

# ANALYSIS

---



Employment

## Conclusions on the abuse of temporary public sector employment: finding a balance between domestic laws and EU law

Following the *Odabal* judgment of the Court of Justice of the European Union, the Supreme Court concluded, inter alia, that temporary contracts in *fraudem legis* do not confer an entrenched status to non-civil service employees in the absence of successful completion of a selection process, as this would violate the Spanish Constitution.

---

**LOURDES LÓPEZ CUMBRE**

Professor of Employment and Social Security Law, University of Cantabria  
Academic counsel, Gómez-Acebo & Pombo

Following the European Court of Justice's judgment of 14 April 2026, in the *Odabal* case (C-418/24), the Supreme Court's response came in judgment no. 425/2026 of 11 May: a

*If entrenched status were imposed in response to the abuse of temporary contracts without regard for the principles of equality, merit and ability, it would undermine the right to enter public sector employment*

comprehensive decision, as befits the scope and judicial history of the matter, which thoroughly addresses all aspects arising from a complex approach to public sector employment and which includes the dissenting opinion of one of the justices of the Employment Division. In summary, the judgment concludes as follows:

**First.** The temporary hiring of non-civil service personnel by public authorities without successfully completing a process for access to stable public sector employment subject to the principles of equality, merit, and ability does not allow such workers to acquire entrenched status as a direct consequence of the abuse of temporary employment, as this would violate the Spanish Constitution and the Basic Statute of Public Employees, and would prevent other citizens from accessing public sector employment. The automatic conversion of all fixed-term contracts (*contratos de du-*

*ración determinada*) involving an abuse of temporary employment into entrenched contracts (*contratos fijos*) would in no way deter public authorities from engaging in further temporary hiring outside the scope of the aforementioned principles. On the contrary, it would be established for the future as a pathway to public sector employment that violates the principles of equality, merit, and ability. If those temporary workers were declared entrenched, thereby circumventing access to public sector employment in accordance with those principles, it would undermine

citizens' right to enter public sector employment and restrict the free movement of workers within the European Union (5<sup>th</sup> point of law).

Successful completion of a selection process for temporary public sector employment does not mean that, if the temporary contract is fraudulent, the worker acquires entrenched status. The reasons are as follows:

- a) there is a significant difference between a selection process for filling an entrenched position and one for filling a temporary position, the expected duration of which may be minimal;
- b) that element of temporariness or entrenchment in the call for applications is decisive in citizens' decisions regarding the exercise of their right to take

part in open competitions for public sector employment;

- c) a large number of citizens are preparing for the competitive examinations to definitively fill those same positions, and the temporary nature of the call for applications may be decisive in determining whether or not a citizen participates in the process;
- d) if an entrenched position had opened up, the number of individuals potentially interested in participating in the selection process would have been much higher than that of those who participated in filling a temporary position;
- e) the bar set by the principles of merit and ability is determined by whether the position subject to the selection process is temporary or entrenched (6<sup>th</sup> point of law).

**Second.** The conversion of a temporary employer/employee relationship to an entrenched one occurs only when the worker who has suffered the abuse of temporary employment had previously passed a selection process for entrenched staff without obtaining a position, since, in such a case, the principles of equality, merit, and ability in access to public sector employment are indeed met.

The judgment of the Court of Justice of the European Union in the *Obadal* case establishes the following legal principle: when a person has taken part in and passed a competitive examination for the hiring of entrenched staff but has not been awarded a position because the number of

candidates who demonstrated their qualifications exceeds the number of positions available, if they subsequently enter into fixed-term contracts involving an abuse of temporary employment (i.e., the employer/employee relationship is prolonged over time), the conversion of that contract into an entrenched one is not contrary to law because that person has already taken part in a competitive examination for entrenched public sector employment in accordance with the requirements of equality, merit and ability, and the subsequent violation of clause 5 of the framework agreement on fixed-term contracts annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work (Official Journal, 10 July), which demonstrates a structural need for workers, demands such conversion (6<sup>th</sup> point of law).

**Third.** When such conversion to an entrenched contract is not possible because it would be contrary to law, the payment of compensatory and punitive damages, together with the administrative penalty imposed by the labour authority, is the appropriate measure to be applied to ensure the effectiveness of the aforementioned clause 5 (7<sup>th</sup> point of law). As established in the European Court of Justice's *Odabal* judgment, even if the worker retires, resigns, or voluntarily decides not to take part in the selection process, he or she is entitled to have the abuse of temporary employment penalised. This is a separate form of compensation and, where applicable, additional to termination pay. Its purpose is not to compensate for the loss of income resulting from the termination of employment, but rather to remedy the insecurity of the worker who has suffered abuse.

The court responsible for determining the amount of compensation for a person who has been the victim of temporary employment abuse in the public sector must take the following into account:

- a) The burden of proof for the harm incurred rests with the worker; this can be very difficult, particularly when it comes to proving pain and suffering. The right to effective judicial protection requires that this be facilitated.
- b) The Constitution recognises the right to equality, which includes equality in the application of the law. Experience shows that, when the quantification of compensatory damages is left to

*The termination of an abusive employer/employee relationship in the public sector will entitle the employee to two distinct and independent forms of compensation that are mutually compatible: termination pay and compensatory damages*

the discretion of individual judges, there can be significant differences between the damages awarded by different judges.

