situation in which the reason for appointing interim civil servants ceases to apply within the meaning of Article 10(3) of the EBEP. The referring court is therefore asking for an interpretation of national law, which falls outside the jurisdiction of the Court.

33. The reason the Spanish Government gives for its objection is that EU law does not in principle call into question the possibility of terminating even fixed-term contracts before their prescribed end date. The fact that a situation in which the grounds of necessity and urgency justifying an appointment cease to apply may constitute a ground for early termination is not called into question either. The question therefore seeks only to ascertain whether the end of the school term may be regarded under national law as a situation in which necessity and urgency cease to apply.

34. That objection is untenable. It is true that, in accordance with settled case-law, the Court is prevented from interpreting national law in the context of preliminary ruling proceedings.[15] The referring court's question, however, is expressly concerned with the interpretation of clause 4(1) of the Framework Agreement. Even though the early termination of fixed-term contracts is not in itself precluded by EU law, any difference in treatment in this regard as between fixed-term workers and permanent employees must nonetheless be justified on objective grounds.[16] The national law must be interpreted in the light of that requirement. In the present proceedings, the Court can and must provide useful guidance in this regard.[17]

35. The first question is therefore admissible.

*2. Reply to the question referred*

36. It should be noted first that the Framework Agreement is also applicable to fixed-term employment contracts and relationships concluded with the public authorities and other public-sector bodies.[18] It follows that interim civil servants within the meaning of Spanish law must also be regarded as workers for the purposes of clause 3(1) of the Framework Agreement.

37. The appellants in the main proceedings were employed on a fixed-term basis. Although it was made clear at the hearing that their letters of appointment did not mention any specific end date, all of the parties appeared to be of the view that the employment relationship of the interim civil servants was supposed to come to an end on 14 September 2012 at the latest. In the order for reference too, that date is described as being the end of the 2011/2012 academic year.[19]

*(a) Applicability of the principle of non-discrimination*

38. Clause 4(1) of the Framework Agreement provides that, in respect of employment conditions, fixed-term workers must not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract. In accordance with the Court's case-law, that provision is unconditional and sufficiently precise for individuals to be able to rely upon it directly before the national courts.[20]

15 See, inter alia, judgments of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraph 16), and of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 81).

16 In *Nierodzik*, for example, the Court held that it was not the premature termination of the fixed-term contract as such which constituted discrimination against the fixed-term worker, but only the unjustified reduction of the notice period applicable to her by comparison with permanent employees; see judgment of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 35).

17 It is a matter of settled case-law that the Court should strive to provide national courts with useful guidance on the interpretation and application of EU law; see, inter alia, judgments of 31 January 2008, *Centro Europa 7* (C-380/05, EU:C:2008:59, paragraphs 49 to 51); of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraphs 17 and 19); of 13 July 2017, *Kleinsteube*r, C-354/16, EU:C:2017:539, paragraph 61); and of 26 July 2017, *Europa Way and Persidera* (C-560/15, EU:C:2017:593, paragraphs 35 and 36).

18 Judgments of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraphs 54 to 57); of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 25); of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraphs 38 to 40); and of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 67).

19 If the referring court were to come to the conclusion in its subsequent examination that the employment relationship of the interim civil servants was simply intended to be open to termination at any time rather than being intended to come to end automatically on 14 September 2012 at the latest, the Framework Agreement would, it is true, not be applicable. For, the mere possibility of terminating a contract at any time does not constitute a fixed term within the meaning of clause 3(1) of the Framework Agreement.

20 Judgments of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 68), and of 12 December 2013, *Carratù* (C-361/12, EU:C:2013:830, paragraph 28).

39. The Spanish Government, however, questions whether a difference in treatment in respect of 'employment conditions' is present in this case. In its view, the difference in treatment consists, rather, exclusively in the fact that interim civil servants are employed on fixed-term contracts, while established civil servants are permanent workers. The prescribed end of a fixed-term contract does not, however, as such, call for any justification. After all, the use of fixed-term contracts is not in itself actually precluded by the Framework Agreement. For that reason, the principle of non-discrimination is inapplicable from the very outset.

