JUDGMENT OF THE COURT (Sixth Chamber)

22 February 2024 (*)

(Reference for a preliminary ruling – Social policy – Directive 2008/104/EC – Temporary agency work – Article 5(1) – Principle of equal treatment – Article 3(1)(f) – Concept of 'basic working and employment conditions applicable to temporary agency workers' – Concept of 'pay' – Compensation payable in respect of the total permanent incapacity of a temporary agency worker to carry out his or her usual occupation as a result of an accident at work which occurred during his or her assignment)

In Case C-649/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), made by decision of 27 September 2022, received at the Court on 14 October 2022, in the proceedings

XXX

v

Randstad Empleo ETT SAU,

Serveo Servicios SAU, formerly Ferrovial Servicios SA,

Axa Seguros Generales SA de Seguros y Reaseguros,

THE COURT (Sixth Chamber),

composed of P.G. Xuereb, acting as President of the Chamber, A. Kumin (Rapporteur) and I. Ziemele, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Spanish Government, by M. Morales Puerta, acting as Agent,

– the European Commission, by I. Galindo Martín and D. Recchia, 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 Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter'), Article 2 TEU and the first

subparagraph of Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9), read in conjunction with Article 3(1)(f) thereof.

2 The request has been made in proceedings between XXX, a temporary agency worker, and Randstad Empleo ETT SAU ('Randstad Empleo'), a company with which he entered into a temporary employment contract, and Serveo Servicios SAU, formerly Ferrovial Servicios SA ('Serveo Servicios'), the user undertaking to which he was assigned, and the insurance company Axa Seguros Generales SA de Seguros y Reaseguros ('Axa'), as regards the amount of compensation to which XXX is entitled in respect of his total permanent incapacity to carry out his usual occupation as a result of an accident at work which occurred during his assignment to that user undertaking and resulting in the termination of his employment relationship.

Legal context

European Union law

Directive 91/383/EEC

3 The fourth recital of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (OJ 1991 L 206, p. 19) is worded as follows:

'Whereas research has shown that in general workers with a fixed-duration employment relationship or temporary employment relationship are, in certain sectors, more exposed to the risk of accidents at work and occupational diseases than other workers'.

4 Article 1 of that directive, entitled 'Scope', provides:

'This Directive shall apply to:

…

2. temporary employment relationships between a temporary employment business which is the employer and the worker, where the latter is assigned to work for and under the control of an undertaking and/or establishment making use of his services.'

5 Article 2 of that directive, headed 'Object', provides:

'1. The purpose of this Directive is to ensure that workers with an employment relationship as referred to in Article 1 are afforded, as regards safety and health at work, the same level of protection as that of other workers in the user undertaking and/or establishment.

2. The existence of an employment relationship as referred to in Article 1 shall not justify different treatment with respect to working conditions inasmuch as the protection of safety and health at work are involved, especially as regards access to personal protective equipment.

…'

6 Under Article 8 of that directive, entitled ' Temporary employment relationships: responsibility':

'Member States shall take the necessary steps to ensure that:

1. without prejudice to the responsibility of the temporary employment business as laid down in

national legislation, the user undertaking and/or establishment is/are responsible, for the duration of the assignment, for the conditions governing performance of the work;

2. for the application of point 1, the conditions governing the performance of the work shall be limited to those connected with safety, hygiene and health at work.'

Directive 2008/104

7 Recitals 1, 10 to 13 and 15 to 17 of Directive 2008/104 state:

'(1) This Directive respects the fundamental rights and complies with the principles recognised by the [Charter]. In particular, it is designed to ensure full compliance with Article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity …

…

(10) There are considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union.

(11) Temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market.

(12) This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.

(13) [Directive 91/383] establishes the safety and health provisions applicable to temporary agency workers.

…

(15) Employment contracts of an indefinite duration are the general form of employment relationship. In the case of workers who have a permanent contract with their temporary-work agency, and in view of the special protection such a contract offers, provision should be made to permit exemptions from the rules applicable in the user undertaking.

(16) In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected.

