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PUBLIC EMPLOYMENT AFTER THE CRISIS*

Joan Mauri Majós**

Abstract

This article looks at the measures adopted in relation to the civil service for tackling the economic crisis and offers a preliminary assessment of their effects, focusing on the following aspects: the redefinition of powers for establishing the working conditions of public employees; staff ageing and instability; the process of differentiation, segmentation and inequality affecting different types of staff and the results, or rather, lack of results in the processes to flexibilize and individualize modern systems of human resources.

Key words: crisis; public employment; law; negotiation; ageing; temporary employment; segmentation; equality; individualization; flexibility; human resources; public sector.

L'OCUPACIÓ PÚBLICA DESPRÉS DE LA CRISI

Resum

Aquest article analitza les mesures preses sobre la funció pública amb la finalitat de superar la crisi econòmica i ofereix una primera valoració sobre els seus efectes, centrats en els aspectes següents: la redefinició de poders per establir les condicions de treball dels empleats públics; l'envelliment i la precarització del personal; el procés de diferenciació, segmentació i desigualtat induït sobre els diferents tipus de personal i els resultats o, millor, la falta de resultats, en els processos de flexibilitat i individualització propis dels moderns sistemes de recursos humans.

Paraules clau: crisi; ocupació pública; llei; negociació; envelliment; temporalitat; segmentació; igualtat; individualització; flexibilitat; recursos humans; sector públic.

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** Joan Mauri Majós, lecturer in administrative law at the Universitat de Barcelona, Faculty of Law, avinguda Diagonal, 684, 08034 Barcelona. jmaurim@ub.edu.

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Contents

1 Hypothesis

Any analysis of the legal concept 'public employment' after the Great Recession must study the aims and features of the measures adopted as well as their effects and consequences, taking into account that critical situations highlight unknowns or relevant question marks over the ability of the model to address certain future challenges brought about by the same state of emergency.

Hence, we will make mention of two aspects that we consider important. Taking as a basis the principles of budgetary stability and financial sustainability, the measures adopted in the context of the state of emergency can be viewed as the result of a series of adjustment policies that will in all likelihood be reversed or one or more of which will be evaluated as reference structural situations tending to become established and alter the initial model. Obviously, the latter are far more interesting to identify and describe than the former. We also need to consider that these adjustment measures have been superimposed over management rules and practices that have not been formally altered. Thus, the maintenance of the legal framework and pre-existing cognitive operating schemas has meant that the changes introduced contingently to tackle an extraordinary situation may be considered by the diverse agents as a required break in a management practice that has tended, first, to mitigate its effects, and subsequently, to adapt and absorb the objectives sought by the processes of adjustment and reform to be implemented (Cuenca Cervera, *et al.*, 2013).

In our view, the most recent consequences of the measures adopted during the crisis should be considered based on four axes, which will form the basic elements of this argument and focus on the following aspects: the redistribution of powers and capabilities to establish the working conditions of public employees; the ageing and instability of public workforces; the process of differentiation, segmentation and inequality affecting the different *types* of staff during the crisis and the recent results of systems of individualization and flexibility in employment relationships that should have been incorporated into the management of human resources policies to maximize activity and increase the real productivity of the available volume of public employment.

2 Aims and features of the measures

Following a review of the explanatory statements of the two financial exception regulations coordinating public employment measures during the crisis, namely Royal Decree-Law 8/2010, of 20 May, adopting extraordinary measures to reduce the public deficit, and Royal Decree-Law 20/2012, of 13 July, on measures to ensure budgetary stability and foster competitiveness, one quickly comes to the conclusion that the underlying purpose of these reforms is to contain staff costs in order to reduce the public deficit. This is the main and virtually sole aim, which is compatible with a second, streamlining goal: to improve the efficiency and effectiveness of staff spending, which involves promoting increased working time directly targeting the public service and reducing absenteeism. To put it simply, the idea is to cut staff costs and maximize the available working time so that the activity can be carried out with the minimum possible volume of public employment.

This policy is to be implemented with a series of restrictions, including maintenance of the essential services to ensure public support to those hit hardest by the consequences of the crisis, minimizing the effects of wage cuts on the lower salaries of public workers and understanding that some of these measures are temporary or to be implemented only in exceptional circumstances, so their effectiveness is subject to the subsistence of the difficult economic situation, which affects financial sustainability, or to reasons in the public interest making their implementation necessary in the future.

These measures affect staff costs, working time and the systems determining working conditions. With regard to decisions affecting staff costs, a distinction must be made between those affecting the volume of public employment and those seeking to impact on real pay. On this subject, there are data to show that almost 60% of the adjustment in Spain between 2010 and 2014 was concentrated on the contraction of the real wages of public employees, while the remaining 40% focused on reducing public employment (Hernández de Cos et al., 2016). The latter decrease was obtained both by facilitating employee departures through policies

seeking to advance the real retirement age and, on a smaller scale, through the practice of dismissal for objective reasons and by limiting recruitment i.e. eliminating or reducing staff substitutions. The measures affecting working time and formal productivity are directly related to increased working time, the reduction in days' off, leave and holidays, and the monitoring of temporary incapacity in the public sector, to avoid absenteeism. The flexibility in systems for determining working conditions has also allowed changes to be made to those agreed previously with the aim of cutting costs or increasing productivity with the redrafting of a specific collective agreement or through general regulations that cancel out application of the conventional ones within a larger territorial scope, giving rise to the unilateral provision of the agreed rights.

3 Measures impacting on staff costs

As stated above, actions impacting on staff costs can be split into two large groups: staff volume and staff pay.

The reduction in staff numbers, sought through two general policies—advancing of retirement age and contraction of public competitions—and the creation of a specific instrument for workforce restructuring targeting contract staff: dismissal of contract staff working in the public sector on economic, technical or organizational grounds, to whom we will refer later.

The fixing of the real retirement age of civil servants at 65 years old, extended without question to 70 years at the request of the civil servant, is clearly brought about by Article 11 of Royal Decree-Law 20/2012, of 13 July, complemented in its sole derogating provision by the elimination of paragraph 1(d) of Article 67 of Law 7/2007, of 12 April, on the Basic Statute of Public Employees (hereinafter BSPE 2007), in relation to sections 2 and 4 of the same provision, which are also nullified, all of which referred to the voluntary and partial retirement of civil servants.

In other words, following this provision, civil servants forcibly and generally retire at the age of 65, bar a handful of exceptions considered on the basis of a prior formal application and following a decision grounded in the needs of the organization and the proper delivery of services. This possibility is laid down in a very limited sense in the Constitutional Court Interlocutory Order (in its acronym in Catalan, ITC) 85/2012, of 23 April, which states that the possibility of extending active service is considered an exceptional option and that the Authority must assess or determine such authorization on the basis of service needs and in a context of public spending streamlining and restraint. The partial retirement options also disappear for civil servants and, following the National High Court Ruling (in its acronym in Catalan, SAN) of 8 April 2013, Appeal No. 279/2012, those of contract staff working in public authorities are challenged, since the potential recruitment of substitute workers is subject to the limits and requirements of the budget laws with regard to access by new staff; this raises questions about the institutional mechanisms that have enabled the organized transfer of knowledge within our organizations from the strict point of view of the organized substitution of staff, which is a particularly delicate option when we have known since 2007 that the ageing of public workforces will be a problem on the agendas of all public authorities over the coming years (OECD, 2007).