40. In support of that objection, the Spanish Government and the Consejería argued at the hearing, in essence, that the employment relationship was (in any event) fixed by a term (also) expiring at the end of the school term, that is to say at the end of June 2012. Either the reference to the '2011/2012 academic year' in the letter of appointment was to be understood as referring from the outset only to the period up to the end of the school term; or the employment relationship was actually subject to a fixed term expiring at the point when the grounds of necessity and urgency would cease to apply — which occurred at the end of the school term –and at the latest at the start of the new academic year.

41. What matters, therefore, is whether and to what extent the employment relationship of the interim civil servants in the main proceedings was subject to such a fixed term expiring at the end of the school term.

42. The concept of 'fixed term' for the purposes of clause 3(1) of the Framework Agreement must be interpreted autonomously in EU law.[21] According to the wording of that provision, the critical factor is whether the end of the employment relationship is determined by objective conditions such as reaching a specific date or the occurrence of a specific event.

43. In view of the difficulty in the present case of determining exactly when the 'necessity and urgency' ceased to apply, it would be questionable to say the least, if the foregoing interpretation of fixed term were employed, whether the end is even determined by an objective condition and the occurrence of a *specific* event at all. Indeed, at the hearing, counsel for the Consejería confirmed that it is *not* possible to determine in advance what event will lead to the termination of the employment relationship in an individual case. On the contrary, a number of different circumstances might mean that the reason for the appointment ceases to apply.

44. Be that as it may, a fixed-term contract is characterised by the fact that the employment relationship always comes to an end automatically upon the occurrence of the determined event.[22] In the light of the numerous circumstances in which the necessity and urgency of the appointment may cease to apply, however, it falls to the education authority to make an individual decision on termination in each case. Therefore, the fact that the necessity and urgency of an appointment cease to apply constitutes only a particular ground for termination, but not an event marking the expiry of the fixed term for the purposes of clause 3(1) of the Framework Agreement.

45. So far as concerns whether the fixed term may be regarded as expiring at the end of the school term, on the sole basis of the reference to the '2011/2012 academic year', it is for the national court alone to examine whether that expression actually referred only to the school term. In the event that the expression was from the outset meant to indicate that the employment relationship would come to an end on 30 June 2012, the situation here is similar to that at issue in *Grupo Norte Facility* and *Montero Mateos*. As I have already had occasion to state in my Opinions in those two cases, the prescribed end of a fixed-term employment relationship does not in itself constitute discrimination within the meaning of clause 4(1) of the Framework Agreement.[23]

21 See, in that regard, my Opinion in *Vernaza Ayovi* (C-96/17, EU:C:2018:43, point 43).

22 See, in that regard, my Opinion in *Vernaza Ayovi* (C-96/17, EU:C:2018:43, points 43 to 45).

23 See my Opinions in *Grupo Norte Facility* (C-574/16, EU:C:2017:1022, point 58), and *Montero Mateos* (C-677/16, EU:C:2017:1021, point 53).

46. The order for reference, however, which forms the sole basis for the Court's ruling,[24] states that the 2011/2012 academic year runs from 15 September 2011 to 14 September 2012. As all of the parties confirmed at the hearing, it is apparent from previous practice too that interim civil servants have always been employed for the duration of that period.

47. If we take the foregoing position as the basis for our assessment, the termination of the fixed-term employment relationship was therefore an *early* termination and not one that was *prescribed* in any event.[25] Although early termination is not in principle precluded under clause 4(1) of the Framework Agreement, it must nonetheless be non-discriminatory in its execution.[26]

48. For that reason, the Court has already made it clear that an interpretation of 'employment conditions' within the meaning of clause 4(1) of the Framework Agreement which excludes from the definition of that term conditions relating to termination or dismissal would limit the scope of the protection granted to fixed-term workers against discrimination, in disregard of the objective assigned to that provision.[27] In particular, the Court has held that the notice period applicable to termination constitutes an employment condition.[28] The same must therefore be true of the grounds for termination or dismissal relevant here.