(17) Furthermore, in certain limited circumstances, Member States should, on the basis of an agreement concluded by the social partners at national level, be able to derogate within limits from the principle of equal treatment, so long as an adequate level of protection is provided.'

8 Article 1 of that directive, entitled 'Scope', provides, in paragraph 1 thereof:

'This Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to user undertakings to work temporarily under their supervision and direction.'

9 Article 2 of that directive, headed 'Aim', provides:

‘The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.’

10 Article 3 of Directive 2008/104, headed ‘Definitions’, provides:

‘1. For the purposes of this Directive:

…

(f) “basic working and employment conditions” means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;

(ii) pay.

2. This Directive shall be without prejudice to national law as regards the definition of pay, contract of employment, employment relationship or worker.

…’

11 Article 5 of that directive, entitled ‘The principle of equal treatment’, states:

‘1. The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

…

2. As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.

3. Member States may, after consulting the social partners, give them, at the appropriate level and subject to the conditions laid down by the Member States, the option of upholding or concluding collective agreements which, while respecting the overall protection of temporary agency workers, may establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in paragraph 1.

4. Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

…’

Spanish law

Law 14/1994

12 Article 11(1) of Ley 14/1994 por la que se regulan las empresas de trabajo temporal (Law 14/1994 on temporary-work agencies), of 1 June 1994 (BOE No 131, of 2 June 1994), in the version applicable to the dispute in the main proceedings (‘Law 14/1994’), provides:

‘While working for a user undertaking, temporary agency workers shall be entitled to the basic working and employment conditions that would apply if they had been recruited directly by the user undertaking to occupy the same job.

For these purposes, basic working and employment conditions means working and employment conditions relating to pay, the duration of working time, overtime, rest periods, night work, holidays and public holidays.

Pay shall include all fixed or variable payments established in the collective agreement applicable to the user undertaking for the job to be performed and which relate to the job in question. It must include, in any event, the proportional part corresponding to weekly rest, annual bonuses and gratuities, public holidays and annual leave. The user undertaking is obliged to calculate the final amount to be paid to the worker and, to that end, to mention the payments referred to in this paragraph in the contract for the supply of the worker.

Likewise, temporary agency workers shall be entitled to the same conditions that apply to workers in the user undertaking as regards … equal treatment for men and women, and any action to combat any discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation.’

The Workers’ Statute

13 Article 49(1) of the Estatuto de los Trabajadores (Workers’ Statute), in the version resulting from Real Decreto Legislativo 2/2015 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Law on the Workers’ Statute) of 23 October 2015 (BOE No 255 of 24 October 2015, p. 100224), provides:

‘An employment contract shall be terminated:

…

(e) in the event of the death, severe disability, or total or absolute permanent incapacity of the worker …’

The collective temporary agency work agreement

14 Under Article 42 of the VI convenio colectivo estatal de empresas de trabajo temporal (sixth national collective agreement for temporary-work agencies) (‘the collective temporary agency work agreement’), temporary agency workers are entitled to compensation of EUR 10,500 in the event of a total permanent incapacity to carry out his usual occupation as a result of an accident at work.

The collective transport sector agreement

15 Article 31 of the convenio colectivo para el sector de la industria de transporte de mercancías por carretera y agencias de transporte de Álava (collective agreement for the road haulage sector and transport agencies of Álava) (‘the collective transport sector agreement’) provides for compensation

of EUR 60,101.21 in cases where the worker suffers total or absolute permanent incapacity to carry out his or her usual occupation as a result of an accident at work.

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

16 XXX entered into a temporary employment contract, which took effect on 1 October 2016, with Randstad Empleo, which assigned him to Serveo Servicios to perform the duties of a handling operator. In accordance with that contract, the collective temporary agency work agreement is applicable to that employment relationship.

17 During that assignment, XXX suffered an accident at work on 24 October 2016. By decision of the Dirección Provincial del Instituto Nacional de la Seguridad Social de Álava (Provincial Directorate of the National Social Security Institute, Álava, Spain) of 16 March 2019, upheld by the Juzgado de lo Social No 2 de Vitoria-Gasteiz (Social Court No 2, Vitoria-Gasteiz, Spain), by judgment of 12 September 2019, it was declared that XXX was suffering from a total permanent incapacity to carry out his usual occupation as a result of that accident at work.

