Irregularities in public sector staffing. Jurisdiction and/or substantive law

When a serious irregularity is found in administrative contracts owing to their employment character, jurisdiction lies with the employment branch of the court system. However, if the administrative route is not outside the scope of the law, jurisdiction lies with the judicial review branch of the court system.

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1. Irregularities in public sector staffin, whether administrative or employment-related, have required, as is well known, the dedication first of courts and then of lawmakers to 'order' the endeavour to normalise illegal situations. In employment contracts, it has become necessary to characterise the relationship as permanent or non-fixed permanent in the face of an abuse of law *(frau legis)*, to the extent of incorporating an amendment into the Basic Statute of Public Sector Workers (EBEP) that classifies public sector workers, in Article 8, as tenured civil servants, leave-cover civil servants, employed personnel (whether fixed [entry through competitive exam], permanent or temporary) and casual personnel. Employed personnel are those who, by virtue of a formal written employment contract, in any of the forms of staff hiring provided for in employment legislation, render services remunerated by the general government (public authorities at central, regional and local levels). Depending on the term of the contract, it may be fixed, permanent or temporary,

pursuant to Article 11 EBEP. A fixed nature grants the position, permanence is subject to termination, and temporariness implies submission to a fixed term.

Apart from the many interpretative difficulties that arise in relation to this distinction and, in particular, with the validity of the concept created by case law of non-fixed permanent contracts and employment-related consequences thereof, there is a jurisdictional controversy that seems unresolved, in light of the latest rulings given in the employment and judicial review branches of the court system. In principle, in accordance with the provisions of Article 2(a) of the Employment Jurisdiction Act, employment courts shall hear disputes between employers and employees arising from employment contracts and the exercise of other rights and obligations in the field of labour relations. However, the jurisdictional conflict requires a prior determination because it must be established whether or not the contract entered into in the public sphere has been irregular. If so, the employment character of the contract would, as explained above, fall within the jurisdiction of the employment branch of the court system; otherwise, jurisdiction would lie with the judicial review branch of the court system.

2. It seems that the approach to jurisdictional delimitation is well established, but perhaps in practice it is not so simple. Let us see:

   Two recent judgments of the employment branch of the court system address the abusive use of casual or discretionary personnel appointments in the general government. It should be noted that, in accordance with the provisions of Article 12 EBEP, *casual personnel* are those who, by virtue of their appointment and on a non-permanent basis, only discharge duties expressly characterised as trust-based or special advisory, and are remunerated from the budgetary appropriations allocated for this purpose. Appointments and removals shall be unrestricted. A removal shall take place, in any case, when the authority to which the trust-based or advisory service is provided is removed. A casual status may not constitute merit for access to public service or for internal promotion, and the general scheme for tenured civil servants shall apply to these personnel.

   In one of these rulings, the Employment Division of the Supreme Court, in Judgment no. 1287/2025 of 22 December, clarifies that, although when a tenured or leave-cover civil servant is appointed, the jurisdiction to resolve such conflicts lies with the judicial review branch of the court system, in the case of casual personnel — who do not sign a contract but provide services by virtue of an appointment — other matters must be assessed. And thus:

   a) The unrestricted and discretionary appointment of casual personnel by political office holders constitutes an exception to the constitutional principles of access to public service and the impartiality of public sector workers. If the discretionary appointment of casual personnel by a political office holder cannot constitute merit for access to the status of employed personnel in the same public authority, as a general rule, challenges to the removal of such personnel falls within the jurisdiction of

the judicial review branch of the court system.

b) Most civil servants are characterised by functional indistinguishability with respect to employed personnel. In contrast, casual personnel can only discharge trust-based or special advisory duties. In exceptional cases, this has made it possible to go beyond the *nomen iuris* and examine whether the provision of services has actually complied with legal requirements, in which case jurisdiction would lie with employment branch of the court system.

c) Apart from these exceptional cases, it is for judicial review branch of the court system to resolve conflicts relating to casual personnel (FJ 6).

The problem arises when assessing the *exceptional nature* of each situation. In this case, the claimant had provided her services as casual personnel through discretionary appointments by a political office holder without such appointments being preceded by a contract of employment or a senior manager contract. This is a member of casual staff who was appointed on a discretionary basis by successive political office holders for temporary periods and who have performed trust-based duties. The fact that two months before her removal, the selection process for access to a position within the scope occupied by the claimant was published does not detract from this conclusion, since the functional indistinguishability between the tasks performed during her appointments and that position has not been proven.