49. The principle of non-discrimination is therefore applicable.

*(b) Comparability of interim civil servants and established civil servants*

50. It therefore remains for me to examine, as the central issue in this case, whether teachers having the status of established civil servants may be regarded as 'comparable permanent workers' within the meaning of clause 4(1) of the Framework Agreement. For, as is apparent not least from the wording of that provision, EU law prohibits discrimination against fixed-term workers only where this is perpetrated to the benefit of comparable permanent employees, but does not provide for the equal treatment of non-comparable fixed-term workers and permanent employees. Dismissal at the end of the school term may therefore constitute discrimination against fixed-term workers only where the situations in question are comparable.

51. Any difference in treatment as between different categories of fixed-term workers, on the other hand, is irrelevant — a point that was also made at the hearing.[29] The proper focus of the examination, therefore, is not whether, because of the change of practice in 2012, interim civil servants are now treated differently from interim civil servants who worked in the teaching sector before the 2011/2012 academic year and usually remained in post until the end of the academic year in September.

24 See judgments of 14 October 2010, *van Delft and Others* (C-345/09, EU:C:2010:610, paragraph 114), of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 13), and of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 24).

25 On this distinction, see also my Opinions in *Grupo Norte Facility* (C-574/16, EU:C:2017:1022, point 59), and *Montero Mateos* (C-677/16, EU:C:2017:1021, point 54).

26 See in this regard, not least, point 34 of this Opinion and footnote 16.

27 Judgments of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152, paragraphs 27 and 29), and of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683, paragraph 30).

28 Judgment of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 29).

29 Order of 11 November 2010, *Vino* (C-20/10, EU:C:2010:677, paragraph 57). See also in this regard my Opinions in *Grupo Norte Facility* (C-574/16, EU:C:2017:1022, point 45), and *Montero Mateos* (C-677/16, EU:C:2017:1021, point 40).

52. The appellants in the main proceedings, however, are claiming, conversely, that they are treated differently from *established* civil servants, inasmuch as the employment relationship of the latter is, currently, neither terminated at the end of the school term nor suspended for the duration of the summer holidays, whereas interim civil servants are dismissed at the start of the summer holidays. What matters, therefore, is whether interim civil servants and established civil servants are in a comparable situation.

53. The starting point for an examination of the comparability between teachers on fixed-term contracts and permanent employees, which it is for the referring court to carry out,[30] is the definition of the expression 'comparable permanent worker' in clause 3(2) of the Framework Agreement. The question as to whether the workers are engaged in the same or similar work must then be examined, in accordance with case-law, in the light of a number of factors, such as the nature of the work, training requirements and working conditions.[31]

54. According to the information contained in the order for reference, there is much in the present case to support the proposition that, so far as concerns the specific activity to be carried out, teachers on fixed-term contracts are in the same situation — from the point of view in particular the nature of their work, training requirements and working conditions — as teachers having the status of established civil servants. Indeed, under national law, interim civil servants are specifically appointed to positions which, temporarily, cannot be filled by established civil servants. Interim civil servants thus seem to perform the same kind of work under the same conditions because they each replace an established civil servant. They are also required to undergo the same training in order to enter the teaching profession and are subject to the same selection procedure.

55. The foregoing general considerations do not in themselves show, however, that interim civil servants and established civil servants are all in a situation which is comparable in every respect. The decisive factor is, rather, whether the two categories of employee are in a comparable situation *in relation*, inter alia and in particular, *to the rule at issue* — that is to say, in this instance, the early termination of the employment relationship at the start of the summer holidays.[32]

56. After all, interim civil servants may *not* be comparable with established civil servants in relation to dismissal before the summer holidays, because their status alone allows for the possibility of early termination, whereas the employment relationship of established civil servants is by definition permanent. The referring court in particular has, by its own account, relied on that circumstance in the past in order to justify the lawfulness of dismissing interim civil servants at the end of the school term.