18 On 21 November 2019, on the basis of Article 42 of the collective temporary agency work agreement, Axa paid compensation of EUR 10,500 to XXX in respect of that worker's total permanent incapacity to carry out his usual occupation. However, XXX argues that he should have been paid compensation of EUR 60,101.21 on the basis of Article 31 of the collective transport sector agreement.

19 Accordingly, on 7 February 2020, the sindicato Eusko Langileen Alkartasuna (the trade union Basque Workers' Solidarity), acting as representative for XXX, brought an action for damages before the Juzgado de lo Social No 3 de Vitoria (Social Court No 3, Vitoria, Spain) against, first, Randstad Empleo, Serveo Servicios and Axa and, secondly, the Fondo de Garantía Salarial (Wages Guarantee Fund, Spain) seeking payment to XXX of the sum of EUR 49,601.21, namely the difference between the compensation paid to XXX under Article 42 of the collective agreement for temporary work and the compensation provided for under Article 31 of the collective agreement for the transport sector, plus 20% or default interest. That court dismissed that action by judgment of 30 December 2021 on the ground, inter alia, that the collective temporary agency work agreement was applicable to XXX and that, in the light of the case-law of the Tribunal Supremo (Supreme Court, Spain), supplementary social security benefits granted on a voluntary basis and which do not form part of the minimum wage guarantee provided for in Article 11 of Law 14/1994, such as the compensation claimed in this case by XXX, did not fall within the concept of 'pay'.

20 The trade union Basque Workers' Solidarity brought an appeal against that judgment before the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), the referring court. Before that court, XXX claims that he should have received compensation under Article 31 of the collective transport sector agreement, since that compensation falls within the concept of 'basic working and employment conditions' within the meaning of Article 3(1)(f) of Directive 2008/104. By contrast, the defendants in the main proceedings contend that the collective temporary agency work agreement is applicable to XXX and that compensation such as that at issue in the main proceedings does not fall within the scope of 'basic working and employment conditions' within the meaning of that directive.

21 The referring court expresses doubts as to whether the interpretation by the Tribunal Supremo (Supreme Court) of Article 11 of Law 14/1994, which is intended to transpose Directive 2008/104, is consistent with the principles of equal treatment and non-discrimination enshrined in Articles 20 and 21 of the Charter and with Article 5 of that directive. According to the referring court, under that interpretation, supplementary social security benefits granted on a voluntary basis do not fall within the concept of 'pay' within the meaning of Article 11, since they are not directly linked to

work. It follows from that interpretation that the compensation at issue in the main proceedings does not fall within the concept of 'basic working and employment conditions' and, therefore, that XXX cannot seek payment of compensation under Article 31 of the collective transport sector agreement.

22 According to the referring court, having regard to the purpose of Directive 2008/104, in particular Article 5 thereof, the concept of 'basic working and employment conditions' should be interpreted broadly in accordance with the case-law of the Court so that XXX is entitled to the same compensation to which a worker directly recruited by Serveo Servicios would be entitled in the same situation. The interpretation given by the Tribunal Supremo (Supreme Court) to Article 11 of Law 14/1994 could lead to an absurd situation whereby two workers injured in the course of the same accident at work would obtain different compensation depending on whether or not they were recruited directly by the user undertaking.

23 Furthermore, as regards the termination of XXX's employment contract following that worker's total permanent incapacity to carry out his usual occupation, the referring court notes that, in the judgment of 12 May 2022, *Luso Temp* (C-426/20, EU:C:2022:373), the Court held that the concept of 'basic working and employment conditions' included compensation which an employer is required to pay to a worker on account of the termination of that worker's employment relationship.

24 Finally, the referring court considers that XXX suffers from a disability as a result of the accident at work in question and that he lost his job as a result. The failure to recognise XXX's right to be compensated in the same way as workers directly recruited by Serveo Servicios in the same situation, namely under Article 31 of the collective transport sector agreement, could constitute discrimination on grounds of disability, which is prohibited by Article 21 of the Charter.

