SPANISH CONSTITUTIONAL COURT
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THE TC UPHOLDS THE PREFERENTIAL APPLICATION OF EUROPEAN REGULATIONS, IF ALREADY INTERPRETED BY THE EUROPEAN COURT OF JUSTICE

The Plenary Meeting of the Spanish Constitutional Court (TC) has upheld the appeal for constitutional protection filed by a substitute teacher, who was denied entitlement by the Autonomous Community of Madrid to receive "*six-year payments*" due to lacking official civil servant credentials. The Court has overruled the judgment of the High Court of Justice of Madrid (TSJM), which had upheld the resolution adopted by the Madrid Government, on the grounds of a breach of the right to effective judicial protection and no defencelessness (Art. 24.1 Spanish Constitution (CE)). Ricardo Enríquez acted as the Reporting Judge.

The appellant, a substitute teacher since 1991, applied in late 2009 to the Autonomous Community of Madrid for an acknowledgement of specific continuous training bonuses granted to teachers. These bonuses, commonly referred to as "*six-year payments*", are regulated by a resolution adopted by the Council of Ministers in 1991, which specifies that they are reserved to "*official civil servants*". The applicant for constitutional protection claims in his appeal the application of an EC directive (Directive 1999/70/EC), which forbids any discrimination amongst substitute workers in favour of fixed-term workers, in the absence of justifying "*objective reasons*", other than the term of the employment contract. He also claims that the European Court of Justice (ECJ) has ruled that Spanish regulations are contrary to European law on the matter. The Contentious-Administrative Courts had ruled in his favour at first instance, but the judgment was subsequently overruled on appeal by the TSJM.

The TC states that, although European Union Law does not enjoy "*constitutional rank and force*", the Constitutional Court is obliged to appraise any acts delivered by public powers presented to it for review, both in the case that EU rules are applied and if it is claimed that there is a breach thereof. More specifically, in terms of the right to effective judicial protection (Art. 24.1 CE), viewed as a right to a due process, with all guarantees, the Court should ensure that all judges and tribunals base their decisions "*on established sources of law*".

These "*sources*" include Community law. As the TC has already affirmed on occasion, it is entrusted with the task of "*ensuring that the primacy of EU law is upheld*" if, as is the case here, "*an authentic interpretation exists, made by the European Court of Justice". "The unawareness and omission of EU law, as interpreted by the Court of Justice, may entail an "unreasonable and arbitrary selection of a procedural rule", which could lead to a breach of the right to effective judicial protection*".

In this case, the Plenary Meeting highlights two specific circumstances: 1) Before the discussion leading to the TSJM judgment subject to an appeal for constitutional protection, the ECJ had pronounced itself on several occasions, when resolving preliminary rulings raised by the Spanish Courts, about "*the correct interpretation of the non-discrimination principle*" contained in Directive 1999/70/EC. 2) This ECJ case-law was known to the TSJM, "*and was included in its discussions*"

because the Contentious-Administrative Court had based its decision on the "Cerro Alonso" case (2007) and because the appellant, as soon as he was informed of this decision, provided the "Lorenzo Martínez" order (2012) that ruled in a case that was identical to his.

This notwithstanding, the Contentious-Administrative Chamber of the TSJM "*merely refers to a previous decision*" delivered by one of its Sections and does not uphold any discrimination in a refusal to grant six-yearly payments "*due to the uniqueness of substitute civil servants with respect to official civil servants*"; this argument had already been dismissed by the Luxembourg Court as "*objective and valid grounds to justify the "different treatment""* allowed by Directive 1999/70/EC.

"*The Chamber*", affirms the Plenary Meeting in its judgment, "*failed to reason on a basic allegation of the appellee* (…)" and, by not doing so, it adds, it resolved the remedy of appeal "*with an unreasonable and arbitrary selection of a procedural rule, insofar as it overlooked, independently and at its sole discretion, the interpretation of Clause 4.1 of Directive 1999/70/EC, imposed and referred to by the competent body as binding, consequently breaching the principle of primacy of European Union law*".

Said "*primacy principle*" of EU law required, according to the TC, that the Directive be applied as it had been interpreted by the European Court of Justice, "*with preference over any incompatible domestic law*". Furthermore, in this case, the direct applicability of European law did not require "*any preliminary ruling before the European Court of Justice, as the act had been "clarified" by the Court itself in a prior preliminary ruling that was "materially identical" to the one raised in a "similar case""*. Consequently, concludes the Plenary Meeting, "*the inapplicability of said Directive according to the judicial resolution on appeal, without reasoning the timeliness or adequacy of raising a further preliminary ruling, breached this primacy principle and, consequently, made an "unreasonable and arbitrary election of a procedural law, consequently in breach of the appellant's right to effective judicial protection*".

This is why the Court has granted the constitutional protection sought and has decided to overrule the challenged judgment and to retrospectively apply all steps until the time the TSJM is able to deliver another resolution "*that respects the fundamental right infringed*".

Madrid, 24 November 2015.