- c) Article 74(1) of the Employment Jurisdiction Act sets out the principles of employment proceedings, among

which is the principle of expediency. The nature of the claims brought in employment proceedings, which concern wages and Social Security benefits, is incompatible with a very long delay in the judicial response. Disputes concerning these workers who have suffered temporary employment abuse may give rise to significant litigation. It seems reasonable to attempt to limit such litigation or contribute to its swift resolution in the interest of the effectiveness of judicial protection (8<sup>th</sup> point of law).

*Fourth.* When a fraudulent employer/employee relationship is terminated, the employee is entitled to two distinct and independent forms of compensation that are mutually compatible (8<sup>th</sup> point of law). On the one hand, there is termination pay, which consists of the corresponding statutory fixed-rate compensation resulting from termination of the employment contract, the amount of which depends on the grounds of termination. If a public body announces a selection process to fill the position of the worker who has suffered abuse with an entrenched employee, another worker passes who is hired under an entrenched employment contract, and the contract of the former worker is terminated, termination pay for redundancies of twenty days' salary per year worked, prorated monthly, with a maximum of twelve monthly payments, must be applied analogously. Termination payments directly proportional to the

duration of the contract, when applied to abnormally or unusually long employer/employee relationships, will result in a not insignificant amount.

Furthermore, compensatory damages for temporary employment abuse shall be awarded in addition to termination pay and as additional compensation arising from such abuse, fully compensating for the harm suffered in this regard. The worker has provided services for an extended period of time in a situation of job insecurity that has caused professional harm. That harm must be compensated. Compensation may constitute an appropriate measure to combat the abuse of temporary employment. That objective is only met when it involves specific compensation. It is not sufficient to order the payment of the same compensation as when a contract is terminated without abuse of temporary employment. Such compensation must include all material damage (for example, if the worker has received wages lower than those they would have earned had they been an entrenched worker) as well as non-material damage. The consequence is that, in accordance with European doctrine, when their employer/employee relationships are terminated, workers with temporary contracts who have suffered temporary employment abuse will receive higher compensation than entrenched workers because the former have carried out their work in a situation of uncertainty that the latter have not experienced.

**Fifth.** In view of the potential for litigation and inequality that this situation may generate, unified criteria are established to quantify compensation for abuse of temporary employment (8th point of law). The criteria

established in the aforementioned *Obadal* judgment of the Court of Justice of the European Union are adopted as a basis:

- a) damage suffered made good in its entirety and the principle of proportionality, as more than a purely nominal amount is necessary;
- b) must not be more than is necessary to make good the damage in its entirety;
- c) it is necessary to take into account the nature of the duties performed by the worker concerned and the number and cumulative duration of the contracts at issue, the financial benefits to which the person concerned would have been entitled had it not been for the abuse and the damage suffered as a result of the situation of uncertainty in which he or she found himself or herself;
- d) penalising the infringements found to an appropriate degree is necessary.

**Sixth.** Compensatory damages must distinguish between material and non-material damage. The amount of compensation should be assessed having regard to the financial benefits to which the person concerned would have been entitled had it not been for the abuse. This constitutes material damage. Unless proven otherwise, the wages and working conditions of temporary workers shall not have been inferior to those of workers with permanent (open-ended) contracts. If this is not the case, it constitutes material damage that the worker must prove and for which compensation must be awarded. If the worker who has suffered this abuse of temporary

employment has received lower compensation than they would have received had they been an entrenched worker, this material damage must be compensated. Likewise, if they prove that, due to their temporary employment relationship, they have suffered any other material damage, this will be taken into account when calculating the amount of compensation.

For its part, a minimum presumptive compensation for pain and suffering must be established, without prejudice to the fact that, if the worker proves greater harm, they shall be compensated in full. Otherwise, if no such amount is set, each of the numerous lawsuits on this matter would require the worker to provide very difficult proof, which could entail extensive and meticulous evidentiary proceedings, and the quantification of each compensation would be left to the discretion of each judge, with serious consequences for the equal application of the law and for effective judicial protection. A presumptive compensation amount must be established to serve as a minimum, without prejudice to the fact that, when greater harm is proven, they shall be compensated in full. For this purpose, the Employment Violations and Penalties Act may be used as a guideline. Case law has taken into account, when determining the amount of compensation for the violation of fundamental rights, the penalty established in the Employment Violations and Penalties Act for company-employee relations violations due to serious breaches, with amounts ranging from one thousand to ten thousand euros. When the worker proves that, as a result of the abuse of temporary employment, they have suffered greater harm, they must be fully compensated.

An order to pay compensation exceeding the minimum presumptive compensation requires the worker to prove the specific harm suffered.