57. The existence of discrimination cannot, however, be dismissed simply by reference to national legislation which specifically provides for the difference in treatment at issue.[33] What is more, it is a circular argument to say that the two categories of employee in this case are not comparable because the employment relationship of established civil servants is permanent, when the lawfulness of the early termination of the employment relationship of teachers on fixed-term contracts is the very

30 Judgments of 18 October 2012, *Valenza* (C-302/11 to C-305/11, EU:C:2012:646, paragraph 43); of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 32); and of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683, paragraph 42).

31 Judgments of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 66), and of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 31), as well as orders of 21 September 2016, *Álvarez Santirso* (C-631/15, EU:C:2016:725, paragraph 44), and of 9 February 2017, *Rodrigo Sanz* (C-443/16, EU:C:2017:109, paragraph 38); see, to the same effect, not least, judgment of 31 May 1995, *Royal Copenhagen* (C-400/93, EU:C:1995:155, paragraph 33).

32 See also, to that effect, order of 9 February 2012, *Lorenzo Martínez* (C-556/11, EU:C:2012:67, paragraph 44). See, in that regard, my Opinions in *Montero Mateos* (C-677/16, EU:C:2017:1021, point 44), *Grupo Norte Facility* (C-574/16, EU:C:2017:1022, point 49), and *Vernaza Ayovi* (C-96/17, EU:C:2018:43, point 71), as well as, on the principle of equal treatment generally, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 25).

33 Judgments of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 57); of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 54); and of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683, paragraph 46).

matter at issue. Otherwise, the comparability of fixed-term workers and established civil servants in relation to dismissal would always be precluded and fall outside the scope of the Framework Agreement. This, however, would run counter to the Court's case-law, which expressly applies the principle of non-discrimination laid down in clause 4(1) of the Framework Agreement to conditions of dismissal. [34]

58. It is only disadvantages that are inherently associated with fixed-term employment which reflect the (permissible) difference between fixed-term workers and permanent employees and do not therefore constitute discrimination, since fixed-term workers and permanent employees are not comparable in relation to such disadvantages. The disadvantages inherent in fixed-term employment must, however, be distinguished from additional disadvantages. In the present case, the practice of early dismissal at the end of the school term affects only interim civil servants on fixed-term contracts. The possibility of early termination is by no means a circumstance fundamentally inherent in fixed-term employment but an additional way in which interim civil servants are treated less favourably than established civil servants in Spanish law.

59. After all, at least for the period of its anticipated duration, temporary employment is not, in principle, associated with greater uncertainty with respect to its continued existence. Therefore, the comparability with the situation of established civil servants is not excluded simply for that reason. Rather (as I have already had occasion to state elsewhere), [35] the continued existence of the employment relationship of a fixed-term worker is precisely not less worthy of protection during the term of his contract than the continued existence of the employment relationship of a permanent employee. It is true that, in the present case, the national law provides that interim civil servants may be dismissed prematurely where the necessity and urgency of their appointment cease to apply. However, given in particular that the school term ends every year at the start of the school holidays, the persons concerned had no reason to expect that this would be classified by the administration as a situation in which the necessity and urgency of their appointment would cease to apply. The Commission too laid particular emphasis on this point at the hearing. Otherwise, their employment relationship could from the outset have been fixed by a term expiring at the end of the school term.

60. As regards the continuation of the employment relationship for the whole of the 2011/2012 academic year, interim civil servants and established civil servants are therefore in a comparable situation within the meaning of clause 4(1) of the Framework Agreement. Neither established civil servants nor interim civil servants had any reason to expect that, in the ordinary course of events (and particularly in the light of previous practice), they would be dismissed before the end of the academic year. As the Commission rightly points out, it is clear that the referring court too (alone competent, ultimately, to make such a finding) proceeds on the assumption that the situations of interim civil servants and established civil servants are comparable.

