

Employment

Temporary public employment and its definitive reform

With previous legislation passed in mid-2021, this new piece of legislation on public employment aims to achieve stability in a sector with high rates of temporary employment and marked cases of irregularity that have been denounced by the European Union. It is precisely the latter that demands, in the recovery phase and in the context of funds being made available, legal and real efforts in public sector employment.

LOURDES LÓPEZ CUMBRE

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

1. In the middle of the year, the Government approved Royal Decree-law 14/2021 of 6 July (Official Journal of Spain ['BOE'] of 7 July), on Urgent Measures for the Reduction of Temporariness in Public Employment, the result of consensus with the trade unions present in the General Negotiating Committee of the Public Administrations. This regulation was validated, but it has been necessary to pass Act 20/2021 of 28 December (BOE of 29 December) with the same title, i.e. "Urgent Measures for the Reduction of Temporariness in Public Employment", in order to definitively establish the rules to be followed in the coming years in this area.

As already highlighted with the approval of the previous legislation ("New legislation on temporary public employment, in particular on cover staff"), numerous European and national court decisions and some public services that were oversized during the pandemic made it necessary to highlight the mismatches between reality and regulation in relation to public employment, especially with regard to cover staff. This new regulatory reform of public employment, backed by trade union consensus, opens the way to regularisation with stabilisation processes or, if this is not possible, with severance pay for those who, occupying positions on a cover basis, do not obtain a civil servant

appointment or a permanent employment contract.

The approval of the new legal measure recognises the momentum of the Recovery, Transformation and Resilience Plan, whose component 11, on the modernisation of public administrations, establishes the need to undertake a reform aimed at reducing the temporary nature of public employment. “This represents a before and after in tackling major structural reforms to adapt and make more efficient the functioning of public administrations, their legal system and the unavoidable planning of human resource management to ensure the provision of quality public services” (explanatory notes). The objective of the reform is precisely to bring the structural temporality rate below 8% in Spanish public administrations as a whole, with the reform acting in three dimensions: by adopting immediate measures to remedy the high level of existing temporariness, by articulating effective measures to prevent and sanction abuse and fraud in temporariness in the future and, finally, by promoting the adoption of tools and a culture of planning for better management of human resources. It is based on a series of principles as its main axes; thus, and as expressly stated by the legislator, a commitment to the public sector, providing the Administration with the necessary legal framework to provide public services with guarantees and efficiency; the professionalisation of the public employment model, with the focus on career civil servants and the delimitation of the cases of appointment of temporary staff; the maintenance of the role of cover civil servant personnel, establishing its legal regime to ensure the appropriate use of this type of personnel and to demand accountability from the Administration in the event of inappropriate use of the role of cover

civil servant personnel, thus contributing to promoting and strengthening appropriate human resource planning.

2. The form and content of this new Act 20/2021 is quite similar to that of its predecessor. However, some aspects differ, precisely those that have made parliamentary passage necessary after the previous regulation had already been validated.

As there, the *modification of the regulation on cover civil servants contained in Article 10 of the Basic Statute of the Public Employee* (“EBEP”) is incorporated. As is well known, the aforementioned statute regulates both the legal regime for civil servants and hired staff in the service of the Public Administrations. The latter are governed, as well as by labour legislation and applicable collective agreement rules, by those provisions of this statute that so provide (Art. 7 EBEP). All of them are considered to be public employees, a category that includes career civil servants, cover civil servants, hired staff - whether fixed (entry through competitive exam), permanent or temporary- and casual staff. The epicentre of this reform refers to cover staff, whether civil servants or hired staff.

Pursuant to the same amendment, *cover civil servants* are considered to be those who, for expressly justified reasons of necessity and urgency, are appointed as such on a temporary basis to perform the duties of career civil servants in any of the following circumstances: (a) the existence of vacant posts, when it is not possible to fill them with career civil servants, for a maximum of three years; (b) the temporary replacement of incumbents for the time strictly necessary; (c) the execution of programmes of a temporary nature, which may not last more than three years, extendable for up to twelve months

more by the civil service laws that are issued in the implementation of this statute, and (d) the excess or accumulation of tasks for a maximum period of nine months, within a period of eighteen months.

This definition, contained in Article 10(1) of the Basic Statute of the Public Employee, reinforces the temporary nature of the functions performed by such staff. Previously, the relationship was also temporary, but, as reality has shown, it was so prolonged in time that the occupation seemed to be permanent. Now, legislation underlines the temporary nature of the “civil servant” relationship by reinforcing certain aspects: one, that the appointment will take place “on a temporary basis” for the performance of tasks proper to career civil servants - which are already, in themselves, permanent -; two, that the existence of a vacancy will be extended “for a maximum of three years” - following the guidelines already established by the legislation itself, but not complied with judging by European and national court rulings with regard to labour staff-; three, that the transitory replacement of the vacant post will be for “a maximum of three years” -following the guidelines already established by the regulation itself, but not complied with judging by European and national court rulings with regard to hired staff-; three, that the temporary replacement of the incumbent will take place “for the time strictly necessary” - to avoid delays that lead to the irregularity of the contract”, and, finally, the reference to the excess or accumulation of tasks is modified, previously providing for a maximum period of six months within a twelve-month period, now for a “maximum period of nine months, within a period of eighteen months” - with a greater margin for the use of this type of relationship by the Public Administrations, within the afore-

mentioned limitations -. In accordance with these regulations, all selection procedures for cover civil servants shall be open and shall be governed by the principles of equality, merit, ability and promptness, and shall be aimed at the immediate filling of the post. However, the appointment resulting from these selection procedures shall in no case give rise to the recognition of the status of career civil servant.