With regard to vacancies in public employment, restrictions on new staff recruitment are implemented according to the staff substitution rate. This rate is calculated by a fixed maximum percentage applied to the difference resulting from the number of permanent employees who ceased in service in the previous budget year and the number of permanent employees who joined in the year in question. Logically, places not filled due to the legal impossibility of incorporating them in the competition would need to be amortized. In reality, there is no single workforce substitution rate, given that this can adopt sectors, areas, sections and categories as a reference, although we can generally distinguish between a substitution rate of staff in what are termed *priority* sectors and a general substitution rate for other sectors. Moreover, by adopting the technique of priority sectors, the State can control and direct the policy of new staff recruitment to areas considered deserving of special attention, clearly to the detriment of the organizational capacity of other public authorities. Therefore, the offer of public employment puts quantitative and sectoral limits on the places for new recruits that the various authorities can convene in a budget year. Constitutional Court Ruling (in its acronym in Catalan, STC) 178/2006, of 6 June, recognizes that the setting of this limitation is part of

the State powers of general economic management, in accordance with Article 149(1)(13) of the Spanish Constitution (in its acronym in Catalan, CE), and of the principle of coordination of the financial autonomy of the Autonomous Communities with the national treasury, in accordance with Article 156(1) CE; it also allows the limitation of the offer to sectors, functions and professional categories considered an absolute priority in the State budget legislation to constitute a measure directly related to the goals of economic policy without this entailing any special sacrifice of the right to self-organization of the Autonomous Communities and local entities, understanding that such measure does not presuppose a concrete and unique result for each of its public organizations.

Since budget year 2008, the staff substitution rates have contracted and adopted the technique of reference to sectoral areas considered priority that will not be abandoned until budget year 2016. It is considered that the staff substitution rate for 2009 must be less than 30%, that of 2010 to be less than 15%, that of 2011 to be less than 10%, and in budget years 2012, 2013 and 2014 no new staff will be recruited. That is to say, there will be no staff substitution rate. The rate for 2015 is 50%, and in 2016 and 2017, it is 100% for substitution in priority sectors and 50% in the remainder. In budget year 2017, the so-called *additional stabilization rates* appear, which overlap with the *priority and general rates*.

In all events, it should be clear that the above staff substitution rates apply only to the recruitment of new permanent staff. The hiring of non-permanent staff is subject to other rules and requirements. In theory, temporary staff can only be hired or interim staff appointed in exceptional cases and to cover urgent needs that cannot be postponed. From budget year 2012 and up to 2017, this requirement was rounded off cumulatively by the condition that these needs arise in sectors, functions and professional categories considered priority or those affecting the functioning of essential public services. The first of these requirements is to interpret the notion of need in the restrictive sense of being urgent and not able to be postponed. However, it is an indeterminate legal concept that the competent authority will be required to specify in terms of its minimum staff needs for the exercise of its functions in accordance with reasonable parameters of economy and efficiency. Likewise, the notion of essential public services refers to the vital or essential services for community life, directly linked to the exercise of fundamental rights, public freedoms and constitutionally protected property, which encompasses a broad horizon. Similarly, the notion of priority sectors, functions or categories is entirely vague. Therefore, it is deduced that, within the margin of exceptionality and urgency provided for by law, concepts such as those of essential public services or priority sectors can be interpreted flexibly by each authority in the exercise of the applicable margin of appreciation and on reasonable grounds (Sánchez Morón, 2012a).

Nonetheless, the fact that the recruitment of non-permanent staff is not subject to a substitution percentage rate has had a knock-on effect that cannot be ignored: the creation of new positions filled by non-permanent staff. Objectively, the budget law does not preclude the creation of new staff positions, only their coverage with new permanent staff, as laid down in the Supreme Court Ruling (in its acronym in Catalan, STS) of 11 May 2015, Appeal No. 3359/2013. It is also unquestionable that the workforce and offer of public work are individualized and differentiated instruments of staff organization, albeit closely related in the opinion of the STS of 16 November 2001, Appeal No. 7185/1997. Although there have been rulings in case law stating that creating positions to fill them with interim staff is to seek a legal loophole, as in the elaborate argument of the Judgement of Contentious Administrative Proceedings Court (in its acronym in Catalan, SJCA) No. 1, of Oviedo, of 21 December 2016, Appeal No. 288/20126, the reality is that this possibility puts pressure on staff management in public authorities with more difficulties in coordinating their political projects through the creation of new services or a change in their management model and indirectly promotes the recruitment of temporary staff, which subsequently creates a demand for stabilization.

Staff adjustment has also been sought through the introduction of the objective dismissal of contract staff working for public authorities. Law 3/2012, of 6 July, on urgent measures for labour market reform, has added a twentieth additional provision to the Workers' Statute now integrated in Royal Legislative Decree 2/2015, of 23 October, approving the revised text of the Workers' Statute Law (hereinafter, WS), governing the procedure for the dismissal on economic, technical and organizational grounds of contract staff of public sector bodies, entities and agencies. For the implementation of collective dismissal procedures, the

nineteenth final provision of Law 3/2012, of 6 July, delegated to the Government the approval of a regulation on the procedure for objective dismissal, contract suspension and working hours reduction. This resulted in the publication of Royal Decree 1483/2012, of 29 October, approving the regulation of the procedure for collective dismissal, contract suspension and working hours reduction (in its acronym in Catalan, RPAC), whose Title III lays down the specific rules of collective dismissal procedures for contract staff working for public sector bodies, entities and agencies. The problem with these rules has been the lack of practical adaptation of these mechanisms of public sector staff reduction. The new sixteenth additional provision of the WS establishes that staff dismissal procedures must be implemented as part of the preventive and corrective maintenance mechanisms regulated in the regulations governing budgetary stability and the financial sustainability of general government, so it appears that the grounds for the dismissal must be linked to the measures and mechanisms set out in this legislation. Consequently, grounds for collective dismissal in the public sector must be linked to the specific budgetary and financial situation of the institution or agency implementing the collective measure and, in particular, with the specific measures that must be taken to correct the deficit or debt targets (Sánchez Morón; Jalvo, 2013).

In particular, the requirement of linking the dismissal to the budgetary stability and financial sustainability goals and measures makes complete sense when the grounds stated are economic, considered as an unforeseen and persistent budget shortfall for financing the relevant public services; in this case, the budget shortfall is deemed persistent if it lasts for three consecutive quarters. It appears, therefore, that three conditions are required for the implementation of objective dismissal in general government: the existence of preventive or corrective measures to achieve the budgetary stability target, the accreditation of a budget shortfall and that this has the necessary features to be classed as an unforeseen situation persisting over three consecutive quarters.

