

JUDGMENT OF THE COURT (Eighth Chamber)

13 March 2014 (*)

(Request for a preliminary ruling – Social policy – Directive 1999/70/EC – Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP – Clause 4 – Concept of ‘employment conditions’ – Notice period for the termination of a fixed-term employment contract – Difference in treatment between workers on contracts of indefinite duration)

In Case C-38/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy w Białymstoku (Poland), made by decision of 14 January 2013, received at the Court on 25 January 2013, in the proceedings

Małgorzata Nierodzik

v

Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy,

THE COURT (Eighth Chamber),

composed of C.G. Fernlund, President of the Chamber, A. Ó Caoimh (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by M. Owsiany-Hornung and D. Martin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of clauses 1 and 4 of the Framework Agreement on fixed-term work concluded on 18 March 1999 (‘the Framework Agreement’), which is 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 (OJ 1999 L 175,

p. 43).

- 2 The request has been made in proceedings between Ms Nierodzik, a nursing assistant, and her former employer *Samodzielny Publiczny Psychiatryczny Zakład Opieki Zdrowotnej im. dr. Stanisława Deresza w Choroszczy* (Dr. Stanisław Deresz Public and Independent Psychiatric Health Care Institution, Choroszcz) ('the *Psychiatryczny Zakład Opieki Zdrowotnej*') concerning the termination of a fixed-term contract between Ms Nierodzik and that institution.

Legal context

European Union law

- 3 Recital 14 in the preamble to Directive 1999/70, which is based on Article 139(2) EC, indicates that, in concluding the Framework Agreement, the signatory parties wished to improve the quality of fixed-term work by ensuring the application of the principle of nondiscrimination and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

- 4 Article 1 of Directive 1999/70 states that the purpose of that directive is 'to put into effect the framework agreement ... concluded ... between the general cross-industry organisations (ETUC, UNICE and CEEP) annexed hereto'.

- 5 The third paragraph in the preamble to the Framework Agreement is worded as follows:

'This agreement sets out the general principles and minimum requirements relating to fixed-term work, recognising that their detailed application needs to take account of the realities of specific national, sectoral and seasonal situations. It illustrates the willingness of the Social Partners to establish a general framework for ensuring equal treatment for fixed-term workers by protecting them against discrimination and for using fixed-term employment contracts on a basis acceptable to employers and workers.'

- 6 Pursuant to Clause 1(a) of the Framework Agreement, its purpose is to 'improve the quality of fixed-term work by ensuring the application of the principle of nondiscrimination'.

- 7 Clause 2 of the Framework Agreement, entitled 'Scope', states at point 1:

'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.'

- 8 Clause 3 of the Framework Agreement, entitled 'Definitions', provides:

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.

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. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national

law, collective agreements or practice.’

9 Clause 4 of the framework agreement, headed ‘Principle of nondiscrimination’, provides, at point 1:

‘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.’

Polish law

10 The file before the Court states that, under Article 32(1) of the Law relating to the Labour Code (Ustawa – Kodeks pracy) of 26 June 1974 (Dz. U. of 1998, No. 21, Position 94) (‘the Labour Code’), each of the parties may terminate an employment contract concluded for a trial period or an indefinite duration by giving notice. Pursuant to Article 32(2) of the Labour Code, an employment contract will end on the expiry of a period of notice.

11 Article 33 of the Labour Code, which concerns the notice period applicable to fixed-term contracts, provides:

‘Where a fixed-term employment contract is concluded for a period exceeding six months, the parties may provide for the contract to be terminated on two weeks’ notice.’

12 Under Article 36(1) of the Labour Code ‘the notice period for an employment contract of indefinite duration shall depend on the length of service of the worker with the employer concerned and shall be:

- 1) two weeks if the worker has been employed for less than six months;
- 2) one month if the worker has been employed for at least six months,
- 3) three months if the worker has been employed for at least three years’.

The dispute in the main proceedings and the question referred for a preliminary ruling

13 Ms Nierodzik was employed by the Psychiatryczny Zakład Opieki Zdrowotnej from 12 May 1986 until 15 February 2010. The parties were bound, during the greater part of that period, by an employment contract of indefinite duration. On 15 February 2010, they terminated that contract by mutual agreement at the request of the applicant in the main proceedings who wished to take early retirement.

14 Subsequently, the Psychiatryczny Zakład Opieki Zdrowotnej concluded a fixedterm contract with Ms Nierodzik for part-time employment for the period from 16 February 2010 to 3 February 2015. Pursuant to that contract, the Psychiatryczny Zakład Opieki Zdrowotnej could unilaterally terminate that contract at the end of a two-week notice period. It did not require to give any justification for doing so.

15 On 3 April 2012, the Psychiatryczny Zakład Opieki Zdrowotnej informed Ms Nierodzik that it was unilaterally terminating the contract and that the contract would end on the expiry of the two-week notice period, that is to say, on 21 April 2012.