25 In those circumstances the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 20 and 21 of the [Charter], Article 2 of the Treaty on European Union and Article 3[1](f) and Article 5 of Directive [2008/104] be interpreted as precluding a case-law interpretation of Spanish legislation according to which compensation for a temporary agency worker whose employment contract has been terminated following a declaration of total permanent incapacity resulting from an accident at work sustained at the user undertaking is excluded from the concept of "basic working and employment conditions"?'

Admissibility of the request for a preliminary ruling

26 As a preliminary point, it must be recalled that the need to arrive at an interpretation of EU law which will be of use to the referring court requires that court to define the factual and legislative context of the questions it is asking, or at the very least to explain the factual circumstances on which those questions are based. In the procedure established by Article 267 TFEU, the Court is empowered to give rulings on the interpretation of EU legislation only on the basis of the facts which the national court puts before it (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 85 and the case-law cited).

27 In addition, the Court stresses that it is important for the referring court to set out the precise reasons why it was unsure as to the correct interpretation of EU law and why it considered it necessary to refer questions to the Court for a preliminary ruling. In that regard, it is essential that, in the order for reference itself, the referring court should give at the very least some explanation of the reasons for the choice of the EU law provisions which it seeks to have interpreted and of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it (judgment of 9 September 2021, *Toplofikatsia Sofia and Others*, C-208/20 and

C-256/20, EU:C:2021:719, paragraph 19 and the case-law cited).

28 Those requirements concerning the content of a request for a preliminary ruling are expressly set out in Article 94 of the Rules of Procedure of the Court of Justice, of which the national court is supposed, in the context of the cooperation between the Court and the national courts under Article 267 TFEU, to be aware and which it is bound to observe scrupulously. They are also set out in paragraph 15 of the recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2019 C 380, p. 1) (judgment of 9 September 2021, *Toplofikatsia Sofia and Others*, C-208/20 and C-256/20, EU:C:2021:719, paragraph 20 and the case-law cited).

29 In the present case, the referring court asks the Court to interpret Articles 20 and 21 of the Charter, Article 2 TEU and Articles 3(1)(f) and 5 of Directive 2008/104. However, the referring court does not state with the requisite precision and clarity the reasons why it was unsure as to the interpretation of Articles 20 and 21 of the Charter and Article 2 TEU or the link it establishes between those provisions and the national legislation at issue in the main proceedings.

30 First, although Articles 20 and 21 of the Charter establish the principles of equal treatment and non-discrimination respectively, it should be stated, as the European Commission has done, that the referring court merely states, with regard to those provisions, that the fact that XXX's right to be compensated had not been recognised as if he were a worker directly recruited by Serveo Servicios could constitute discrimination on grounds of disability, which is prohibited by Article 21.

31 The referring court has not explained how compensating XXX on the basis of Article 42 of the collective temporary agency work agreement rather than under Article 31 of the collective transport sector agreement is liable to constitute discrimination against him on the basis of a disability. As is apparent from the order for reference, it must be stated, as the Spanish Government has done, that the decisive factor in determining which of those collective agreements a worker may rely on in order to seek payment of compensation for total permanent incapacity to carry out his usual occupation is that worker's status, since any disability suffered by the worker is irrelevant in that context.

32 In those circumstances, there is also no need to examine XXX's situation in the light of Articles 2 and 3 of 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), relating, inter alia, to discrimination on the grounds of disability, provisions to which the national court refers without, however, specifying how those provisions are relevant for the resolution of the dispute in the main proceedings.

33 Furthermore, in so far as the order for reference contains a reference to Article 14 of 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 which 'there shall be no direct or indirect discrimination on grounds of sex', the file before the Court does not contain the slightest evidence of any discrimination against XXX on grounds of sex.

34 Secondly, as regards Article 2 TEU, it is sufficient to point out that the reference for a preliminary ruling does not comply with the case-law cited in paragraphs 27 and 28 above in that it does not contain any details as to the reasons why the referring court asked the Court about the interpretation of that provision or as to the link which it establishes between that provision and the national legislation applicable to the dispute in the main proceedings.