Nonetheless, there is no definition of budget shortfall in a public service in any regulation. Article 35(3) of the RPAC sought to define the concept by stating that there is a budget shortfall when the following cumulative circumstances occur: 1) that in the previous year the public authority to which the department, agency, body, institution or entity is attached filed a budget deficit, and 2) that the credits of the department or the transfers, economic contributions to the agency, body, institution or entity or its credits have dropped by 5% in the current financial year or by 7% in previous years. Logically, this definition entailed a substantial increase in the guidelines on legal certainty in the handling of the economic grounds for public sector objective dismissal, but in the opinion of the STS of 19 May 2015, Appeal No. 836/2012, this conceptualization of budget shortfall represents a clear deviation from the legal criterion, consisting of substantive or material data, such as inability to finance the delegated public services, with purely formal data seeking to automate the situation of termination. The problem, therefore, is what is meant by unforeseen and persistent budget shortfall, a concept now subject to scholarly debate that will ensure judicial conflict in the adoption of these measures (Treviño Pascual, 2017). This and other reasons that we will mention later may explain why the public sector collective dismissals procedure has rarely been used as a staff adjustment instrument in practice. Indeed, the few figures available in this regard show that in the 'Public administration and defence; social security' division in 2012 there were 1,767 dismissals compared to the 175,706 terminations recorded in the various productive activities (Ruano Vila, 2015). In 2016, in that same activity, 105 'public' dismissals were recorded compared to the 24,348 terminations across the different private economic sectors (CCOO, 2017).

The upshot of these policies is that, according to the series of the Labour Force Survey, public employment reached its highest levels in history in 2011, with 3,100,00 staff. Between 2012 and 2013, cuts of around 350,000 staff were made, which crept back up between 2014 and 2015. Over the past year, the number of public employees stood at 2,840,000 workers, at a similar level to 2007 (Martínez Matute et al., 2017).

With regard to pay, interventions in the total payroll of public employees have been a classic policy of budget consolidation processes. The quantitative importance of remuneration expenditure on public employees in Spain, which accounts for almost a quarter of public spending, and its impact on the determination of private sector remuneration explains why it is a hot topic (Hernández de Cos et al., 2015). Up to 2010, the actions of the public authorities in remuneration terms had been carried out through wage restraint policies. With Royal Decree-Law 8/2010, of 24 May, a reduction was agreed in the basic and complementary remuneration

of public employees representing, in annual terms, a 5% reduction in the overall total. The remuneration of public employees was reduced effectively and sharply for the first time.

This reduction was based on a policy of inverse proportionality whereby the wages of categories with lower qualifications, i.e. less skilled occupational structures, were maintained at virtually the same level, while higher groups representing the more skilled occupational structures, saw their remuneration cut by around 7%. Moreover, the wage adjustment excluded a series of business undertakings, companies and foundations of the public sector already enjoying a positive pay differential compared to the administrative public sector (Mauri Majós, 2011). It was sought to resolve this privileged position of qualified staff of the civil service in a clearly contradictory way through the fifth additional provision of Royal Decree-Law 20/2012, of 13 July, which, for no greater reason, allows civil servants of the State Administration to request adjustment of the specific complement for compatibility with the performance of tasks in the private sector.

In all events, this cut was followed by a virtual freezing of public employee wages that was maintained until 2016 and supplemented by the elimination of an extraordinary wage payment through Royal Decree-Law 20/2012, of 14 July, which was discussed in the Supreme Court Decision of 2 April 2014, Appeal No. 63/2013 and has been recovered by parts from 2014 and 2015 (Law 36/2014, of 26 December, on the General State Budget for 2015; Royal Decree-Law 10/2015, of 11 September, granting extraordinary credits and credit supplements in the State Budget and adopting other measures in matters of public employment and economic stimulus, and Law 48/2015, of 29 October, on the General State Budget for 2016).

The uniqueness of these wage restraint measures lies in determining and expressly and specifically identifying wage items to be affected by the cut and to regulate in detail the procedure for implementing these total payroll cuts, which leaves the authorities with public employment powers without real room for manoeuvre in their compliance with the targets laid down in the basic State regulation in this regard. This was expressly set out in Opinion 11/2012 dated 22 August, of the Council for Statutory Guarantees of the Government of Catalonia in relation to Royal Decree-Law 20/2012, of 13 July, on measures to achieve budgetary stability and the promotion of competitiveness. However, it has not sparked major reactions among the judicial authorities, which subsume quantitative reductions, direct impacts of specific pay structures and intervention procedures under the same concept of the containment of staff costs in the framework of State powers on the bases and coordination of the general planning of economic activity of Article 149(1)(13) CE and on the legitimacy of the rules of complement and enforcement necessary to ensure the effectiveness of the established regulation, in accordance with the abovementioned provisions, as stated in STC 81/2015, of 30 April, and STC 18/2016, of 4 February.

Note that the Autonomous Communities have implemented their own wage cut policies. For example, the Government of Catalonia reduced the annual pay of its staff by the equivalent of one extraordinary wage payment during 2013 and 2014. From a general point of view, however, the more specific and unique interventions in the wages of public employees of the various Autonomous Communities have been structured around the following policies: 1) the impact on variable wage items related to productivity, performance, achievement of targets, extraordinary and career services, which are reduced or virtually eliminated in Andalusia, Castile-la Mancha, Catalonia, the Balearic Islands and Madrid; 2) the reduction of the working day and the wages of non-permanent staff in variable periods, which takes place in over 33% in the Community of Valencia, one third in Murcia, 20% in the Canary Islands, 15% in Catalonia and 10% in Andalusia and Madrid, and 3) the reduction or elimination of social assistance funds and measures for public employees in Murcia, Catalonia, the Balearic Islands and Madrid.

As a result of all this, the weight of employee wages as a percentage of total Government spending increased from 23.9% in 2008 to 22.9% in 2013, very close to the 1995 figure of 22.7%, which demonstrates the clear contribution of public employee wages to the fiscal consolidation resulting from the economic crisis (Hernández de Cos et al., 2015).

4 Measures impacting on working time

Royal Decree-Law 20/2011, of 30 December, established the working day of the State public sector at thirty-seven and a half hours per week of effective work averaged over the year. This measure was extended under the seventy-first additional provision of Law 2/2012, of 29 June, of the General State Budget for 2012 to all staff of the State, autonomous and local public sector, which also stated that the general working day could not be less than thirty-seven and a half hours per week of effective work averaged over the year. This was the first time that a basic State regulation had set a minimum effective annual working day for all public employees. This option was validated by the STC 99/2016, of 25 May, which considered that the imposition of a general minimum working day for all public sector staff is a legitimate exercise of State powers in accordance with Article 149(1)(18) CE—it allows basic regulation of the rights and duties of public sector staff with civil servant status—and an application of the exclusive powers in labour legislation attributed to the State under Article 149(1)(17) CE. All of this was carried out without overlooking the connection between this determination and the criterion of savings in the coverage of public sector needs, specifying that the minimum nature of the working day leaves the Autonomous Communities sufficient room for manoeuvre to extend its duration and distribute working hours.