16 Taking the view that the conclusion of a fixedterm contract for a period of several years was unlawful, as it was intended to circumvent national law and deprive her of the rights she could have relied upon if she had had an employment contract of indefinite duration. Ms Nierodzik brought an

action against the Psychiatryczny Zakład Opieki Zdrowotnej before the Sąd Rejonowy w Białymstoku. She requests that the fixed-term contract be reclassified as a contract of indefinite duration and a declaration that she was entitled to a notice period of three months.

- 17 The referring court is unsure about the compatibility of the Framework Agreement with national legislation, since the application of the latter gives rise to a difference in treatment between workers on fixed-term contracts and contracts of indefinite duration. In that regard, the referring court states that Article 33 of the Labour Code provides that parties who conclude a fixed-term contract of more than six months may provide for a notice period of two weeks in the contract, whereas, for an employment contract of indefinite duration that period is between two weeks and three months, to be determined in accordance with the length of service of the employee concerned, pursuant to Article 36(1) thereof.
- 18 In those circumstances, the Sąd Rejonowy w Białymstoku decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Article 1 of [Directive 1999/70], clause 1 of the [Framework Agreement], clause 4 of the [Framework Agreement] and the general principle of European Union law prohibiting discrimination based on the type of employment contract be construed as meaning that they preclude provisions of national law establishing rules for determining the length of the notice period for the termination of fixed-term employment contracts concluded for a period exceeding six months which are different (less favourable for workers employed on fixed-term contracts) from the rules determining the length of the notice period for the termination of employment contracts of indefinite duration; more specifically, do they preclude provisions of national law (Article 33 of the Law relating to the [Labour Code] which, irrespective of a worker’s length of service, establish a fixed two-week notice period for the termination of fixed-term contracts concluded for a period exceeding six months, whereas the length of the notice period for the termination of contracts of indefinite duration is dependent on the worker’s length of service and may range from two weeks to up to three months (Article 36(1) ... of the Labour Code)?’

The question referred for a preliminary ruling

- 19 By its question, the referring court asks essentially whether clause 4(1) of the Framework Agreement read together with Article 1 of Directive 1999/70, clause 1 of the Framework Agreement and the principle of non-discrimination, must be interpreted as precluding a national rule, such as that at issue in the main proceedings, which provides that, for the termination of fixed-term contracts of employment of more than six months a fixed notice period of two weeks may be applied regardless of the length of service of the worker concerned, whereas the length of the notice period for contracts of indefinite duration is fixed in accordance with the length of service of the worker concerned and may vary from two weeks to three months.
- 20 Clause 4(1) of the Framework Agreement lays down, in respect of employment conditions, a prohibition on treating fixed-term workers 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.
- 21 Therefore, it must be determined first of all whether the length the notice period of a fixed-term contract falls within the definition of ‘employment conditions’ within the meaning of that provision.
- 22 It should be recalled that, according to clause 1(a) of the Framework Agreement, one of its objectives is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination. Similarly, the third paragraph in the preamble to the framework agreement states that it ‘illustrates the willingness of the Social Partners to establish a general framework for

ensuring equal treatment for fixed-term workers by protecting them against discrimination'. Recital 14 in the preamble to Directive 1999/70 indicates to that effect that the aim of the Framework Agreement is, in particular, to improve the quality of fixed-term work by setting out minimum requirements in order to ensure the application of the principle of non-discrimination (Joined Cases C-444/09 and C-456/09 *Gavieiro Gavieiro and Iglesias Torres* [2010] ECR I-14031, paragraph 47).

- 23 The framework agreement, in particular clause 4 thereof, aims to apply the principle of non-discrimination to fixed-term workers in order to prevent an employer using such an employment relationship to deny those workers rights which are recognised for permanent workers (Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109, paragraph 37, and *Gavieiro Gavieiro and Iglesias Torres*, paragraph 48).
- 24 Having regard to the objectives pursued by the framework agreement, according to settled case-law of the Court, clause 4 of the Framework Agreement must be understood as expressing a principle of European Union social law which cannot be interpreted restrictively (see, to that effect, *Del Cerro Alonso*, paragraph 38, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 114).
- 25 The Court has held that the decisive criterion for determining whether a measure falls within the scope of 'employment conditions' within the meaning of that clause is, precisely, the criterion of employment, that is to say the employment relationship between a worker and his employer (see, to that effect, Case C-361/12 *Carratù* [2013] ECR, paragraph 35).
- 26 In that connection, the Court has already held that three-yearly length of service increments fall within the definition of 'employment conditions' within the meaning of clause 4(1) of the Framework Agreement (see, to that effect, *Del Cerro Alonso*, paragraph 47; *Gavieiro Gavieiro and Iglesias Torres*, paragraphs 50 to 58; and order of 18 March 2011 in Case C-273/10 *Montoya Medina*, paragraphs 32 to 34) as well as the compensation that the employer must pay to an employee on account of the unlawful insertion of a fixed-term clause into his employment contract (*Carratù*, paragraph 38).
- 27 In the present case, it must be observed that the national law at issue in the main proceedings concerns the conditions for the termination of a fixed-term employment contract. An interpretation of clause 4(1) of the Framework Agreement which excludes from the definition of 'employment conditions', within the meaning of that provision, conditions of that nature relating to termination would limit the scope of the protection granted to fixed-term workers against discrimination, in disregard of the objective assigned to that provision.
- 28 Moreover, it must be observed that the definition of 'employment conditions' also appears in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23). Under Article 3(1)(c) of Directive 2000/78 and Article 14(1)(c) of Directive 2006/54, employment conditions include conditions relating to dismissals. As regards the Framework Agreement, the scope of the definition of 'employment conditions' for the purpose of clause 4(1) of that directive is, by analogy, similar.
- 29 Having regard to those factors, it must be held that the definition of 'employment conditions' within the meaning of clause 4(1) includes the notice period for the termination of fixed-term employment contracts.
- 30 As regards the application of clause 4(1), it must be examined, first, whether the situation of fixed-term and permanent workers at issue in the main proceedings is comparable.

