THE ONE-YEAR TRIAL PERIOD IN SPANISH PERMANENT EMPLOYMENT CONTRACTS: A NEW KIND OF ATYPICAL WORK?

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The rise of atypical workers, such as fixed-term or part-time workers, has become a hot issued in employment law and employment market policies across the world. The judgment of the Spanish Constitutional Court, dated 16 July, 2014, analyses three provisions of Law 3/2012 on labour reform and their compliance with the Spanish Constitution. Specifically, the Parliament of Navarra's appeal challenges, among other aspects, the one-year trial period in permanent employment contracts to support entrepreneurs. The Spanish Constitutional Court dismisses the appeal. Regarding the one-year trial period, the Constitutional Court holds that, the aim to create employment under the provision is legitimate. Moreover, after weighing up the constitutional rights at stake, the Constitutional Court concludes that, the one-year trial period is reasonable, particularly in view of the economic situation in Spain and given that this provision will only be effective if the unemployment rate exceeds 15 per 100. Asked by a Spanish court whether this provision is compatible with EU law, the European Court of Justice found itself without jurisdiction to answer the question. This paper will try to explain the one-year trial period in permanent employment contracts, the judgments of the Spanish Constitutional Court and the European Court of Justice.

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INTRODUCTION

Employment relations are governed in Spain by Royal Legislative Decree 1/1995 of 24 March 1995 approving the consolidated version of the Workers' Statute¹.

As regards the 'probationary period', Article 14 of the Workers' Statute provides:

"1. A probationary period may be agreed in writing, subject to limits as to duration laid down, as the case may be, in collective agreements. Where no collective agreement applies, the probationary period may not exceed six months for a person holding a diploma of intermediate education [técnicos titulados] and two months for other workers. In companies with fewer than 25 workers, the probationary period may not exceed 3 months for workers other than persons who hold a diploma of intermediate education.

In the case of temporary fixed-term contracts, as referred to in Article 15 and agreed for a period not exceeding 6 months, the probationary period may not exceed one month, unless provision is made to the contrary in a collective agreement [...]"

Law 3/2012 of 6 July, 2012 on urgent measures for labour market reform² amended the employment legislation because of the economic crisis that Spain was undergoing. Law 3/2012 is intended to facilitate employment and is an example of the legislative reform in the field of employment prompted by the decisions and recommendations of the European Union on employment policy. Among the measures for 'fostering employment of indefinite duration and other measures to promote job creation', Article 4 of Law 3/2012 provided for the 'employment contract of indefinite duration to support entrepreneurs'.

Under Article 4:

"1. In order to facilitate employment stability while fostering the spirit of enterprise, undertakings with fewer than 50 workers may conclude employment contracts to support entrepreneurs governed by the present Article.

2. The contract shall be concluded for an indefinite duration and on a full-time basis and shall be set out in writing in accordance with a model to be established.

3. The legal framework for the contract and the related rights and obligations shall in general be governed by the consolidated version of the Workers' Statute approved by Royal Legislative Decree 1/1995 of 24 March and by collective agreements in the case of employment contracts of indefinite duration, with the

¹ BOE, The Workers' Statute 9654 (No. 75 of 29 March, 1995).

² BOE, 49-113 (No. 162, of 7 July, 2012).

sole exception of the probationary period referred to in Article 14 of the Workers' Statute, which shall in all circumstances be of one year's duration. A probationary period may not be fixed where the worker has already discharged the same duties within the undertaking, whatever the form of the employment contract".

The length of the probationary period under Article 4 of Law 3/2012 is not the same as that normally provided for under Spanish law and is unrelated to the professional skills of the person recruited. That provision establishes an atypical contract with a fixed term of one year, which may be converted into a contract of indefinite duration once that period has elapsed. Furthermore, during the probationary period, the employee has no legal protection against dismissal, notably as regards the form that dismissal may take, the reasons for which a dismissal decision may be taken and the extent to which a dismissal is subject to review by the courts.

Under Article 4, the employment contract to support entrepreneurs is to be accompanied by tax and social security advantages and, where such a contract is agreed with jobseekers registered with the employment office, it is to give rise to the right to a variety of benefits.

The employment contract of indefinite duration to support entrepreneurs may not be concluded by an undertaking which, in the six months prior to conclusion of the contract, carried out unfair dismissals. For the purposes of the benefits linked to the contract of indefinite duration to support entrepreneurs, the undertaking must employ the worker concerned for at least three years with effect from the establishment of the employment relationship. Furthermore, it must maintain the level of employment offered by that contract for at least one year with effect from the conclusion of the contract. In the event that those obligations are not met, the benefits must be repaid³.

The period of validity of that type of employment is laid down in paragraph 2 of the ninth transitional provision of Law 3/2012, in the following terms:

"Employment contracts of indefinite duration to support entrepreneurs may be concluded until the unemployment rate of our country is lower than 15%".