This solution differs from that adopted by the Employment Division of the Supreme Court in Judgment no. 1288/2025 of 29 December, which also addressed the removal of successively-appointed trust-based casual personnel. Both the Employment Court and the High Court of Justice concluded that they were not dealing with an employer/employee relationship and that jurisdiction lied with the judicial review branch of the court system. As stated in the case law of the latter branch of the court system, the trust-based and special advisory duties discharged by casual personnel cannot be equated to tasks that are permanent in nature within an administrative organisation. In principle, the removal of casual personnel is an administrative act subject to administrative law that must be challenged at a judicial review court. The parallel consequence that can also be drawn is that such casual personnel should be prohibited from carrying out professional collaboration activities that fall within normal general government functions, whether public service provisions and policing, or purely internal duties of administrative organisation. These professional activities, due to their direct connection with the constitutional principles of administrative objectivity and efficiency, must be assigned to public personnel selected under the principles of equality, merit and ability.

It is therefore necessary to determine whether the claimant's duties adequately matched trust-based and special advisory duties, which are the only ones that could justify the use of a casual contract. This is a person who has been discharging her duties for a very long period of time (twenty-seven years) when administrative

rules emphasise the need for the work performed to be "non-permanent" and "it can hardly be argued that a job held for twenty-seven years can be considered non-permanent as required by the Basic Statute of Public Workers"; furthermore, the position is listed in the list of positions (RPT) with that status and is remunerated in the budget allocated for personnel included in that list. It is "absolutely strange and illogical, as it is incompatible with the very nature of casual personnel who can be appointed and removed without restriction by policy makers at any time, that the claimant's duties appear on a permanent basis in a stable instrument such as the municipality's RPT [...]. The inclusion of the claimant's position in the RPT of the defendant City Council constitutes further evidence to be added to the understanding of the permanent nature of the activities carried out"; the appealed judgment "does not mention any activity or event that required special advice, nor does it explain why the discharge of her duties implied the need for the trust that characterises casual personnel. Rather, what can be inferred is that her duties [...] reveal the performance of ordinary council tasks for which, in no way, was casual personnel's special —essential— trust required. These are all circumstances indicative of a provision of services that are "permanently and fully integrated into the [defendant's] structure of ordinary provision of services", since the performance of the work falls within the normal scope of ordinary services provided by an employee under the employer's direction. Consequently, the successive appointments as a casual staff member "constituted abuse of law and concealed a genuine employer/employee relationship; therefore, jurisdiction over the disputed removal lays with the employment branch of the court system" (4th point of law).

3. An "unusually long" contract (twenty-seven years) allows us to presume that the contract is irregular. Therefore, when the Supreme Court's Employment Division examines a contract that is initially "administrative" but may become an "employment" contract due to its successive abuse, it must also examine whether it has jurisdiction to resolve the conflict raised. This was the case in Supreme Court Judgment no. 1276/2025 of 17 December, in which, after the defence of lack of jurisdiction of the employment branch of the jurisdiction was upheld in a review of employment court decision, the question of jurisdiction was examined. It is claimed in the 'cassation' appeal (appeal on the grounds of a breach of the provisions governing the determination of a dispute) that, as the three-year period provided for as a non-extendable time limit in Article 70(1) EBEP had been exceeded ("in any case, the execution of the public sector job offer or similar instrument must take place within the non-extendable time limit of three years"), the applicant's relationship with the general government, based on an "administrative contract", had become abusive and, therefore, as she had acquired the status of a non-fixed permanent employee, jurisdiction lays with the employment branch of the court system.

   However, case law has established that, in cases of administrative contracts for the temporary filling of vacancies, with a duration exceeding the three years referred to in the aforementioned Article 70(1), the determination of the competent jurisdiction

to hear the action brought for a judicial adjudication on the consequences of this situation requires an examination, first, of the validity of the administrative contract and, second, its possible unusually long duration. This was stated by the Employment Division in Supreme Court Judgment no. 49/2024 of 11 January, which held that when a serious irregularity is found in an administrative contract to the extent that, through the application of administrative rules, employment provisions are circumvented and the true nature of the employer/employee relationship is masked or concealed, the jurisdiction of the employment branch of the court system is indisputable and irrevocable. However, if the administrative route does not fall outside the cases covered by law, abuse in this sense cannot be concluded. Therefore, if the subject of the claim is the excessive length of the relationship, a challenge to the termination of an administrative contract will not fall within the jurisdiction of the employment branch of the court system. The legal scope of this situation of abuse due to the unusually long duration of the temporary administrative contract must be determined by the judicial review branch of the court system, applying the relevant legislative provisions and legal doctrine. Therefore, the mere invocation of this irregularity does not prejudge the administrative contract entered into, and the judicial review branch of the court system therefore retains jurisdiction to rule on any issues that may arise in the course of the contract.