Along these same lines, Royal Decree-Law 20/2012, of 13 July, homogenized the system of civil servant leave and holidays, limiting days' leave for personal affairs to three and eliminating additional days off and holidays granted on the basis of staff seniority. Nonetheless, Law 15/2014, of 16 September, on rationalization of the public sector and other administrative reform measures, increased the number of days for personal affairs to five; then Royal Decree-Law 10/2015, of 11 September, cited earlier, set the number of days for personal affairs to six, which were maintained following approval of Royal Legislative Decree 5/2015, of 30 October, approving the revised text of the Law of the Basic Statute of Public Employees (hereinafter, BSPE 2015).

The argument used for wage reductions was repeated here. The new legislation determines the cases in which leave may be granted and the requirements, effects and duration of this; the duration of holiday, and the number of days for personal affairs in almost exhaustive detail to ensure direct fulfilment of the measures adopted. Nonetheless, STC 156/2015, of 9 July, considers that the regulation of all situations allowing for non-attendance of work by civil servants must fall within the legal framework of rights and duties of civil servants included in the State legislation provided for in Article 149(1)(18) CE. Thus, a uniform, common system of the diverse concepts of justified temporary leave is established and while it is acknowledged that the regulation developed in basic State rules leaves little leeway for the legislative competences of the Autonomous Communities, their constitutional legitimacy is admitted on the understanding that there is still room for manoeuvre in these Communities in establishing the form and manner of use of this temporary leave.

The same legal provision introduced a reduction in credits and trade union leave at the minimums guaranteed by law, which thus became maximums for trade union action in our public authorities, although the door was left open to restructuring at the negotiation tables. This recovery will soon begin in the General State Administration through the Ruling of the Minister of Finance and Public Administration dated 12 November 2012, approving and publishing the Agreement of the General Negotiating Bureau of the General State Administration, dated 29 October 2012, on the allocation of resources and rationalizing of collective bargaining structures.

Royal Decree-Law 20/2012, of 13 July, also reformed the temporary incapacity allowances paid to public employees. Prior to the latter decree, these employees received an allowance guaranteeing 100% of their pay for the first three months of incapacity. Since the adoption of this decree, if the incapacity is caused by common contingencies, the allowance is structured as follows: 1) over the first three days, an allowance may be granted up to 50% of the wage; 2) from the fourth day to the twentieth day inclusive, the allowance payable may not exceed 75% of the wage, and 3) from the twenty-first day inclusive, an allowance equivalent to 100% of the wage may be granted. If the incapacity arises from professional contingencies, requires hospitalization or surgery, or in exceptional circumstances, or cases of maternity, paternity and pregnancy

risk or breastfeeding, the allowance can rise to 100% of the wage. This is designed to target the early days of incapacity, especially in those of short duration, which is the segment that concentrates absenteeism related to personal strategies, while longer leaves are highly likely to be related to worker health status (Martínez et al., 2014).

Beyond the calculations advanced by the State, which calculated the savings from the extended working day measures at EUR 1.3 million and the savings from other measures on working time as having a similar impact, the few contrasted studies available on this subject tell us that the increase in the number of hours worked was real, so the percentage of non-permanent workers whose working time totalled 37.5 hours increased from under 30% to almost 60% and that this decision had an important qualitative impact in mitigating the correction in the number of employees of public authorities carried out in budget years 2012 and 2013, ensuring stabilization and operation with acceptable minimum standards (Montesinos et al., 2014).

5 Measures on the determination of working conditions

Previously, the initial wording of Article 38(10) BSPE 2007 included a clause for opting out of the fulfilment of collective agreements reached to determine the working conditions of civil servants through collective bargaining procedures. Consequently, the fulfilment of agreements is guaranteed unless, in exceptional cases and on serious grounds in the public interest arising from a substantial change in economic circumstances, the governing bodies of the public authorities suspend or modify fulfilment of agreements already signed to the extent strictly necessary to safeguard the public interest.

What the anti-crisis legislation now brings—and more specifically Article 7 of Royal Decree-Law 20/2012, of 17 July—is a homogenization of this opt-out formula for contract staff working in the public sector and an interpretation of its general possibilities through the second additional provision of the same text.

Under this regulation, a new wording is given to Article 32 of the BSPE 2007 relative to the collective bargaining of public employees with an employment contract and a new paragraph is added stating: 'The fulfilment of collective agreements in relation to contract staff is guaranteed unless, in exceptional cases and on serious grounds in the public interest arising from a substantial change in economic circumstances, the governing bodies of the public authorities suspend or modify the fulfilment of collective agreements already signed to the extent strictly necessary to safeguard the public interest.'

The second additional provision of this decree-law clarifies that: 'For the purposes of Articles 32(2) and 38(10) of the Basic Statute of Public Employees, it will be considered that there are serious grounds in the public interest arising from the substantial change in economic circumstances when the public authorities must adopt measures or plans for adjustment, for the rebalancing of public accounts, or of an economic or financial nature to ensure budgetary stability or to correct the public deficit.' In its initial wording, this could restrict the scope of operations of inapplicability of collective agreements to those arising from measures to correct the public deficit, but this was strongly challenged through a questionable use of the error correction technique, so the following wording is substituted: 'it will be considered that there are serious grounds in the public interest' is replaced by the paragraph 'it will be considered that there are serious grounds in the public interest, among others,' which replaces a restrictive rule with a clearly illustrative one.

Logically, this regulatory intervention openly questions the effectiveness of the collective rules laying down the working conditions of public employees, which is unquestionable from the strict point of view of the collective bargaining right of civil servants, a statutory right in whose configuration the law can establish the legal effects of the adopted agreements. However, the possibility of the unilateral opting-out of a collective agreement regulating the working conditions of contract staff working for public authorities can overtly contradict the binding force of the collective agreement recognized under Article 37(1) CE (Rodríguez Fernández, 2016).

But there is more to it than this. The laws and decree-laws on budgetary stability during the crisis govern the working conditions of civil servants and ordinarily contain precepts that suspend and nullify any agreements

for civil servants and contract staff signed by the public authorities, their agencies and related entities or those reporting to them where these do not conform to the regulatory content of the former. This is what is termed *legal opt-out* and is considered to derive from the principle of legality and regulatory hierarchy. As clarified by ITC 33/2005, ITC 34/2005 and ITC 35/2005, of 31 January, collective regulations cannot contravene or prevent the production of effects of a law; the agreement must respect and be subject to the law and to higher ranking regulations, not the other way around.

This doctrine was reinforced during the crisis by ITC 85/2011, of 7 June, ITCs 179/2011 and 180/2011, of 13 December, ITC 184/2011, of 20 December, ITC 8/2011, of 13 January, ITC 35/2012, of 14 February, and ITC 128/2012, of 19 June, which clarified the following issues: 1) the viability of the decree-law in affecting the content of a collective agreement where it does not alter the general legal regime or the essential elements of the right to freedom of association, which includes collective bargaining with binding effects; 2) the need to distinguish between the intangibility or inalterability of the collective agreement and the binding force of the collective agreement with respect to employment contracts, and 3) the impossibility of maintaining the intangibility or inalterability of the collective regulation in the presence of a higher-ranking legal standard, even if it is a subsequent regulation.