Many authors have criticised the one-year trial period in this contract and have declared their doubts on its effects on the labour market⁴. The

³ Paragraphs 6, 7 and 8 of Article 4 of Law, No. 3/2012.

⁴ See among others, J. Baz Rodríguez, *El contrato de trabajo indefinido de apoyo a los emprendedores. Análisis crítico de una apuesta por la flexi-inseguridad*, 59 REVISTA DE DERECHO SOCIAL 87-116 (2012). R. Fernández Fernández, *El nuevo contrato indefinido de apoyo a emprendedores: luces y sombras*, LAS REFORMAS DEL DERECHO DEL TRABAJO EN EL CONFLICTO DE LA

employment contract of indefinite duration to support entrepreneurs would infringe among others: Article 30 of the Charter; Articles 2.2(b) and 4 of Convention No. 158 concerning the Termination of Employment at the Initiative of the Employer, adopted on 22 June, 1982 in Geneva by the International Labour Organisation; the European Social Charter signed at Turin on 18 October, 1961⁵; and Directive 1999/70⁶.

As regards, more specifically, Directive 1999/70, Law 3/2012 would be contrary to the objectives of that directive, namely, non-discrimination as regards workers engaged under a fixed-term contract and the prevention of abuse resulting from the use of successive fixed-term contracts or employment relationships⁷. Law 3/2012 would give rise to discrimination between, on the one hand, workers who have concluded such contracts or employment relationships and, on the other, those who have an ordinary fixed-term employment contract or one of indefinite duration, that discrimination arising in relation to the first year in which those contracts or employment relationships run, in so far as, in the event of early termination of employment, no compensation is payable for workers in the former category. Additionally, Law 3/2012 would introduce, in breach of Directive 1999/70 and the Framework Agreement, a new virtually fixed-term contract that imposes less favourable working conditions on the workers to whom it applies⁸.

CRISIS ECONÓMICA: LA REFORMA LABORAL DE 2012 (2013); Congreso Nacional de Derecho del Trabajo y de la Seguridad Social. F. J. Gómez Abelleira, *El contrato de apoyo a emprendedores ante el Derecho internacional*, 1 REVISTA DE INFORMACIÓN LABORAL 213-29 (2014). M. Hernández Bejarano, *El período de prueba del contrato de apoyo a los emprendedores*, 124 TEMAS LABORALES 227-243 (2014). J. Moreno Gené, *La constitucionalidad del período de prueba del contrato de apoyo a los emprendedores*, 39 REVISTA GENERAL DE DERECHO DEL TRABAJO Y DE LA SEGURIDAD SOCIAL (2014). M. N. Moreno Vida, *La contratación laboral: La reforma de la contratación laboral. De nuevo el fomento del empleo a través de la precariedad*, 34 REVISTA GENERAL DEL DERECHO DEL TRABAJO Y DE LA SEGURIDAD SOCIAL (2013). S. Olarte Encabo, *La ilegalidad internacional del período de prueba de un año del contrato de apoyo a emprendedores*, 370 ESTUDIOS FINANCIEROS. REVISTA DE TRABAJO Y SEGURIDAD SOCIAL 173-76 (2014). F. Ramos Moragues, *El contrato de apoyo a los emprendedores como medida de fomento del empleo*, 157 CIVITAS. REVISTA ESPAÑOLA DE DERECHO DEL TRABAJO 201-19 (2013). M. C. Salcedo Beltrán, *El contrato de apoyo a emprendedores: su difícil encaje en la normativa internacional, europea y nacional*, 62 REVISTA DE DERECHO SOCIAL 93-122 (2013). A. V. Sempere Navarro, *El TJUE y el TC examinan el contrato de apoyo a emprendedores*, 901 ACTUALIDAD JURÍDICA ARANZADI (2015).

⁵ An infringement which is apparent from a decision of the European Committee of Social Rights of 23 May, 2012 in relation to a similar Greek contract.

⁶ J. Moreno Gené, *La constitucionalidad del período de prueba del contrato de apoyo a los emprendedores*, 39 REVISTA GENERAL DE DERECHO DEL TRABAJO Y DE LA SEGURIDAD SOCIAL (2014).

⁷ S. Olarte Encabo, *La ilegalidad internacional del período de prueba de un año del contrato de apoyo a emprendedores*, 370 ESTUDIOS FINANCIEROS. REVISTA DE TRABAJO Y SEGURIDAD SOCIAL 173 (2014).

⁸ M. Hernández Bejarano, *El período de prueba del contrato de apoyo a los emprendedores*, 124 TEMAS LABORALES 227 (2014).

