



**Key Issues:** Fixed Term Work – permanent and temporary workers – disciplinary dismissal

**Case:** Gardenia Vernaza Ayovi v Consorci Sanitari de Terrassa

**Reference:** Case C-96/17, CJEU (Sixth Chamber), 25 July 2018

**Legislation:** Directive 1999/70/EC

Ms Vernaza Ayovi was engaged as a nurse by the Fundació Sant Llàtzer (Saint Lazare Private Foundation, Spain) on 30 May 2006 under an ‘interinidad’ contract (fixed-term temporary replacement contract), namely a contract for the temporary replacement of a member of staff or the temporary cover of a vacant post. That contract ended on 14 August 2006. On 15 August 2006 the parties entered into a new interinidad contract which became a non-permanent employment contract of indefinite duration on 28 December 2006. The rights and obligations resulting from the employment relationship were transferred to the Health Consortium, Terrassa.

Ms Vernaza Ayovi was granted leave on personal grounds for the period from 19 July 2011 to 19 July 2012, which was twice renewed for a period of one year. On 19 June 2014, Ms Vernaza Ayovi asked to be reinstated. The Health Consortium, Terrassa informed her that there was no post available corresponding to her qualification. On 29 April 2016 she again asked to be reinstated. On 6 May 2016, the Health Consortium, Terrassa sent her a schedule of working hours based on a part-time role. Refusing to accept any job that was not a full-time position, Ms Vernaza Ayovi did not turn up for work and was dismissed on that ground on 15 July 2016.

On 26 August 2016, Ms Vernaza Ayovi brought an action before the Juzgado de lo Social n.º 2 de Terrassa (Social Court No 2, Terrassa, Spain) seeking a declaration that her dismissal was wrongful and an order requiring her employer either to reinstate her under employment conditions identical to those that were applicable prior to her dismissal and pay in full the arrears of salary owed to her from the time of her dismissal, or to pay her the maximum amount of compensation available in law for wrongful dismissal.

The national court considered that Ms Vernaza Ayovi comes within the scope of the framework agreement on fixed-term work concluded on 18 March 1999 which is annexed to Council Directive 1999/70/EC (‘the Framework Agreement’), since, first, her employment contract became indefinite only after the conclusion of two temporary fixed-term contracts, with the result that a misuse of fixed-term contracts is not excluded and, second, she does not have the status of a member of the permanent contract staff.

In those circumstances, the national court decided to stay the proceedings and to refer a number of questions to the Court of Justice of the EU (CJEU) for a preliminary ruling.

### **Consideration by CJEU**

The Framework Agreement seeks 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. It is important to bear in mind that the Framework Agreement prohibits, with regard to employment conditions, less favourable treatment of fixed-term workers than that of comparable permanent workers on the sole ground that they work on a fixed-term basis, unless different treatment is justified on objective grounds.

The concept of 'objective grounds' must be understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general and abstract measure, such as a law or a collective agreement. According to the settled case-law of the CJEU, that concept requires unequal treatment to be justified by the presence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs, and on the basis of objective and transparent criteria, in order to ensure that the unequal treatment:

- responds to a genuine need,
- is appropriate for the purpose of attaining the objective pursued, and
- is necessary for that purpose.

Those factors may be apparent, in particular, from the specific nature of the tasks for the performance of which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from the pursuit of a legitimate social-policy objective of a Member State

### **The CJEU held that:**

**Clause 4(1) of the framework agreement on fixed-term work must be interpreted as not precluding national legislation according to which, when the disciplinary dismissal of a permanent worker in the service of a public authority is declared wrongful, the worker in question must be reinstated, whereas, in the same situation, a worker employed under a temporary contract or a temporary contract of indefinite duration performing the same duties as that permanent worker need not be reinstated but instead may receive compensation.**

## **Why is this decision important?**

An employer should exercise caution when using fixed term contracts and, in particular, when treating workers differently on the basis of their permanent and temporary status. This judgment confirms that a difference in treatment is permissible if it can be justified on objective grounds. But employers should note that this is a “high bar” that requires careful planning and sound advice.

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### **CLfE (9/2018)**

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