61. It follows that the dismissal of the appellants at the end of the 2011/2012 term constitutes a difference in treatment requiring justification for the purposes of clause 4(1) of the Framework Agreement.

*(c) Justification for the difference in treatment*

62. It must therefore be examined, finally, whether the difference in treatment can be justified on objective grounds.

34 See, in that regard, point 48 of this Opinion and footnote 27.

35 See my Opinion in *Vernaza Ayovi* (C-96/17, EU:C:2018:43, point 73).

63. By the reference to objective grounds, contained inter alia in clause 4(1) of the Framework Agreement, the European social partners — and, ultimately, the EU legislature too — give expression to the fundamental notion that fixed-term employment relationships must not be used by employers to deny the workers concerned rights which are recognised for comparable permanent workers. [36]

64. Put simply, the case-law on clause 4(1) of the Framework Agreement [37] recognises as objective grounds for a difference in treatment as between fixed-term workers and comparable permanent workers both the tasks to be performed by the workers concerned and legitimate social-policy objectives pursued by the Member State in question. Furthermore, even where objective grounds are present, unequal treatment is justifiable only if it is linked to precise and concrete factors and respects the principle of proportionality.

65. In accordance with those criteria, the end of the school term is not capable of constituting an objective ground for the less favourable treatment of the appellants in the main proceedings.

66. First, the nature of the employment relationship of interim civil servants is not such as to justify the difference in treatment as between them and teachers having the status of established civil servants. In accordance with settled case-law, after all, the temporary nature of the employment cannot be the sole justification for the discrimination. [38]

67. The Spanish Government and the Consejería maintain that, given their status, the interim civil servants should have expected to be dismissed prematurely, this having been provided for in the event that the reason for their appointment should cease to apply. They could not, however, have specifically foreseen that the end of the school term would be classified as a situation in which the reason for their appointment would cease to apply. An academic year is, after all, characterised by the alternation of periods of the school term and non-term time. The end of the school term in June was fixed from the outset and had even been given a date. To classify that customary and entirely foreseeable event, in the absence of the occurrence of any other circumstances, as one on account of which the reason for appointment ceases to apply, seems contradictory. In that event, the employment relationship should from the outset have been fixed by a term expiring at the start of the summer holidays, since, logically, there would from the beginning have been no reason to appoint staff out of term.

68. The position is arguably different in the case of an unforeseeable turn of events, such as where a private school opens in the catchment area of the establishment concerned and the demand for teaching staff is reduced as pupils switch to the other school, or where a colleague who has been on long-term sick leave makes an unexpected recovery.

69. Secondly, the reduced or non-existent demand for teaching at the end of term affects established civil servants and interim civil servants in the same way. So far as concerns the teaching itself, after all, the tasks assigned to interim civil servants are the same as those performed by established civil servants. [39] According to the referring court, not even established civil servants are under any obligation to attend school during the holidays or otherwise to make themselves specifically available to the education authority.

36 Judgments of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 37); of 12 December 2013, *Carratù* (C-361/12, EU:C:2013:830, paragraph 41); and of 13 March 2014, *Nierodzik* (C-38/13, EU:C:2014:152, paragraph 23).

37 Judgments of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraphs 53 and 58); of 22 April 2010, *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (C-486/08, EU:C:2010:215, paragraph 42); of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 55); of 18 October 2012, *Valenza* (C-302/11 to C-305/11, EU:C:2012:646, paragraph 51); and of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683, paragraph 45).

38 Judgments of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 57); of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 56); and of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 74).

39 See, in that regard, point 54 of this Opinion.

70. It is true that, during the summer holidays, established civil servants may have to make preparations for the next academic year which fall to interim civil servants only if they are appointed for a further academic year. Both categories of teacher must, however, use the summer holidays for further vocational training. What is more, there is no reason why interim civil servants would not be asked to conduct re-sit examinations in exactly the same way as established civil servants. At the hearing, it was confirmed in this regard that the holding of examinations is not by any means an activity confined to established civil servants but can be performed just as well by interim civil servants — in particular in the shorter out-of-term periods during the academic year. A difference in treatment cannot therefore be justified by the nature of the tasks assigned to the disadvantaged workers.