The new wording of Article 10(3) of the Basic Statute of the Civil Servant must also be considered relevant, which now adds, to the previous brief reference to the termination of contract of the cover civil servant for the same reasons provided for the loss of the status of career civil servant, specific situations that occur frequently in practice and, most importantly, “without the right to any severance pay whatsoever”. Thus, and in any case, the Administration must formalise *sua sponte* the termination of the cover relationship, in addition to the aforementioned grounds and without the right to severance pay, for the following reasons: a) due to the regulated filling of the post by career civil servants through any of the legally established procedures; b) for organisational reasons that give rise to the elimination or redundancy of the assigned posts; c) due to the end of the authorised term expressly set out in their appointment, or d) due to the end of the cause that gave rise to the appointment.

However, it is in the fourth paragraph of this new provision that a difference is established in the new Act 20/2021. Before the change introduced by Royal Decree-law 14/2021, vacant positions held by cover civil servants had to be included in the job offer for the year in which their appointment took place and, if this was not possible, in the

following year, unless it was decided that the job should be made redundant. With the aforementioned reform, these positions “*must be covered by any of the mechanisms of provision or mobility provided for in the regulations of each Public Administration*”. However, three years after the cover civil servant’s appointment, the cover relationship will come to an end and the vacancy may only be filled by career civil servants, unless the relevant selection process is unsuccessful, in which case another appointment of cover civil servants may be made. Exceptionally, cover civil servants may remain in the post they occupy temporarily, provided that the relevant vacancy notice has been published within the three-year period. In the case of Royal Decree-law 14/2102, it was specified that this period would count “*from the date of appointment of the cover civil servant*”, but now the reference has changed and it is stipulated that it will be “*from the date of appointment of the cover civil servant and is resolved in accordance with the periods set out in Article 70 TREBEP [recast version of the EBEP]. In this case, he or she may remain until the resolution of the call for applications, without termination of his or her contract giving rise to severance pay*”. There is still a clear intention on the part of the legislator to limit the permanence of cover staff in the same post, without the possibility of extension, unless the legal deadlines entail a delay in resolution, which would justify the maintenance of cover staff without severance pay for subsequent termination of contract.

As a reflection of this regulation, Article 11 of the Basic Statute of the Public Employee, which refers to hired staff, is also amended. A third paragraph has been added, which requires that selection procedures for hired staff be open, governed in all cases by the

principles of equality, merit and ability. In the case of temporary hired staff, they will also be governed by the principle of promptness, with the aim of meeting expressly justified reasons of necessity and urgency (Art. 11(3) EBEP).

3. In order to ensure compliance with all these measures, Act 20/2021 also introduces a new seventeenth additional provision in the Basic Statute of the Public Employee that includes mechanisms to control the temporary nature of public employment. In this sense, the Public Administrations will be responsible for compliance with the provisions contained in this reform, and, in particular, they must ensure that they avoid any type of irregularity in temporary hiring and in the appointment of cover civil servants. Consequently, any act, pact, agreement or regulatory provision, as well as the measures adopted in compliance or implementation thereof, the content of which directly or indirectly entails non-compliance by the Administration with the maximum periods of permanence as temporary staff shall be void ab initio.

However, what is truly innovative - although brought about by judicial decisions already settled with regard to hired staff and already included in Royal Decree Law 14/2021 - is that failure to comply with the maximum period of permanence will give rise to severance pay for the cover civil servant affected, which will be equivalent to twenty days of their fixed remuneration per year of service, with periods of less than one year being prorated by month, up to a maximum of twelve monthly payments. Entitlement to such pay shall be acquired as from the date of actual termination of contract and the amount shall relate exclusively to the appointment from which the non-compliance

arose. There shall be no right to severance pay in the event that the termination of the relationship is due to disciplinary reasons or voluntary resignation.

In the case of temporary staff, failure to comply with the maximum periods of permanence shall entitle such staff to receive the severance pay provided for herein, without prejudice to any compensation that may be due for breach of the specific employment legislation. Such compensation shall consist, where appropriate, of the difference between the maximum of twenty days of their fixed salary per year of service - with a maximum of twelve monthly payments - and the compensation that they would be entitled to receive for the termination of their contract, with periods of less than one year being prorated by month. The right to this compensation shall arise from the date of the effective termination and the amount shall refer exclusively to the contract from which non-compliance arose. In the event that the aforementioned compensation is recognised in legal proceedings, the amounts shall be offset. There shall be no right to the above compensation in the event that the termination of contract is due to fair disciplinary reasons or voluntary resignation.