It is another matter as to whether resorting to the constant amendment of conventional standards by imperative of budgetary legislation could affect the role of the collective regulation as the ordinary system for determining the working conditions of public employees, giving rise to significant erosion of the right to collective bargaining as a system of participation in the determination of working conditions, supported and recognized under ILO Convention No. 154, of 19 June 1981, concerning the Promotion of Collective Bargaining, and ILO Convention No. 151, of 27 June 1978, concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service.

In any event, it is necessary to differentiate between legal opt-out and administrative opt-out. Likewise, separate consideration is required, depending on the system of distribution of powers, of the inapplicability of a conventional standard resulting from State legislation and the same effect of legislation passed in an Autonomous Community.

In this regard, the Judgement of High Court of Justice (in its acronym in Catalan, STSJ) of Castile and León (Valladolid), of 15 May 2013, Appeal No. 693/2013, is correct in distinguishing between legal inapplicability, which is a direct and immediate consequence of a regulation of this rank requiring due compliance, and the inapplicability arising at the initiative and request of the public authorities themselves through the channel opened under Articles 32(2) and 38(10) BSPE 2015. Further, it would appear that legal inapplicability grants the respective authority executive capacity for its ultimate instrumentalization that derives and finds its proximate cause in the same regulation and which should be limited to specific measures for the application of legal corrections. Such capacity, according to employment doctrine, is situated between the powers of organisation, control and management of human resources corresponding to the public authorities (García Torres, 2015).

Likewise, the existence of autonomous laws that nullify the legal efficacy and validity of the conditions agreed in the collective agreements of their staff do not appear to affect the exclusive powers of the State in the regulation of labour legislation. Thus, the STSJ Madrid, of 17 April 2012, Appeal No. 332/2012, warns that not everything with an impact on the system of contract staff of public authorities fits in with the State powers on the production of labour legislation set out in Article 149(1)(17) CE, and points out that there may be provisions in autonomous legislation that address aspects determining the labour relations of contract staff working for public authorities without affecting the basic and general structure of social regulations or their nuclear categories but which are limited, in practice, to governing their particular working conditions, as stated in STSJ Castile-la Mancha, of 13 June 2012, Appeal No. 3/2012.

6 The effects of the crisis on public employment

This article will now look at how the crisis and the measures described in the previous sections have affected the public employment system. To do so, we present a series of trends arising from the policies adopted to deal with the situation, on the understanding that the crisis has often not been the cause of some of the effects that we will explain but rather it has simply contributed to triggering or revealing structural trends within the model that have been highlighted by a situation of institutional emergency. We do know, however, that in other cases, adjustment decisions seeking to contain public finances have had certain effects that will probably require new provisions to tackle problems that the crisis has indirectly brought about because of the decision to opt for a system of measures aimed directly at curbing public spending in a linear way using a system of adjustment without reform (Jiménez Asensio, 2012; Sánchez Morón, 2012b).

In any event, as we stated at the beginning of this work, our argument is structured around the following issues: the redistribution of powers and capabilities for establishing the working conditions of public employees; the ageing and instability of public workforces; the process of differentiation, segmentation and inequality affecting the different types of staff and, lastly, the treatment of the systems of individualization and flexibility in labour relations in the public sector.

7 The redistribution of powers for establishing the working conditions of public employees

The role of the State Government and emergency rule projected on to the system of regional autonomy and the system of collective autonomy has broken with the architecture of institutional balances that characterized the model of public employment emanating from the Basic Statute of Public Employees.

Adjustment measures in the form of basic State regulations have severely conditioned the powers of the Autonomous Communities in the civil service and its organizational capacity. This relativization of autonomous powers has adopted three institutional mechanisms: 1) the State has used its basic and cross-cutting standards, specifically Article 149(1)(13) CE, relating to the bases and general coordination of economic planning, and Article 149(1)(14) CE, on State general finance and debt, to support the determinations adopted with a view to cutting staff costs; 2) the State has begun to *draft as a statute* the working conditions of public employees now considered *rights* of public civil servants and *labour legislation* of workers of public authorities, which has allowed it to subsume the rules of the statutory regime of civil servants under Article 149(1)(18) CE and labour legislation and measures to increase working time under Article 149(1)(7) CE, and 3) the constitutional doctrine has accepted these connections and subsumptions as necessary measures for the implementation and effectiveness of the decisions of the State.

This has highlighted the vulnerability of autonomous powers in public employment (Corretja Torrens, 2013; Urrutia Libarona, 2014). The State measures have reduced the scope and material relevance of autonomous powers to purely instrumental matters. This stance has gone hand in hand with a constitutional doctrine that appears to identify autonomous powers with a minimum residual number of articles on the treatment of ancillary issues, often contingent and verging on irrelevant (Fuentetaja Pastor, 2017).

At this point, we should mention the centrality of the State basic regulations as a mechanism for determining the working conditions of public employees. The decrees-law and laws have unilaterally fixed the basic working conditions of these staff: pay and working hours. The law has been dressed up as an employers' decision to impose working conditions and modify agreed conditions while at the same time resizing the true scope of negotiation and converting the conventional procedure into an accessory procedure of the formation of legislative will, also promoting the homogenization and universalization of the adjustment measures in the administrative public sector and the business public sector, irrespective of the legal nature of each type of organization and its market function.

The collective negotiation of the working conditions of public employees has been replaced by due obedience to the law and to the legal power of the State. Hence, these regulatory changes have altered the system of pre-existing relations between the legal norms and conventional norms, such that the supplementary

and suppletory relations between the Basic Statute of Public Employees and collective agreements have been abolished and toned down to the benefit of the necessary legal rules that reduce the role of collective bargaining to a mere complement or application of a rule of objective law.

Nonetheless, the State Government has often not been in a position to guarantee the effectiveness of the application of the law in all public organizations across the territory. Moreover, the intervention of the law has not modified the collective bargaining system for determining the working conditions of public employees. There are no structural reforms here like the ones taking place in the private sector on the structure and scope of negotiation that impose preferential application of the collective agreement, the legal effectiveness of the collective regulation or the effectiveness of the collective agreement (Valdés Dal-Ré, 2013; Del Rey Guanter, 2013). Beyond the influence of the basic State law, the system maintains the same structural basis, which is simply put on hold or not applied, in hopes of economic recovery. Simply put, the law has sought to contain the results of collective bargaining, considering it as an 'unstoppable engine of public spending,' but has not attempted its conversion to a useful mechanism for meeting the objectives of rationality and efficiency in the management of human resources in public authorities (Alaimo, 2010).

This overlooks the fact that laws cannot impose changes on the conceptual structures with which we understand and manage a given system of employment relations so, after the crisis, following a phase of legislative prescriptions imposing adjustment and good governance, we will return to the same reality and a system of employment relations characterized by conflict, the pursuit of group interests and little respect for rules enacted to the benefit of the public interest will remain in force (Zoppoli, 2013).

