Cover workers, other temps and permanent employees

Proposed interpretive guidance

Lourdes López Cumbre
Professor of Employment and Social Security Law, Universidad de Cantabria
Academic Counsel, Gómez-Acebo & Pombo

We know the facts – Spanish cover worker, under successive contracts with the Ministry of Defence, claims compensation when the last contract ends upon returning the holder of the job, who was on leave for trade union duties – and we know the preliminary ruling of the Court of Justice of the European Union ('CJEU') in Case C–596/14 – De Diego Porras: excluding a cover worker from entitlement to receive the same compensation as that to which a comparable permanent employee is entitled is discriminatory.

Now, in the wake of numerous recent news items, opinions and reactions concerning a pronouncement with substantial legal, economic and even political repercussions, below follows proposed interpretive guidance that takes several issues into consideration.

First. A temporary cover /replacement contract is a needs–based contract just as the rest of temporary contracts, although, unlike some of these, no compensation is provided for when a temporary cover contract is terminated. The reasonable thing would have been to regard as discriminatory the treatment afforded by the Spanish legislature to cover workers, which does not apply compensation recognised to other temporary workers, and require it to equate them. But, in principle, the CJEU admits that Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed–term work concluded by ETUC, UNICE and CEEP ('the Directive'), in particular clause 4 (principle of non–discrimination) thereof, provides for a comparison not between different types of temporary contracts, but between temporary and permanent employees,. Hence, the above solution does not seem to be the one chosen by the CJEU; at least in principle, since to reject the argument supporting the lawfulness of the practice – i.e., that compensation is not provided for by national legislation for temporary employment contracts – it is stated that in comparable situations ("predictability of the end" of the contract) the granting of compensation is provided for, in clear reference to the compensation granted to other categories of fixed–term workers.

Second. This judgment is given on the same date (14 September) as others that analyse the use of successive temporary contracts in the public sector where the service provided covers permanent, not cyclical, needs. Such could also be the approach of the judgment here analysed as, not surprisingly, it refers to a worker with successive temporary cover contracts and long dependency on the same employer. If so, it could be questioned whether this is a contract in abuse of the law (*frau legis*) that would require that the worker be treated as permanent, with the right to compensation appropriate to such contract

(thirty–three days if the termination constitutes an unfair dismissal or twenty days if the termination is by reason of redundancy).

Third. This approach (temporary cover contract in abuse of the law) requires clarification. Spanish employment legislation certainly provides that unconscionable successive temporary contracts (twenty–four months over a period of thirty months) should become permanent, except for temporary cover contracts where this rule does not apply. But this exception does not extend to other cases where the rule of conversion does apply, including abuse of the law (art. 15(3) of the Workers' Statute [*Estatuto de los Trabajadores*]) and non–registration with the Social Security (art. 15(2) of the aforementioned statute). Therefore, a temporary cover contract concluded in abuse of the law will become permanent and will have attached the compensation provided for the latter (thirty–three days if the termination constitutes an unfair dismissal or twenty days if the termination is by reason of redundancy). But neither does this seem to be the conclusion of the CJEU inasmuch as the referring national court accepts that the worker's temporary cover contract is consistent with the law. If this were the case, if the CJEU had wanted to clarify that successive contracts – also for temporary covers – become a permanent contract, the problem would be solved in national legislation by relying on the device of abuse of law, the conversion of the relationship into a permanent one and the entitlement to compensation provided for the latter.

Fourth. It seems, therefore, that the CJEU admits, as submitted by the national court, that the contract in question is consistent with the law, albeit the law does not conform to the Directive. For this reason, the CJEU holds that the Spanish legal system is contrary to the Law by denying compensation for termination of a temporary cover contract whilst allowing the granting of compensation, in particular, to comparable permanent workers. The mere fact that the employee has served under a temporary cover contract cannot constitute objective grounds for denying compensation since both have carried out the same work.

Fifth. A clarification is called for because the "termination" of a permanent employee's contract, in principle, lacks compensation under employment legislation. The law provides for such compensation when the employer unilaterally terminates the contract (dismissal) or when the parties so agree (termination on grounds that have been validly recorded). Similarly, however, if for identical reasons (dismissal) the temporary cover contract is terminated, compensation would be identical (taking into account the same items of remuneration and with the same limit of days – twenty or thirty–three, respectively –). Hence, what the ruling should refer to is an event of "termination" where the grounds stated in the contract (return of the replaced employee) apply. And in this the permanent contract and the temporary cover contract differ. The permanent contract does not provide for any grounds of termination, the same extending indefinitely unless statutory reasons for redundancy apply that enable the employer to unilaterally terminate the contract with compensation. For its part, the temporary cover contract does provide events of termination (the return of the replaced employee), to which condition (or term) it is subject. Just as temporary contracts that provide for compensation (upon completion of the work or service, the contract is terminated, or once the casual engagement is completed, the relationship comes to an end), for which Spanish legislation provides, in respect of their "termination", compensation equivalent to twelve days of salary (if a dismissal, the same rules as for the permanent contract would apply).