Consequently, the employment branch of the court system will hear claims by a person hired under an administrative scheme due to the inexistence of a misused legal provision and, therefore, due to the existence of an employer/employee relationship (Supreme Court Judgment no. 862/2025 of 1 October; Supreme Court Judgment no. 608/2025 of 24 June; Supreme Court Judgments no. 520/2025 of 30 May and 278/2025 of 2 April, among others).

Consequently, the established doctrine is that, if the claim is not based on the use of an irregular route in the administrative staffing, the vicissitudes arising from the performance of the contract fall within the jurisdiction of the judicial review branch of the court system because, in this case, there is no contractual novation by virtue of which an initially lawful administrative contract becomes an employment contract simply because of the passage of time. On the contrary, when it is claimed that the contract was irregular from the outset because the administrative route was used outside the cases provided for by law, the employment branch of the court system has jurisdiction to hear such irregularities.

When an administrative contract circumvents employment law provisions, the jurisdiction of the employment branch of the court system is indisputable and irrevocable

If the administrative contract has legislative cover, irregularities of a lawful contract shall be heard by judicial review courts

Thus, "the employment branch of the court system has jurisdiction to hear the claim seeking a declaration that the claimant has the status of a fixed employee because [...] there is no evidence of the need to hire, nor of the impossibility to provide services with fixed personnel. The reason is that the cause of action is that administrative contracts were used irregularly to conceal the existence of a genuine employer/employee relationship and that dispute lies with the employment branch of the court system [...] [but] if the court concludes that the administrative contract did have legislative cover, in which case, as it is a lawful administrative contract, the examination of the legal consequences of the prolonged duration of the contractual relationship falls within the jurisdiction of the judicial review branch of the court system, which must judge whether there was an abusive use of temporary contracts prohibited by Directive 1999/70/EC" (STS 1101/2025, of 18 November, FJ 6).

Since, in the case analysed by Supreme Court Judgment no. 1276/2025 of 17 December, an "administrative contract for the temporary filling of a vacancy identified in the workforce" was signed that complied with all the required formalities , without any irregularity affecting the contract being found, jurisdiction will lie with the judicial review branch of the court system. The claimant's only allegation is that the contract was unusually long, "the only issue debated in the proceedings, over which the employment branch of the court system has no jurisdiction, therefore, as it affects the future of the relationship, it must be concluded that jurisdiction lies with the judicial review branch of the court system" (Supreme Court Judgment no. 1276/2025 of 17 December, 4th point of law).

4. The premise seems simple: if the administrative contract complies with the law, any vicissitude must be examined by the judicial review branch of the court system, but if the contract is irregular in origin, it must be heard by the employment branch of the court system. The problem is that any irregularity breaks the seams of legality because an unusually long contract to perform an activity initially considered "administrative" and not "employment" may give rise, at least presumptively, to the "administrative" contract concluded not complying with the nature provided for in the law for it, for example, in the case of casual personnel. In fact, one of the most common aspects in determining abuse of law in employment contracts, both in national case law and in the European justice system, is precisely an unusually long duration.

   And, as stated by the employment branch of the court system, when "a serious irregularity in an administrative contract is found to the extent that the application of administrative rules circumvents employment provisions and masks or conceals the true nature of the employer/employee relationship, the jurisdiction of the em-

ployment branch of the court system is indisputable and irrevocable" (Supreme Court Judgment no. 1288/2025 of 29 December, 4th point of law), the problem remains unresolved because the irregularity in a contract may not be detected until the legal breach in the performance of the activity is proven. And it will not be enough to specify, once the legality of the administrative contract has been accepted, non-compliance with — employment — law, since the rulings that defend the jurisdiction of the judicial review branch of the court system refer to the need to "adjudicate on whether there was an abusive use of temporary contracts prohibited by Directive 1999/70/EC", i.e. the European Framework Agreement on Fixed-Term Work will mean the application of the appropriate legislation, because, perhaps precisely, it is the contract procedure used that is inappropriate.

Certainly, as is well known, jurisdiction and the application of substantive law are two different things. Of course, the judicial review branch of the court system can apply employment legislation in the resolution of a dispute when the applicable substantive rule is of this nature. The employment branch of the court system could also do so in the opposite direction. However, this judicial back-and-forth is surprising when, for reasons of procedural economy and legal certainty, it would be more appropriate for the court hearing the case to apply the relevant substantive law — administrative or employment law — once the claim has been filed in grey area cases such as those described above.