In the private system, collective bargaining must now serve to adapt working conditions to specific business circumstances; in the public system, collective bargaining—in the post-crisis recovery phase—may recover its incrementalist position in relation to the treatment of the working conditions of public employees. As a result, the differences between the two systems for determining working conditions may reappear and become consolidated (Malaret, 2016).

8 The ageing and instability of public workforces

The substitution of staff of Spanish public authorities has remained at virtually the same levels in 2010, 2011, 2012, 2013 and 2014. In other words, almost five generations of public employees have been skipped. This policy has led to the rapid ageing of some workforces, which have naturally started to curve. The data on this topic are very illustrative. The employment plan for public authorities of the Basque Country, approved by the Basque Government on 1 December 2015, warns that the occupants of Prefecture and technical positions are approaching the age of 55 en masse and that their average retirement year will be 2027. It further states that, between 2020 and 2030, 68.13% of the occupants of these Prefecture positions will disappear and this figure rises to 78.09% for the same calculation between 2015 and 2030. Studies in Catalonia show that the public authorities have more staff aged 60 and above than staff under the age of 30, and indicate that the number of staff aged 60 and over during the crisis has increased progressively by 30%, while the number of staff under the age of 30 has fallen by 64.6%. This means that the public authorities of Catalonia suffer from a regressive age pyramid, a loss of young talent and a gap of three to four generations (Longo; Albareda; YSA; Férez; Salvador, 2017).

Nonetheless, in an ageing organization, age has not been a political concern. Age policies do not figure on the public agenda when we know that keeping older people in work is a social need and we know the potential structural consequences of having staff and technicians of an advanced age in our public authorities and their impact on informal competencies in these organizations, which are those that allow them to update and apply a corpus of knowledge tending to maximize efficiency (Dalkir, 2010).

Such policies should presuppose the existence of specific actions to support the useful life of older workers through training and the implementation of professional transition units, be used to organize the transfer of knowledge and skills and contribute to an express assessment of the contribution of senior workers, focusing

on health maintenance and improved working conditions, and promote the extension of their active lives and gradual retirement from jobs (Brindeau, 2012).

The best that can be said of our public authorities is that they have not laid the foundations—or, with the exception of the Basque Government, even begun to think about—age policy. In addition, the adjustment measures that have contributed to the rapid departure of staff and done away with the possibility of extending the retirement age and partial retirement age have been exposed as hasty, contraindicated policies in need of urgent review.

Temporary employment is a structural factor of our public employment system, mainly of contract staff working for the public authorities. The crisis has served to extend this temporality to civil servants and deepen it in certain sectoral areas, such as health and social services. Specifically, the highest peak in the rate of temporary employment in the public sector occurred in 2006, with 26.2% of all employees, and totalled 23% for all public authorities in 2016. In comparison with 2006, the percentage of open-ended contracts has increased by more than three percentage points, the same amount as the reduction in the temporary employment rate. This change in the composition of permanent and temporary employees reflects the fact that the net expansion of public employment between 2007 and 2011 was concentrated in open-ended contracts, compared to a more moderate increase in temporary staff. In the later adjustment phase, between 2011 and 2013, the number of temporary workers fell by 28%, while permanent staff fell by around 6%. Overall, between 2007 and 2016, permanent staff working for the public authorities increased by 6.3% (130,000 people), while temporary staff fell by 13.2% (99,000 people). However, this phenomenon is witnessing a reversal during the recovery phase. Between 2013 and 2016, open-ended employment has declined while temporary employment is on the rise: since 2013, there have been 100,000 more temporary jobs and 36,000 less open-ended contracts. The recovery of public staff is actually concentrated on temporary workers (+17%) compared to a slight reduction in permanent workers (–1%). In other words, temporary employment in the public sector is experiencing a resurgence with the same form and intensity as before the crisis (Martínez Matute et al., 2017).

Therefore, the crisis has not increased temporality in public employment. Non-permanent workers are the ones who have paid the price of the crisis in the public sector. The adjustment of workforces in many public authorities has been done in the easiest possible way: By reducing the volume of non-permanent employment relationships. The emergence of a new set of realities from the crisis is another matter. For example, temporary employment has spread from contract public employment to public employment under administrative law. According to specific data on the Catalan public authorities, the rate of staff temporality is calculated among contract staff at around 25.7% and among civil servants at around 20.3%, when the latter traditionally stood at 9.5% (Mauri Majós, 2017a). Moreover, the rate of temporary employment in the sector of public authorities, which was historically less than traditionally observed in enterprise, has skyrocketed in health and social services: while it stood at 25% in 2016 in the private part of the system, it was 33% in the public part (Martínez Matute et al., 2017).

However, we must be careful not to confuse temporality with instability. Temporality may be perfectly justified by objective reasons. This can occur in specific circumstances related to the substitution of permanent civil servants, or to the particular flexibility needs required for sufficient coverage of services in the public interest based on the demand of the population and their territorial distribution. What we term instability is another matter and must be closely connected to the successive use of employment relationships of fixed duration to cover structural positions, a use that puts workers in a situation where they agree to new contracts with different working modalities and conditions likely to worsen job quality and the same working conditions in a process of flexibility that has been referred to as ‘coming and going’ (Álvarez Gimeno, 2017).

This could be the main problem with the composition of Spanish public employment. The use of fixed-term employment relationships to fill stable and permanent positions that cannot be covered due to the limitations set out in budget laws for the allocation of positions for new recruits, which culminates in a lack of systematic calls to cover workforce vacancies and in the recruitment of temporary staff or the appointment of interim civil servants as a formula to meet pressing needs in positions that should essentially be seen as structural.

The reaction here is from the European authorities. The letter of formal notice of the European Commission dated 26 March 2015 regarding Spain's application of Directive 1999/70/EC concerning the fixed-term work of civil servants in the public sector and CJEU judgements of 14 September 2016, cases C-596/14, C-184/15, C-197/15 and C-16/15, on fixed-term employment relationships in Spanish public authorities, have rocked the legal world. These European rulings point clearly to a discrimination of interim staff in the public sector in working conditions, a lack of mechanisms in the legal system of public employment to address the abusive use of fixed-term employment relationships and the absence of institutions requiring the competent authorities to create structural positions culminating in the recruitment or appointment of temporary staff to fill these stable and permanent positions.

The reaction to this situation from the judicial bodies responsible for the correct interpretation and application of the legal system has been tardy and timid; that of the State Government has been purely positional, shying away from coming up with a global solution to the problem of the reform of the legal regulation of temporary employment in the public sector. The judicial bodies responsible for legal application have offered different interpretations of the ultimate consequences of the rulings handed down by the jurisdictional authorities in Europe and sparked a heated debate on severance pay following termination in public employment and the possible conversion of long-term interim civil servants to permanent staff subject to the rules of administrative law. This debate has given rise to a situation whose main traits are chaos and lack of predictability in such matters (Molina Navarrete, 2017).