35 In the light of the foregoing, the request for a preliminary ruling is admissible only in so far as it concerns the first subparagraph of Article 5(1) and Article 3(1)(f) of Directive 2008/104.

Consideration of the question referred

36 By its question, and in the light of paragraph 35 above, the referring court asks, in essence, whether the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof, must be interpreted as precluding national legislation, as interpreted by national case-law, under which the compensation to which temporary agency workers are entitled in respect of a total permanent incapacity to carry out their usual occupation as a result of an accident at work sustained at the user undertaking and resulting in the termination of their temporary employment relationship, is less than the compensation to which those workers would be entitled, in the same situation and on the same basis, if they had been recruited directly by that user undertaking to occupy the same job for the same period of time.

The concept of 'basic working and employment conditions' within the meaning of the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof

37 In the first place, it is necessary to examine whether the compensation payable to temporary agency workers in respect of a total permanent incapacity to carry out their usual occupation as a result of an accident at work sustained at the user undertaking and resulting in the termination of their temporary employment relationship falls within the concept of 'basic working and employment conditions' within the meaning of the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof.

38 Although the first subparagraph of Article 5(1) of Directive 2008/104 does not indicate whether the concept of 'basic working and employment conditions' referred to therein must be interpreted as including such compensation or not, that concept refers, inter alia, in accordance with the definition given in Article 3(1)(f) of that directive, to the concept of 'pay'.

39 In that regard, it should be noted that that concept is not defined by Directive 2008/104.

40 While it is true that, in accordance with Article 3(2) of Directive 2008/104, that directive 'shall be without prejudice to national law as regards the definition of pay', that provision cannot be interpreted as a waiver on the part of the EU legislature of its power itself to determine the scope of the concept of 'pay' within the meaning of that directive, since that provision merely means that that legislature intended to preserve the power of the Member States to define that concept for the purposes of national law, an aspect which that directive is not intended to harmonise (see, to that effect, judgment of 17 November 2016, *Betriebsrat der Ruhrlandklinik*, C-216/15, EU:C:2016:883, paragraphs 30 to 32).

41 According to settled case-law, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while account is also taken of the context in which they occur and the purposes of the rules of which they form part (judgment of 1 August 2022, *Navitours*, C-294/21, EU:C:2022:608, paragraph 25 and the case-law cited).

42 First, according to its usual meaning in everyday language, the concept of 'pay' is generally understood as the money paid in respect of certain work or the performance of a service.

43 In that regard, it should be recalled that, according to settled case-law, the essential characteristic of 'pay' lies in the fact that it constitutes consideration for the service in question and is normally agreed upon between the provider and the recipient of the service (judgment of 11 November 2021, *Manpower Lit*, C-948/19, EU:C:2021:906, paragraph 45 and the case-law cited).

44 Furthermore, the concept of 'pay' is defined in Article 157(2) TFEU as 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker

receives directly or indirectly, in respect of his employment, from his employer'. As is apparent from the case-law, that concept must be interpreted broadly and it covers, in particular, any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis (judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 70 and the case-law cited).

45 In addition, the Court has stated that consideration classified as 'pay' within the meaning of Article 157 TFEU specifically includes consideration paid by the employer under a contract of employment whose purpose is to ensure that workers receive income even where, in certain specific cases, they are not performing any work provided for in their contracts of employment. Moreover, the fact that such benefits are in the nature of pay cannot be called in question merely because they can also be regarded as reflecting considerations of social policy (judgment of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 34 and the case-law cited).

46 In that regard, it should be noted that it is apparent from the case-law that 'pay' within the meaning of Article 157(2) TFEU is one of the 'employment conditions' within the meaning of point 1 of Clause 4 of the Framework Agreement on part-time work concluded on 6 June 1997, which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10) and point 1 of Clause 4 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 (OJ 1999 L 175, p. 43) (see, to that effect, judgments of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraphs 131 and 132, and of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraphs 20 and 21).