71. Thirdly, the dismissal of teachers on fixed-term contracts at the end of the school term cannot be justified on the sole ground that the anticipated continuation of their employment during the summer would place too great a burden on the public finances.

72. It is apparent from the order for reference that, until the 2011/2012 academic year, interim civil servants who had been appointed for a full academic year remained in employment even during the summer holidays. In early 2012, however, that practice was changed with a view to making budgetary savings. To that end, Spain enacted Law 5/2012 on General Budgets, which provides for the dismissal of interim civil servants at the end of the school term and the payment of a pro rata allowance in lieu of untaken leave. The referring court takes the view, therefore, that the achievement of budgetary savings is the real objective behind the change of practice. In accordance with settled case-law, however, budgetary considerations alone cannot themselves serve as justification for discrimination. [40]

73. Nor is it apparent why interim civil servants in particular should contribute to the objective of achieving efficiencies by having their employment relationships terminated early. Although it falls to the Member States to decide how to use their budgetary resources, they must do so in a non-discriminatory manner. [41]

74. Fourthly, even if the achievement of efficiencies dictated by budgetary policy were to be recognised as a legitimate objective in certain circumstances, the pursuit of that aim would in any event be disproportionate in this case.

75. For, within the scope of the prohibition of discrimination laid down in the Framework Agreement in particular, case-law requires, for the purposes of examining proportionality, that a difference in treatment must be capable of being justified by reference to objective and transparent criteria. [42]

76. The Spanish practice, however, is not transparent in two respects. On the one hand, the dismissal of interim civil servants at the start of the summer holidays is contrary to the 1994 collective agreement which the employees in question legitimately expected to apply. This provides that interim civil servants must remain in employment in their posts during the summer if they have been teaching for at least five and a half months on 30 June. Law 5/2012, on the other hand, seeks to circumvent that collective agreement by affording interim civil servants, at the time of their dismissal, only pro rata compensation in lieu of a maximum of 22 leave days leave rather than continuing to pay them during non-term time.

40 Judgments of 24 February 1994, *Roks and Others* (C-343/92, EU:C:1994:71, paragraph 35 and, additionally, paragraphs 36 and 37); of 20 March 2003, *Kutz-Bauer* (C-187/00, EU:C:2003:168, paragraph 59 and, additionally, paragraphs 60 and 61); and of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401, paragraph 110).

41 To that effect, the Court held in the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 48), that the reduction of judges' salaries did not infringe EU law because it formed part of an extensive savings programme in the public sector.

42 Judgments of 13 September 2007, *Del Cerro Alonso* (C-307/05, EU:C:2007:509, paragraph 58); of 22 December 2010, *Gavieiro Gavieiro and Iglesias Torres* (C-444/09 and C-456/09, EU:C:2010:819, paragraph 55); and of 8 September 2011, *Rosado Santana* (C-177/10, EU:C:2011:557, paragraph 77).

77. On the other hand, according to the referring court, the practice of dismissing interim civil servants at the end of the school term is not being implemented uniformly. Not all interim civil servants are dismissed at the end of the school term. Instead of adhering to objective and transparent criteria, the education authority can thus decide on a case-by-case basis, and in a quasi-arbitrary fashion, whether or not to dismiss an interim civil servant.

78. For all the foregoing reasons, the difference in treatment as between interim civil servants such as the appellants in the main proceedings and teachers having the status of established civil servants in relation to the continuation during the summer holidays of an employment relationship extending over a given academic year cannot be justified.

79. In answer to the first question, clause 4(1) of the Framework Agreement must therefore be interpreted as meaning that it precludes a national practice, such as that at issue in the main proceedings, whereby teachers appointed as interim civil servants within the meaning of Spanish law for a full academic year are dismissed immediately at the end of the school term, whereas the employment relationship of permanent employees who are to this extent comparable carries on even after the end of the school term and is also not suspended.