For the present, the ITS of 25 October 2017, Appeal No. 3970/2016, appears to advocate a response of the CJEU that would close the issue of severance pay following the termination of interim staff based on comparison with staff whose project or service contract is terminated, or of temporary staff, i.e. twelve days' salary per year of employment, in contrast to the twenty days of salary per year of employment that is paid to permanent workers (Rojo, 2017). Likewise, the possible recognition of a concept of permanent civil servant similar to interim staff whose purpose would be to fill the relevant position, advocated in some judicial review rulings as a sanction for the abusive use of successive fixed-term relationships in public authorities (Beltrán de Heredia, 2017), must be contrasted with the STS of 13 March 2017, Appeal No. 896/2014, and its natural consequence, the SAN of 6 April 2017, Appeal No. 7/2017, which expressly notes that it is not within judicial powers to innovate in legislative matters nor is the latter a consequence arising directly from the application of Community directives. They also note that certain creations of social judges arising from the ultimate interpretation of the employment contract cannot be applied literally to the statutory situation of the civil service and they reject the intent of the parties to implement through the judicial authority a given regulation of a permanent public employee that transcends the review function of the administrative jurisdiction.

The State Government has sought to react to the interpellation made by the European decisions through its agreement signed on 29 March 2017 between the Minister for Finance and Public Administration and the representatives of the CCOO, UGT and CSIF trade unions called 'for the improvement of the public employment,' which had clear repercussions on Law 3/2017, of 27 June, on the General State Budgets for 2017. The latter is a purely defensive measure whose main goal is to silence the conflict in the trade unions in relation to the sizing of staff and the treatment of temporary employment in the public sector. Its goal, therefore, is not to organize non-permanent employment relationships in public authorities, but to reduce temporary employment within the previously established limits and rules of spending. Thus, the objectives of the agreement are consistent: 1) make decisions on substitution rates and reinforce staff numbers across public authorities overall, and 2) over the next three years, reduce temporarily filled positions and current numbers of temporary staff, up to a maximum of 90%. To this end, the agreement provides for the possible implementation of additional substitution rates to stabilize and consolidate temporary staff through recruitment procedures ensuring the principle of equality and merit, which may be negotiated in the respective areas, and which will assess seniority in the competitive stage. It also allows for the announcement of positions held by staff classed as non-permanent and open-ended, which, to all intents and purposes will not be considered in the general staff substitution rate.

Some of these prescriptions were incorporated into this year's budget law, which envisages two additional rates: one for the stabilization of temporary employment in certain priority sectors, which may incorporate positions deemed structural with budget allocations and which have been filled temporarily and consecutively over the three years prior to 31 December 2016, and a second for the consolidation of the coverage of positions held temporarily or temporarily prior to 1 January 2005, under the terms of the fourth transitional provision of the BSPE 2015. This same law incorporates the commitment to exclude from the calculation of the general substitution rate the positions of staff classed as non-permanent and open-ended by a court ruling. The coordination of the stabilization recruitment procedures arising from these additional rates must uphold the principle of equality and merit and may be subject to negotiation in each of the territorial areas of the General State Administration, Autonomous Communities and local entities, which will no doubt be subject to the ultimate conditions laid down in the State agreement with regard to the method of selection and system of merit evaluation.

The measure, which seeks to correct the use of staff cuts with undue planning and a systemic order covering the process of staff reduction, has clear shortcomings (Palomar Olmeda, 2017). In principle, it is a partial measure that may have repercussions on certain sectors considered as priority by the State, but its impact on certain territorial authorities, such as the local ones, is only relative. Viewed on its own terms, it is also a limited stabilization measure projected on temporary staff who have held their jobs temporarily and continuously over the three years prior to 31 December 2016. These years marked the start of economic recovery, meaning that this measure is not designed for the recovery of staff lost during the darkest periods of the crisis, i.e. 2011, 2012 and 2013. Furthermore, the condition of continued relationship means that the most unstable staff—those subject to high rotation—will be unable to consolidate their positions due to the excessive use of this type of flexibility in certain areas of public authorities, such as education, health and social services.

The consolidation of these staff will really depend on whether their position is considered structural and permanent, which will drive any policy for reconsideration of the objective needs of Government in terms of the stabilization of the current occupants; therefore, it will be in addition to the powers needed to tackle the new professional sectors that the public authorities will need to carry out promotion in areas such as information technologies and eGovernment, so there is a clear risk of stabilizing interim or temporary staff for the performance of certain duties that could be obsolete within a few years and become superfluous (Jiménez Asensio, 2017).

Aside from this issue, the crisis situation has triggered the mobilization of certain endemisms typical of institutionally learned departures in the public employment system (Cuenca Cervera, 2017). Crises are contained by unplanned adjustments that seek immediate quantitative results regardless of the feasibility of the services, yielding a difficult continuity and converting permanent staff into unstable forms of work, to be stabilized once the urgency has passed. This gives rise to extraordinary vacancies for public work and competitions for stabilizing or consolidating structural positions of the civil service.

The first sacrifice of these policies is the fundamental right of citizens to access public employment under conditions of equality and merit, a right that is disregarded in the unacceptable extension of exceptional interim situations that morph into situations of long-term temporality, or the law being ignored by the use of recruitment tests that, while formally open to all applicants, in practice favour access by the current occupants by reducing tests on knowledge to an absolute minimum and overvaluing the merits of experience in the position advertised, which is held by temporary staff who must be stabilized. The result is that unplanned adjustment leads to instability and requires subsequent stabilization, the upshot of which is damaging to the principle of equality and merit.

9 Differentiation, segmentation and inequality

The crisis accentuates the multiplication of differentiations and exceptions in the legal regimes of the traditional dualism of our public employment system based on the distinction between civil service and contract staff. It also segments the types and concepts specific to public employment legislation, giving rise to the birth of a series of case-law creations seeking to solve compatibility problems between the different legal regimes brought about by transformation and change in the *business* concepts that spring up as managers of public services. The crisis has also given rise to a series of discriminatory processes in the treatment of working conditions that coincide in time with a European doctrine that prioritises the equal rights of non-permanent and permanent staff in situations where provisional or temporary relationships become long-term relationships.

First of all, the crisis has fostered the notion that contract staff working in public authorities are *separate* to common staff based on a special law of public character that tends towards unilateralism and inequality. The legal regime of the public worker is gradually distinguished from the legal regime of the common worker in a clear line of reduced rights (Marín Alonso, 2013). The crisis postpones the role of conventional norms in the public sector, questions the legal effectiveness of collective agreements and allows the unilateral modification of agreed working conditions. Further, the mechanisms of contract suspension and reduction in the working day laid down in Article 47 WS, which constitute a non-traumatic mechanism of flexibility in the adjustment of employment needs, exclude the contract staff of authorities and public-law bodies not engaged in the market. In the event of restructuring, this puts them in a situation of forced contract termination by means of a negotiation procedure in which judicial doctrine has allowed the use of budget restrictions, in the application of measures to reduce or mitigate the consequences of dismissals, as justification for refusing enhanced legal indemnity or the introduction of compensatory measures, improvements and compensation that would be contrary to the policies to curb public spending, in the opinion of the STS dated 18 February 2014, Appeal No. 59/2013. Along these same lines, the doctrine appears to authorize the late contribution of relocation plans typical of restructuring processes which, in addition, are drafted internally and difficult to control, and which should logically serve to mitigate the social consequences of mass redundancies, as evidenced in the STSJ Navarre of 24 March 2014, Appeal No. 220/2013.