47 The first subparagraph of Article 5(1) of Directive 2008/104 is intended to provide effective protection for atypical and precarious workers in an even more targeted manner than those clauses, so an interpretation similar to that adopted in the case-law cited in paragraphs 44 and 45 above concerning the concept of 'pay' within the meaning of Article 157 TFEU is necessary, a fortiori, in order to determine the scope of that concept, within the meaning of Article 3(1)(f)(ii) of that directive (see, to that effect, judgment of 12 May 2022, *Luso Temp*, C-426/20, EU:C:2022:373, paragraph 36).

48 While it is true that compensation such as that referred to in paragraph 37 above is not paid directly in return for work carried out by a temporary agency worker, such compensation nevertheless constitutes consideration in cash which (i) is received indirectly by the worker from his or her employer in respect of his or her employment, in so far as such compensation is provided for by a collective agreement applicable to the employment relationship, and (ii) is paid to the worker to compensate for the loss of income resulting from his or her incapacity to carry out his or her usual occupation, so that its purpose is to provide him or her with a source of income.

49 Therefore, the concept of 'pay', within the meaning of Article 3(1)(f)(ii) of Directive 2008/104, is sufficiently broad to cover compensation to which temporary agency workers are entitled in respect of a total permanent incapacity to carry out their usual occupation as a result of an accident at work sustained at the user undertaking.

50 Secondly, as regards the context of the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f)(ii) thereof, it should be noted that, according to recital 13 of that directive, Directive 91/383 lays down the safety and health provisions applicable to temporary agency workers.

51 It is apparent from Article 2(1) of Directive 91/383, read in conjunction with Article 1(2) thereof, that the purpose of that directive is to ensure that temporary agency workers are afforded, as regards safety and health at work, the same level of protection as that of other workers in the user undertaking. Furthermore, under Article 2(2), read in conjunction with Article 1(2), the existence of a temporary employment relationship cannot justify different treatment with respect to working conditions inasmuch as the protection of safety and health at work are involved, especially since, as is apparent from the fourth recital of that directive, temporary agency workers are, in certain sectors, more exposed to the risk of accidents at work than other workers.

52 In addition, Article 8 of Directive 91/383 provides, in essence, that Member States are to take the necessary steps to ensure that, without prejudice to the responsibility of the temporary-work agencies as laid down in national legislation, the user undertaking is responsible, for the duration of the assignment, for the conditions governing the performance of the work connected with safety, hygiene and health at work.

53 Accordingly, it must be held, first, that the protection of 'safety' and 'health' at work is covered by 'working conditions', within the meaning of Directive 91/383, and that the temporary agency worker must, in that regard, be treated, for the duration of the assignment, in the same way as workers employed directly by the user undertaking.

54 Secondly, compensation such as that referred to in paragraph 37 above is linked to the protection of 'safety' and 'health' at work in so far as the responsibility of the user undertaking and, as the case may be, of the temporary work agency, with regard to the conditions of performance of work associated with that protection, goes hand in hand with compensation for damage in the event that that protection fails, namely, in particular, where an accident at work occurs during the period of assignment of a temporary agency worker resulting in his or her total permanent incapacity to carry out his or her usual occupation.

55 Having regard to the reference made by Directive 2008/104 to Directive 91/383, it must therefore be held that the context of the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof, supports the interpretation that the concept of 'pay', to which the concept of 'basic working and employment conditions' in those provisions refers, includes compensation such as that referred to in paragraph 37 above.

56 Thirdly, as regards the objectives pursued by Directive 2008/104, it is apparent from recital 1 of that directive that it seeks to ensure full compliance with Article 31 of the Charter, paragraph 1 of which establishes in general terms the right of every worker to working conditions that respect his or her health, safety and dignity. The Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) indicate, in that regard, that the concept of 'working conditions' must be understood in accordance with Article 156 TFEU, although that provision does not define that concept. In the light of the objective of that directive to protect the rights of temporary agency workers, that lack of precision supports a broad interpretation of that concept (see, to that effect, judgment of 12 May 2022, *Luso Temp*, C-426/20, EU:C:2022:373, paragraph 40 and the case-law cited).