Sixth. It is true that the Spanish legislature has expressly provided for termination of a permanent contract "on grounds that have been validly recorded" in the contract [art. 49(b)) of the Workers' Statute]. And since the temporary cover contract also

records grounds of termination (the return of the replaced employee), a comparison between the two would be possible. But, strictly speaking, neither does the legislator provide compensation for the former, except for, where appropriate, that agreed by the parties. Therefore, the parties might not provide for compensation in the event of grounds for termination.

Seventh. At this point, and in a joint interpretation of the three pronouncements of the CJEU on the same date, we should pay heed to their common denominator: the finding against the unconscionable use of temporary contracts, particularly in the public sphere. Insofar that, depending on the different sectors (education, health, etc.) and by virtue of different authorities (national, regional, local), there are rules that find 'objective grounds' (inter alia, budgetary conditions concerning positions covered) for successive temporary contracts in situations which are *de facto* permanent even if they are *de jure* presented as temporary, the CJEU consolidates its view. And this is the reason that it decides, here too, that if the termination of contract results in a permanent and stable working relationship, the consequences must be the same as for permanent employment.

Eighth. Because of the foregoing, based on a comparison between the work of the cover worker and that of the employee on leave, it seems that the CJEU ponders equating the compensation provided for the latter. There is, however, a problem. The comparison on work done (similar or identical) makes sense since the cover worker performs the same functions as the holder. But it also makes sense for the rest of temporary workers given that most of them perform the same jobs (cover workers in respect of those replaced, casual workers in respect of those they strengthen), except in those cases where the contract is separable from the employer's activities as a whole. Therefore, if the CJEU's concern is the work done by temporary employees and comparable permanent employees, all of the former, not only cover workers, should receive the same compensation as the latter.

Ninth. But what compensation? The judgment does not specify either the type or the amount. The most consistent option, given the foregoing, would be twenty days (comparison with permanent employees and reason of redundancy that terminates the contract). The thirty–three days would be exclusively reserved to unfair dismissals (a case in no way similar to the one in issue) and twelve days for termination of remaining temporary contracts (but the CJEU avoids making comparisons with these, focusing the same on permanent contracts). But, if this determination is imposed and the comparison lies in the identical or similar nature of work, such will also be the claim of those other temporary workers who, perform the same work, receive twelve days of compensation instead of twenty.

Tenth. The CJEU forgets, after all, that the Directive prohibits the treatment of fixed–term workers in a less favourable manner than comparable permanent workers, unless different treatment is justified on objective grounds. The difference between compensating for the termination of a temporary contract and for the termination of a permanent contract resides in the fact that the former contract provides for its duration, whilst the latter does not, whereby the "harm" for the employee in the latter case is higher, justifying a higher amount as reparation. And yes, it is true that the CJEU concludes that the temporary nature of the contract cannot be accepted as objective grounds for the difference. But it does so clarifying that the predictability of the end of the temporary cover contract is not based on objective and transparent criteria, given that such a contract "*can in fact become permanent, as in the situation of the applicant in the main proceedings, in respect of whom contractual relations have continued over a period of*" many years. Reason that seems to confirm how the basis of the judgment is served by a temporary replacement in abuse of the law – covering permanent needs with

temporary contracts – and not by the temporary cover contract (or any other temporary contract) consistent with the law.

The most balanced solution, considering the circumstances of the case, the other pronouncements, the arguments put forward and the scope of the ruling is that there are permanent needs, fraudulently covered with a temporary contract, which requires equating the worker's working conditions to those of the employee who, with a permanent relationship, has been replaced, so that the same compensation is appropriate to both. Perhaps the problem lies in allowing the use of temporary cover contracts for long–term replacements of employees with retention of position. And, of course, compensation may be unjustified upon termination of some fixed–term contracts and not so of others. Moreover, the perpetuation of permanent activities with fixed–term contracts, under the aegis of legislation, constitutes an abuse of law. But if this solution were to be extended to any temporary cover contract, regardless of abuse of law, on the basis that it involves work identical in nature to that of comparable permanent employees, one could hardly avoid an identical solution for remaining temporary employees with said similarity.

Undoubtedly, it will be up to the national courts to delimit the scope of this judgment. The best thing, however, would be a legislative amendment determining, in terms of fairness and among other issues, whether the compensation between permanent and temporary cover staff, between temporary cover workers and temps or between all temporary and permanent staff should be equated, if the nature of the employer (public sector) can justify rules with disparate consequences, or which are the objective grounds that would make it possible, in line with the EU and where appropriate, to justify a different treatment of workers according to the type of contract concluded. In short, new actions are required, serenely and preferably with general consensus, regarding the Spanish employment contract model.