- 31 In that connection, in order to assess whether the persons concerned are engaged in the same or similar work for the purposes of the Framework Agreement, it must be determined, in accordance with clauses 3(2) and 4(1) of that agreement, whether, in the light of a number of factors, such as the nature of the work, training requirements and working conditions, those persons can be regarded as being in a comparable situation (Joined Cases C-302/11 to C-305/11 *Valenza and Others* [2012] ECR, paragraph 42 and the case-law cited).
- 32 Therefore, it is for the national court to determine whether the applicant in the main proceedings, when she was working for the Psychiatryczny Zakład Opieki Zdrowotnej under a fixed-term employment contract, was in a situation comparable to that of other workers employed on a permanent basis by the same employer for the same period (see, by analogy, *Valenza and Others*, paragraph 43 and the case-law cited).
- 33 In the present case, if the referring court finds that the applicant in the main proceedings did similar or identical work to a permanent worker, it should be found that the applicant was in a comparable situation to that of permanent workers. In that connection, the fact that the applicant previously occupied the same post, as an employee with a contract of indefinite duration, may constitute evidence to support a finding that her situation as a fixed-term worker was comparable to that of a person with a contract of indefinite duration.
- 34 In that case, it is clear that the notice period, prior to the termination of the employment contract of the applicant in the main proceedings, fixed without taking account of her length of service, was one of two weeks, whereas, if Ms Nierodzik had been employed under a contract of indefinite duration, that period, calculated in accordance with her length of service, would have been one month, that is to say, twice the length of the notice period she received. The only factor capable of distinguishing Ms Nierodzik's situation from that of a permanent worker seems to be the temporary nature of the employment relationship with her employer.
- 35 It follows from the foregoing that the application of notice periods of different length constitutes different treatment in respect of employment conditions.
- 36 Second, as regards the existence of a possible objective justification, for the purpose of clause 4(1) of the Framework Agreement, the Polish Government puts forward arguments relating to the difference in nature and purpose which distinguish between fixedterm employment contracts and employment contracts of indefinite duration. In the present case, the difference between the two types of employment contracts lies in their length and the stability of the employment relationship.
- 37 As regards the difference in nature of those employment contracts, it must be recalled, in that connection, that the Court has already held that reliance on the mere temporary nature of the employment is not capable of constituting an objective ground (see, to that effect, *Valenza and Others*, paragraph 52 and the case-law cited).
- 38 Different treatment with regard to employment conditions as between fixed-term workers and permanent workers cannot be justified on the basis of a criterion which, in a general and abstract manner, refers precisely to the term of the employment. If the mere temporary nature of an employment relationship were held to be sufficient to justify such a difference, the objectives of Directive 1999/70 and the Framework Agreement would be negated. Rather than improving the quality of fixed-term work and promoting equal treatment as required by Directive 1999/70 and the Framework Agreement, recourse to such a criterion would perpetuate a situation unfavourable to fixed-term workers (order of 9 February 2012 in Case C-556/11 *Lorenzo Martínez*, paragraph 50 and the caselaw cited).
- 39 As regards the Polish Government's argument that a fixed-term contract is supposed to promote the stability of employment relationships, it must be held that that does not constitute an objective

ground, within the meaning of clause 4(1) of the Framework Agreement, giving legitimacy to different treatment such as that at issue in the main proceedings.

- 40 Having regard to the foregoing considerations, the answer to the question referred by the national court is that clause 4(1) of the Framework Agreement must be interpreted as precluding a national rule, such as that at issue in the main proceedings, which provides that, for the termination of fixed-term contracts of employment of more than six months, a fixed notice period of two weeks may be applied regardless of the length of service of the worker concerned, whereas the length of the notice period for contracts of indefinite duration is fixed in accordance with the length of service of the worker concerned and may vary from two weeks to three months, where those two categories of workers are in comparable situations.

Costs

- 41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Clause 4(1) of the Framework Agreement on fixed-term work concluded on 18 March 1999, which is 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 precluding a national rule, such as that at issue in the main proceedings, which provides that, for the termination of fixed-term contracts of more than six months, a fixed notice period of two weeks may be applied regardless of the length of service of the worker concerned, whereas the length of the notice period for contracts of indefinite duration is fixed in accordance with the length of service of the worker concerned and may vary from two weeks to three months, where those two categories of workers are in comparable situations.

[Signatures]

* Language of the case: Polish.