### *B. Payment in lieu of leave (second and third questions referred)*

80. As the first question must, in my opinion, be answered in the negative, there is no need to answer the second and third questions.

81. The following points in relation to the second question are therefore made only in the alternative. The fact that, because they are dismissed before the summer holidays, interim civil servants are also no longer allowed to take the leave prescribed during that period, is merely a necessary consequence of (what, in my view, is) their unlawful dismissal. This does not, however, amount to a separate instance of discrimination. If an established civil servant were dismissed at the end of the school term, on one of the grounds for loss of civil servant status provided for in Article 63 of the EBEP, for example, he would no longer be able to take leave in the summer months either but would be paid in lieu of the leave entitlement provided for in Article 50(1) of the EBEP. Interim civil servants are certainly not treated any less favourably on this account.

82. What is more, Article 7(2) of Directive 2003/88 specifically provides for an allowance in lieu of leave entitlement to be paid where the employment relationship is terminated.

83. As to the third question, the referring court thereby seeks to ascertain, in essence, whether the principle of non-discrimination laid down in clause 4(1) of the Framework Agreement precludes national legislation rescinding a previously concluded collective agreement under which teachers on fixed-term contracts who have been teaching for at least five and a half months on 30 June of a given year are to continue to perform their duties until the end of the academic year in September — and must therefore continue to be paid in July and August.

84. It is true that Law 5/2012 provides instead for an allowance *pro rata temporis* to be paid to teachers dismissed at the end of the school term in lieu of the leave entitlement 'lost' as a result of the termination of their employment relationship. However, in accordance with the rule contained in Article 50(1) of the EBEP, applicable to established civil servants too, their leave entitlement amounts

in full to only 22 days.[43] The appellants now seem to regard themselves as discriminated against inasmuch as established civil servants are effectively paid for more (approximately twice as many) non-working days in July and August. As a result, interim civil servants are thereby deprived of a large proportion of the paid leave due to them in July and August.

85. In reality, however, this too is simply a necessary consequence of the dismissal of interim civil servants at the end of the school term. If the dismissal of the workers concerned is unlawful from the point of view of EU law, then, by extension, it no longer matters whether those workers can be awarded an allowance in lieu of 22 untaken leave days instead of continuing to be paid a salary until September.

86. In the event that the Court does not classify the dismissal of the teachers concerned at the end of the school term as discriminatory, it must be noted that, in accordance with Article 50(1) of the EBEP, established civil servants too would be entitled only to an allowance in lieu of 22 leave days if they were dismissed at the end of the school term. Interim civil servants are not therefore treated less favourably in this regard either. The fact that a teacher's position may be more advantageous if that teacher simply continues to be paid during the summer months is attributable to the nature of teaching, which is characterised by the alternation of periods of school term and periods of non-term time. However, out-of-term periods during an academic year cannot all be treated automatically as leave.[44]

## V. Conclusion

87. In the light of the foregoing, I propose that the Court's response to the request for a preliminary ruling of the Tribunal Superior de Justicia de Castilla-La Mancha (High Court of Justice of Castilla-La Mancha, Spain) should be as follows:

Clause 4(1) of the Framework Agreement on fixed-term work annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP must be interpreted as meaning that it precludes a national practice, such as that at issue in the main proceedings, whereby teachers appointed as interim civil servants within the meaning of Spanish law for a full academic year are dismissed immediately at the end of the school term, whereas the employment relationship of permanent employees who are to this extent comparable carries on even after the end of the school term and is also not suspended.

43 An allowance in lieu of the full 22 days is paid only to interim civil servants who have already worked for 12 months beforehand. Interim civil servants who were not appointed until the beginning of the academic year receive only an allowance pro rata to the time previously worked.

44 See, in that regard, point 70 of this Opinion.