**Seventh.** Ordering the payment of punitive damages would indeed have a deterrent financial impact on public bodies and would not hinder the free movement of workers. However, it is the legislature that, in compliance with Directive 1999/70, must adopt the necessary measures to address this abuse of temporary employment (5th point of law). The consequences of the abuse of temporary employment should be addressed by holding individual public body personnel liable, thereby preventing the burden from falling on the public treasury. The penalty would be imposed on the individual responsible for the abuse. It is incumbent upon the legislature to enact the necessary reforms to ensure the effectiveness of this liability, and upon the competent authorities to guarantee the effectiveness of the legal provisions requiring such liability (9<sup>th</sup> point of law).

In the current situation, the supreme interpreter of EU law has ruled that this is not a proportionate, effective, or dissuasive measure to ensure the full effectiveness of the provisions adopted in application of the framework agreement. In the opinion of the Employment Division, an effective measure could consist of, when an abuse of temporary employment is found to have occurred, forwarding a copy of the judgment to the Labour and Social Security Inspectorate so that it may initiate the corresponding sanctioning proceedings against the public authority. The judgment will have declared that a breach of employment legislation has occurred,

and the labour authority will be competent to impose penalties. For example, when there has been an abuse of temporary employment and a replacement contract for temporary coverage during the selection or promotion process for permanent coverage has been extended for more than three years without justification, this would constitute the classed conduct described in Article 7(2) of the Employment Violations and Penalties Act. The case of each worker whose temporary contract does not comply with the time limits is considered a separate violation, and more severe penalties are imposed in the event of a repeat violation, which enhances their deterrent effect (9th point of law).

**Eighth.** Given the significant litigation arising from the interpretation and application of clause 5, it is advisable to establish the criteria specified below, which distinguish between actions seeking a declaration of entrenched status and termination actions (10<sup>th</sup> point of law):

- In the case of a claim for entrenched status, a distinction shall be made between the following:
  - a) Unlawful temporary contract without abuse of temporary status. Since no such abuse has occurred — either because there has been no succession of contracts or contractual extension, or because the employer/employee relationship has not been unusually or abnormally long — Directive 1999/70 shall not apply. In such a case, the same case law doctrine shall continue to apply as prior to the European

Court of Justice's *Obadal* judgment.

- b) Abuse of temporary employment without the worker having passed a recruitment process for entrenched staff. When such abuse has occurred without compliance with the principles of equality, merit and ability in access to public sector employment, the claim for entrenched status will not be upheld. These are the consequences:
  - 1) Such abuse of temporary employment constitutes a violation of the legal system, entitling the worker to claim appropriate damages. When a legal violation occurs, it is not necessary for the violation to have ended in order to claim compensatory damages.
  - 2) If the employer/employee relationship is subsequently terminated, the employee will be entitled to claim additional compensation for the abuse. Any compensation already received will be taken into account in the calculation.
  - 3) The court must forward a copy of the judgment to the Labour and Social Security Inspectorate so that it may impose the appropriate penalty on the public authority.

- In the termination claim, the order to pay the two indicated compensations shall be observed, namely, the termination pay and the compensatory damages for the abuse of temporary employment.

**Ninth.** This judgment also addresses the issue raised by claims filed before the European Court of Justice issued the *Obadal* judgment, provided that the abuse of temporary employment was alleged — whether through an action for a declaratory judgment of entrenched status or a claim for dismissal — without compensation for said abuse having been claimed.

According to previous rulings by the Court, a distinction must be made between proceedings at the lower court level and proceedings in review of employment court decision or in cassation (11th point of law). In the first case, that is, in proceedings at the lower court level, compensation for the abuse of temporary employment may be claimed by expanding the claim or during the oral hearing. Article 85 of the Employment Jurisdiction Act allows the parties to be heard during the oral hearing on issues raised by the court regarding the limits of the claim asserted. If a claim for entrenched status or for termination based on the abuse of temporary employment has been filed without seeking compensation for that abuse, the court must hear the parties regarding whether they wish to introduce that dispute into the proceedings in order to resolve it in a single case.

Conversely, if the lower court judgment has been appealed in review of employment court decision or in cassation, the nature of appeal on a point of law and the prohibition on taking evidence to establish the harm suffered by the worker who has been the victim of abuse, except for the exceptional submission of documentary evidence under Article 233 of the Employment Jurisdiction Act (without, obviously, the *Obadal* judgment itself or the present one being considered as such), prevents the claim for compensatory damages from being introduced into the review or cassation proceedings if it had not been claimed at the lower court level.

**Tenth.** Justice López Parada issues a dissenting opinion in which he challenges the majority's interpretation applicable to this case regarding free movement; the concept of “abnormally” long-term temporary employment; the interpretation of the constitutional requirements of equality, merit and ability; the consideration of selection processes in public sector employment; the deterrent effect of administrative penalties; and, finally, among other arguments, his assessment of the alternative to entrenched status adopted in the majority opinion — namely, the recognition of compensation for the abuse of temporary employment for the affected workers — on the grounds that this is not equivalent to the recognition of entrenched status derived from the relevant European case law.