57 Accordingly, in so far as the objective of Directive 2008/104 is to ensure the protection of temporary agency workers as regards safety and health at work, it must be held, as the Commission has done, that if, in the event of an accident at work, the financial risk for user undertakings were lower as regards those workers compared with the workers they recruit directly, those undertakings would be less encouraged to invest in the safety of temporary agency workers, which would undermine that objective.

58 Consequently, the objectives pursued by Directive 2008/104 support the interpretation of the concept of 'pay', within the meaning of Article 3(1)(f)(ii) of that directive, as a 'basic working and

employment condition', within the meaning of the first subparagraph of Article 5(1) of that directive, according to which that concept includes compensation to which a temporary agency worker is entitled in respect of the total permanent incapacity to carry out his or her usual occupation as a result of an accident at work sustained at the user undertaking.

59 Contrary to what the Spanish Government essentially claims, that interpretation is not affected by the fact that such compensation is paid after the termination of the temporary employment relationship or by the fact that that compensation allegedly arises solely from the declaration of total permanent incapacity of the temporary agency worker concerned to work and, therefore, from the termination of his employment relationship.

60 First, it must be stated that the fact that the compensation at issue is paid after the termination of the employment relationship does not prevent them from being in the nature of pay within the meaning of Article 3(1)(f)(ii) of Directive 2008/104 (see, by analogy, judgment of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 70).

61 Secondly, an interpretation of the concept of 'basic working and employment conditions' which excludes the compensation that an employer must pay to a temporary agency worker solely because that compensation is linked to the termination of his or her employment relationship, from the scope of the first subparagraph of Article 5(1) of Directive 2008/104, would be contrary both to the context of that provision and to the aims pursued by that directive (see, to that effect, judgment of 12 May 2022, *Luso Temp*, C-426/20, EU:C:2022:373, paragraphs 39 and 45).

62 Furthermore, as is apparent from the documents before the Court, the accident at work in question in the main proceedings, which is the event giving rise to XXX's total permanent incapacity to carry out his or her usual occupation, occurred '[during his] assignment at [the] user undertaking', within the meaning of the first subparagraph of Article 5(1) of Directive 2008/104, with the result that it cannot be accepted that the compensation paid on account of that incapacity arises solely from the termination of XXX's employment relationship.

63 In the light of all of the foregoing, it must be held that the compensation payable to temporary agency workers in respect of a total permanent incapacity to carry out their usual occupation as a result of an accident at work sustained at the user undertaking and resulting in the termination of their temporary employment relationship falls within the concept of 'basic working and employment conditions' within the meaning of the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof.

The scope of the principle of equal treatment referred to in the first subparagraph of Article 5(1) of Directive 2008/104

64 As regards, in the second place, the scope of the principle of equal treatment, referred to in the first subparagraph of Article 5(1) of Directive 2008/104, it should be noted that, in accordance with that provision, the basic working and employment conditions of temporary agency workers must be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

65 It is therefore for the referring court to determine, first, the basic working and employment conditions which would apply to a temporary agency worker if he or she had been recruited directly by the user undertaking to occupy the same job as that which he or she actually occupies there for the same period of time and, more specifically, in the present case, the compensation to which the temporary agency worker in question would be entitled in respect of his total permanent incapacity to carry out his usual occupation as a result of an accident at work and resulting in the termination of his employment relationship. That court must, secondly, compare those basic working and employment conditions with those which are actually applicable to that temporary agency worker

during the period of his or her assignment at that user undertaking, in order to ascertain, on the basis of all of the relevant circumstances at issue in the main proceedings, whether or not the principle of equal treatment has been complied with in the case of that temporary agency worker (see, to that effect, judgment of 12 May 2022, *Luso Temp*, C-426/20, EU:C:2022:373, paragraph 50).

66 In the present case, the referring court states that, in the light of the interpretation by the Tribunal Supremo (Supreme Court) of Article 11 of Law 14/1994, temporary agency workers are entitled, in the event of total permanent incapacity to carry out their usual occupation, only to compensation under Article 42 of the collective temporary agency work agreement, which is less than the compensation to which workers directly recruited by the user undertaking are entitled under Article 31 of the collective transport sector agreement. More specifically, according to the documents before the Court, XXX, as a temporary agency worker, is entitled to compensation of EUR 10,500 on the basis of the first of those collective agreements, whereas, if he had been recruited directly by Serveo Servicios, he would be entitled to compensation of EUR 60,101.21 in respect of the second of those collective agreements.