I. THE JUDGEMENT OF THE SPANISH CONSTITUTIONAL COURT DATED 16 JULY 2014

The judgment of the Spanish Constitutional Court, dated 16 July, 2014, analyses three provisions of Law 3/2012 on labour reform and their compliance with the Spanish Constitution. Specifically, the Parliament of Navarra's appeal challenges, among other aspects, the one-year trial period in permanent employment contracts to support entrepreneurs.

The Spanish Constitutional Court dismisses the appeal. Regarding the one-year trial period, the Constitutional Court holds that, the aim to create employment under the provision is legitimate. Moreover, after weighing up the constitutional rights at stake, the Constitutional Court concludes that, the one-year trial period is reasonable, particularly in view of the economic situation in Spain and given that this provision will only be effective if the unemployment rate exceeds 15 per 100. The sacrifice of the employee's stability is proportionate to the benefits of creating employment through this policy. Furthermore, the Constitutional Court states that, this provision is not in breach of Convention 158 of the International Labour Organization. Three judges issued dissenting opinions.

The resolution of the Constitutional Court 119/2014 of 16 July confirmed the constitutional conformity of the major parts of the Law 3/2012, but there were three votes disagreeing on the constitutionality of the 12-month probation period of the Spanish permanent employment contract on the grounds of its disproportionality.

II. THE DISPUTE IN THE PROCEDURE: JUDGEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION, DATED 5 FEBRUARY 2015 (52/2015)

Ms. Nisttahuz Poclava, of Bolivian nationality, worked as a cook for a hotel company. Her contract for full-time employment was signed on 16 January, 2013. That contract fell within the category of employment contracts of indefinite duration to support entrepreneurs.

Clause 2 of the contract states that, the probationary period for Ms. Nisttahuz Poclava would, in any event, be one year. Under Clause 11, the contract may be co-financed by the European Social Fund. The collective agreement for the hotel, restaurant and catering trade is applicable in respect of all matters not covered by the employment contract.

By letter of 31 May, 2013, Ms. Nisttahuz Poclava was informed that, with effect from that date, she was no longer in the employ of the company because she had not successfully completed her probationary period.

On 2 July, 2013, Ms. Nisttahuz Poclava brought an action against her

employer before the Juzgado de lo Social No. 23 de Madrid seeking a declaration that, her dismissal was unfair and an order directing her employer either to reinstate her on the same terms as those applicable before the employment contract was terminated or to pay her compensation equivalent to 33 days' salary per year of service.

As regards the decisions and recommendations of the European Union, the referring court refers in that respect to Article 148 TFEU, laying down guidelines for employment; Article 151 TFEU; Council Decision 2008/618/EC of 15 July 2008 on guidelines for the employment policies of the Member States⁹; the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 April, 2012, entitled 'Towards a job-rich recovery'¹⁰; Council Decision 2010/707/EU of 21 October, 2010 on guidelines for the employment policies of the Member States¹¹; the Council Recommendation of 12 July, 2011 on the National Reform Programme 2011 of Spain and delivering a Council opinion on the updated Stability Programme of Spain, 2011-2014¹²; and the Council Recommendation of 10 July, 2012 on the National Reform Programme 2012 of Spain and delivering a Council opinion on the Stability Programme for Spain, 2012-2015¹³.

The Spanish court wonders whether it is contrary to EU law for national legislation to establish and regulate an employment contract which entails a one-year probationary period and, additionally, to make it impossible for the probationary period for that type of contract to be regulated by agreement through collective bargaining. Also wonders whether that probationary period, during which the employer may freely terminate the contract of employment, is compatible with the fundamental right guaranteed by Article 30 of the Charter.

In those circumstances, the Juzgado de lo Social No. 23 de Madrid decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

"1. Is national legislation under which employment contracts of indefinite duration to support entrepreneurs are made subject to a one-year probationary period, during which the employee may freely be dismissed, contrary to EU law, and is it compatible with the fundamental right guaranteed by Article 30 of the Charter?"

⁹ OJ 2008 L 198, at 47.

¹⁰ COM (2012) 173, final.

¹¹ OJ 2010 L 308, at 46.

¹² OJ 2011 C 212, at 1.

¹³ OJ 2012 C 219, at 81.

2. Is the one-year probationary period to which employment contracts of indefinite duration to support entrepreneurs are made subject prejudicial to the objectives of, and to the rules laid down in, Directive 1999/70—[and, accordingly, Clauses 1 and 3 of the Framework Agreement]?”.

III. THE JUDGEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION DATED 5 FEBRUARY 2015 (52/2015)

The Spanish court asks the court in essence whether, on a proper construction of Article 30 of the Charter, Directive 1999/70 and, more specifically, Clauses 1 and 3 of the Framework Agreement, national legislation such as the Spanish legislation establishing and regulating the employment contract of indefinite duration to support entrepreneurs and providing for a one-year probationary period is precluded.