In the field of employment, when the maximum thresholds for temporary contracts are exceeded or temporary contracts are “chained”, the sanction is the conversion of the relationship into a permanent contract. Also envisaged for the Administration, in the case of irregularities, is the instrument of a non-fixed permanent contract. Now, the Administration’s capacity to terminate the relationship when the regulatory deadlines have been exceeded imposes the payment of the aforementioned compensation, but not

without limitations such as the “discount” of the compensation derived from the employment relationship, if applicable, or the sole consideration of the contract from which non-compliance stemmed without taking into account possible past relationships.

4. Act 20/2021 authorises in Article 2 an additional rate for the stabilisation of temporary employment which will include positions of a structural nature which, whether or not they are included in the lists of posts, staffing tables or other forms of organisation of human resources provided for in the different Public Administrations and budgeted, have been occupied on a temporary and uninterrupted basis for at least three years prior to 31 December 2020. Act 2/10202 states that, apart from that provided for on a transitory basis, the posts affected by the stabilisation processes envisaged in the Spanish Government Budgets for the years 2017 and 2018 must also be considered in these stabilisation processes “*provided that they had been included in the relevant public employment offers for stabilisation and, on the date of entry into force of this law, they had not been called, or having been called and resolved, they had not been filled*”. In any case, the rate of temporary coverage must be below 8% of the structural posts. And, even if the organisation of these selection processes guarantees compliance with the principles of free competition, equality, merit, ability and publicity, the selection system will be based on the formula of competitive examination. These processes may not lead to an increase in expenditure or staff numbers, and structural posts held by temporary staff must necessarily be offered.

Severance pay equivalent to twenty days of fixed salary per year of service, prorated

by months for periods of less than one year, up to a maximum of twelve monthly payments, shall be paid to cover civil servants or temporary hired staff who, while in active service as such, see their relationship with the Administration terminated due to failure to pass the selection process for stabilisation. As in previous cases, in the case of temporary hired staff, such pay shall consist of the difference between the maximum of twenty days of their fixed salary per year of service, with a maximum of twelve monthly payments, and the severance pay that they would be entitled to receive for the termination of their contract, with periods of less than one year being prorated by months. In the event that the aforementioned severance pay is recognised in legal proceedings, the amounts shall be offset. Non-participation in the selection process for stabilisation shall not give a right to severance pay.

5. Unlike Royal Decree-law 14/2021, which appears as a predecessor of this piece of legislation, Act 20/2021 states in its second additional provision not only the need for the Ministry of Finance and Public Function to draw up, within the framework of cooperation in matters of public administration, an annual monitoring report on the situation of temporariness in public employment, but also that this report must be sent to the competent committee of the lower House of Parliament. This report shall contain, at the very least, a functional breakdown at regional and local level of all situations of temporariness in public employment. The third additional provision also specifies that, with the aim of maintaining the adequate provision of public services, the Public Administrations may appoint cover staff to vacancies arising in the budget year due to retirement, as well as to posts of necessary and urgent coverage which, in accordance

with the provisions of the relevant Government Budget Act, are not included in the rate of replacement of staff.

And it adds a series of additional provisions (from the sixth to the tenth) not previously contained in Royal Decree-law 14/2021. Specifically, the aim is to regulate the exceptional call for the stabilisation of long-term temporary employment (sixth additional provision); the extension of the scope of application of these stabilisation processes to government-owned companies, public sector foundations and public sector consortia, without prejudice to the adaptation, where appropriate, to their specific regulations (seventh additional provision); the need to identify the posts to be included in the competitive examination calls in relation to vacant posts of a structural nature occupied temporarily by staff with a relationship of this nature prior to 1 January 2006 (eighth additional provision); the possible actions of the regional and local entities related to the stabilisation processes (ninth additional provision) and, finally, the application of these regulations to 'foral' institutions (tenth additional provision).

As was already the case with Royal Decree-law 14/2021, Act 20/2021 also devotes special attention to the adaptation of this legislation to the teaching staff and to the 'statutory' and equivalent staff of the health services. It is precisely for this reason that the second final provision of the aforementioned Royal Decree-law 14/2021 remains in force. This provision stipulates that, within a period of one year, the legislation governing teaching staff and statutory and equivalent staff in the health services will be adapted to the provisions of this reform - a reasonable point, given that such staff is governed by specific legislation, different

to that set out above, but with which they must comply within this period of one year. Moreover, the first transitional provision of Act 20/2021 establishes 31 December 2024 as the deadline for the resolution of temporary employment stabilisation processes already announced, while the second transitional provision expressly recognises

that all the provisions contained in Article 1 of this piece of legislation - and which modify amends 10, 11, 13 and the seventeenth additional provision of the EBEP, respectively - will only apply in relation to temporary staff appointed or hired after its entry into force, scheduled (final provision three) for the day after its publication.