67 If that is indeed the case, which it is for the referring court to ascertain, it would have to be held that, contrary to what is provided for in the first subparagraph of Article 5(1) of Directive 2008/104, during the period of his assignment at Serveo Servicios, XXX did not enjoy basic working and employment conditions which are at least equal to those which would have been applicable to him if he had been recruited directly by that user undertaking to occupy the same job for the same period.

68 In that regard, although the Member States may, under Article 5(2) to (4) of Directive 2008/104, provide for the possibility, under certain specific conditions, of derogating from the principle of equal treatment, the order for reference and the documents before the Court contain no information regarding the implementation of any such derogation in Spain.

69 In addition, while it is true that, under Article 5(3) of Directive 2008/104, the social partners are able to conclude collective agreements which establish arrangements concerning the working and employment conditions of temporary agency workers which may differ from those referred to in Article 5(1), such agreements must, however, in accordance with Article 5(3), read in conjunction with recitals 16 and 17 of that directive, guarantee the overall protection of temporary agency workers.

70 The obligation to guarantee the overall protection of temporary agency workers requires, in particular, that they be granted advantages in terms of basic working and employment conditions which are such as to compensate for the difference in treatment suffered by those workers, and compliance with that obligation must be specifically assessed (see, to that effect, judgment of 15 December 2022, *TimePartner Personalmanagement*, C-311/21, EU:C:2022:983, paragraphs 44 and 50). Accordingly, in order for the collective temporary work agreement to be able to derogate from the principle of equal treatment laid down in the first subparagraph of Article 5(1) of Directive 2008/104, that collective agreement must be able to provide XXX with such general protection by granting him countervailing benefits in respect of basic working and employment conditions which are capable of counterbalancing the effects of the difference in treatment which he has suffered, and it is for the referring court to determine whether that is the case.

71 Finally, the Court has consistently held that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of that directive in order to achieve an outcome consistent with the objective pursued by the directive. However, an interpretation of national law that is *contra legem* is precluded (see, to that effect, judgment of 12 May 2022, *Luso Temp*, C-426/20, EU:C:2022:373, paragraph 56 and 57 and the case-law cited).

72 Accordingly, if the referring court were to conclude that XXX would have been entitled to the compensation which he claims under Article 31 of the collective agreement for the transport sector if he had been recruited directly by Serveo Servicios, it would be for that court, in particular, to determine whether Article 11 of Law 14/1994 is capable of being interpreted in a manner consistent with the requirements of Directive 2008/104 and, therefore, to be interpreted in a manner other than by depriving XXX of that compensation, an interpretation which would be contrary to the first subparagraph of Article 5(1) of that directive, as is apparent from paragraph 67 above.

73 It follows from all of the foregoing considerations that the first subparagraph of Article 5(1) of Directive 2008/104, read in conjunction with Article 3(1)(f) thereof, must be interpreted as precluding national legislation, as interpreted by national case-law, under which the compensation to which temporary agency workers are entitled in respect of a total permanent incapacity to carry out their usual occupation as a result of an accident at work sustained at the user undertaking and resulting in the termination of their temporary employment relationship, is less than the compensation to which those workers would be entitled, in the same situation and on the same basis, if they had been recruited directly by that user undertaking to occupy the same job for the same period of time.

Costs

74 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 (Sixth Chamber) hereby rules:

The first subparagraph of Article 5(1) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, read in conjunction with Article 3(1)(f) thereof,

must be interpreted as precluding national legislation, as interpreted by national case-law, under which the compensation to which temporary agency workers are entitled in respect of a total permanent incapacity to carry out their usual occupation as a result of an accident at work sustained at the user undertaking and resulting in the termination of their temporary employment relationship, is less than the compensation to which those workers would be entitled, in the same situation and on the same basis, if they had been recruited directly by that user undertaking to occupy the same job for the same period of time.

[Signatures]

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* Language of the case: Spanish.