The scope of the Charter is defined in Article 51(1) thereof, under which the provisions of the Charter are addressed to the member states only when they are implementing EU law.

It emerges in essence that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations¹⁴.

The Court of Justice of the European Union considers necessary “to determine whether the Spanish legislation establishing and regulating the employment contract of indefinite duration to support entrepreneurs implements EU law”.

Directive 1999/70 and the Framework Agreement are applicable to all workers providing remunerated services in the context of a fixed-term employment relationship linking them to their employer¹⁵.

Under Clause 2(1) of the Framework Agreement, that 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.

In accordance with the definitions laid down in Clause 3 of that agreement, “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”.

¹⁴ Judgment in Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 19.

¹⁵ Judgments in Del Cerro Alonso, C-307/05, EU:C:2007:509, paragraph 28; Rosado Santana, C-177/10, EU:C:2011:557, paragraph 40; and Valenza and Others, C-302/11 to C-305/11, EU:C:2012:646, paragraph 33.

The court considers that, “from the definition of ‘fixed-term worker’ in Clause 3 of the Framework Agreement and from the national legislation applicable to the case before the referring court it follows that an employment contract such as that under which Ms. Nisttahuz Poclava was employed cannot be categorised as a fixed-term contract.

A probationary period essentially makes it possible for a worker’s aptitude and skills to be checked, whilst a fixed-term employment contract is used if the end of the employment contract or relationship is determined by objective conditions.

In any event, the duration of a probationary period, such as that laid down in Law 3/2012, is not regulated by Directive 1999/70. It must therefore be held that, a contract such as the ‘employment contract of indefinite duration to support entrepreneurs’, provided for under Spanish law, is not a fixed-term contract that falls within the scope of Directive 1999/70.

The court relies on other provisions of EU law which could support that the legal situation at issue falls within the scope of EU law. As regards Article 151 TFEU, which sets out the objectives of the European Union and member states in the field of social policy, the court considers “that provision does not impose any specific obligation with respect to probationary periods in employment contracts. The same is true for the guidelines and recommendations in the field of employment policy adopted by the Council under Article 148 TFEU”.

In that regard, it should be borne in mind that, when examining the French “new recruitment contract”, the court held that, “even though protection for workers in the event of the termination of the employment contract is one of the means of attaining the objectives laid down in Article 151 TFEU and even though the EU legislature has competence in this field in accordance with the conditions laid down in Article 153(2) TFEU, situations that have not been covered by measures adopted on the basis of those provisions do not fall within the scope of EU law”¹⁶.

In addition, “the fact that the employment contract of indefinite duration to support entrepreneurs may be financed by structural funds is not sufficient, in itself, to support the conclusion that the situation at issue in the main proceedings involves the implementation of EU law for the purposes of Article 51(1) of the Charter. In the grounds for its decision, the referring court also refers to Articles 2.2(b) and 4 of Convention No. 158 on the termination of employment, adopted at Geneva on 22 June, 1982 by the

¹⁶ Order in Polier, C-361/07, EU:C:2008:16, paragraph 13.

International Labour Organisation, and the European Social Charter signed at Turin on 18 October, 1961. It must be held that, the court has no jurisdiction under Article 267 TFEU to rule on the interpretation of provisions of international law which bind Member States outside the framework of EU law”¹⁷.

The European Union Court of Justice finds itself without jurisdiction to answer the question and declares that “It follows from all the foregoing considerations that the situation at issue in the main proceedings does not fall within the scope of EU law. Consequently, the court does not have jurisdiction to answer the questions put by the referring court”.

CONCLUSION

The 2012 Spanish labour market reform has contributed to the incipient employment recovery, but reductions of unemployment and of the two-tier labour market remain important challenges. A two-tier labour market continues to negatively affect productivity growth and medium growth potential.

The 2012 reform aimed at favouring open-ended contract¹⁸. Openended contracts have slightly increased, but temporary contracts still account for over 90% of the new recruitments. The use of the 2012 openended contract for support to entrepreneurs diminished slightly to 11.6% of the total open-ended contracts in 2014. Moreover, there is no clear, recent evidence about the survival rates of jobs formalised with the permanent employment contracts after the one-year probation period, the legal conformity of which has been declared by the Spanish Constitution¹⁹.

¹⁷ See judgments in *Vandeweghe and Others*, 130/73, EU:C:1973:131, paragraph 2 and *TNT Express Nederland*, C-533/08, EU:C:2010:243, paragraph 61; the order in *Corpul Național al Polițiștilor*, C-134/12, EU:C:2012:288, paragraph 14; and the judgment in *Qurbani*, C-481/13, EU:C:2014:2101, paragraph 22.

¹⁸ By reducing the gap in severance costs in fixed-term contracts, and subsidising social contributions for open-ended contracts.

¹⁹ Judgement dated 16 July, 2014.