In other topics, the dualization of staff of the public authorities between an employment relationship and an administrative one has waned during the crisis. The Basic Statute of Public Employees appeared to have finally pinpointed the scope of the relationships of employment and civil service within the structure of positions in administrative organizations based on the reservation for civil servants of the exercise of the functions involving direct or indirect participation in the exercise of public powers or the safeguarding of the general interests of the State and the public authorities. This reservation could be understood in the opposite sense: if these were the reserved functions, the remainder could be carried out by contract staff, disregarding the doctrine of STC 99/1987, of 11 June, on the existence in the Spanish Constitution of a generic option favouring a statutory regime for public servants.

Logically, if the organizational criterion for classification of civil servant positions were the exercise of public powers, the other positions prioritizing the choice of a legal system to increase efficiency in the delivery of public service could be carried out by contract staff, so contract staff positions should not be an organizational or regulatory exception (Gorriti Bontigui, 2016).

Inexplicably, however, the legislation enacted in 2013 on rationalization and sustainability of local government reinstates the general nature of the performance of jobs for civil servants. Moreover, as stated in the report of the Commission for the Reform of the Public Authorities (CORA report, 2012), one of the keys to the strategy for innovation and efficiency in the public authorities turns out to be the best configuration of public employment through determination of the legal status of the staff who must participate in the delivery of the public services, an attempt at which appears to have been made by recovering the general rule of preference for the civil servant relationship.

In all events, we are now seeing the coexistence of a variety of organizational models and a diversity of legal systems that distort the identification of an integrating and homogeneous model of public employment to facilitate the joint management of staff in a scenario of minimally ordered dualization.

This dual model is accompanied by the progressive erosion and disaggregation of different types of staff. The employment models of public authorities have a particular inherent trait in times of tension. The principle of stability and the principle of merit in access to public employment should uphold a particular balance, which is tested at the point at which they coincide. Administrative irregularity in the treatment of temporary employment relationships, which should lead to conversion of the non-permanent employment contract to a permanent one, nuanced by the principle of equality and merit, is converted into a non-permanent, open-ended relationship (Arrufe Varela, 2015; Rodríguez Alcázar, 2015). The staff of the private operators that indirectly manage public services become subrogated staff who are not public employees when the authority recovers their direct delivery (Mauri Majós, 2017b; Castillo Blanco, 2017). Interim staff, who retain their jobs over a series of budget years in which there are no public competitions for filling the vacancies, are defined as long-term interim staff, as stated in the STS of 30 June 2014, Appeal No. 1846/2013. In other words, a transitory and provisional relationship implemented for reasons of urgency and need is finally given the consideration of a long-term relationship.

In all these cases, the affirmations are accompanied by negations, so determining the legal regime of each legal concept becomes a process of legal engineering. The legal types of staff are segmented and diversified over the periods in which the public workforces explore the boundaries of dualization and the instability of public sector staff in their quest for a virtually impossible balance.

In this operation of differentiation and instability, the principle of equality acts as a compensatory element. The problem of segmentation and instability, which is not the effect of an era but rather the sum of several periods, coincides in time and in the constitutional and European framework with a doctrine of equating the rights of non-permanent and permanent workers in cases with a degree of consolidation of the public employment relationship (Palomar Olmeda, 2017). The principle of non-discrimination in the working conditions of workers with a fixed-term relationship and comparable permanent workers, formulated in Article 4 of Council Directive 1999/70/EC of 28 June, which seeks to apply the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, is wholly applicable to contract staff and civil servants of public authorities (Aldomà Buixadé, 2015). This principle of Community social policy, which could be an application of the principle of equality laid down in Article 20 of the Charter of Fundamental Rights of the European Union, has had a particular projection on the working conditions of temporary workers and interim civil servants of public authorities in the recognition of seniority and three-year periods of interim civil servants and of the same temporary staff of public authorities in the CJEU judgement of 13 September 2007, C-307/05, and in the CJEU judgement of 9 July, C-177/14, in the assertion of the right to a horizontal career and to the relevant career incentives and complements of interim civil servants in the CJEU order of 9 February 2012, C-556/11 and in the CJEU order of 21 September 2016, C-631/15, and in the recognition of previous services provided as interim staff for the calculation of time for exercise of the right to internal promotion stated in the CJEU judgement of 8 September 2011, C-177/10 (Cantero Martínez, 2017). Likewise, STC 232/2015, of 5 November, asserts the right of interim civil servants to receive the specific allowances associated with seniority and the so-called 'six-year period' training in the public education system, a decision afforded continuity by STC 71/2016, of 14 April, which overrides the legal precepts of one autonomous community that had introduced reduced working hours and pay as a means of tackling the crisis solely for interim civil servants and for the temporary and permanent contract staff of its public authorities. In the specific chapter that could be devoted to non-permanent staff with open-ended contracts, mention must be made of the STS of 28 March 2017, Appeal No. 1644/2015, which has normalized this concept as a type midway between a temporary and permanent employment relationship in which certain rights of permanent workers can be recognized, such as severance pay for objective dismissal—regular coverage of the position—or the right to internal mobility as stated in the STS of 21 July 2016, Appeal No. 134/2015.

Therefore, processes of segmentation and instability not only lead to the disaggregation of the legal types of staff, they also differentiate between their regimes and attract variable elements of permanent and non-permanent relationships in the configuration of a strange hybridization whose only basis is that of equating working conditions that crisis periods attempt to distinguish through the instrumentalization of legal staff structures. This division occurs between civil servants and contract staff, but also between the different types of civil servant and their possible spaces of career and mobility, and among the different types of employment relationships deemed fixed-term, open-ended or temporary. The diversification of public servants based on their legal relationship, permanence and origin is the order of the day in an ebb-and-flow type movement brought about by the judicial doctrine, impossible to grasp by an inattentive legislator.

10 Individualization and flexibility in public employment

The two main goals of the reform of the regulatory framework of private sector employment relationships have been: one, the adjustment of labour costs, and the other, which was repeatedly expressed, to make employment relationships more flexible and adaptable for employers to avoid the destruction of employment where possible (Duran López, 2015). The instruments of internal flexibility used for this purpose have been the classification of staff into broad occupational groups, the expansion of the possibilities of geographical and functional mobility, the irregular distribution of the working day and, ultimately, substantial modifications to working conditions, including the inapplicability of signed collective agreements (Álvarez Gimeno, 2017). In addition, one of the essential arguments of flexibility policies has been precisely that of the individualization of employment relationships. In most cases, this policy is rooted in the introduction of methods of individual assessment, almost always associated with wage and professional promotion policies (Banyus Llopis; Recio Andreu, 2015).

By contrast, the adjustment project in the public sector has focused solely and exclusively on the reduction of staff costs. Above and beyond the possible inapplicability of collective agreements, the crisis has not come up with a specific flexibility proposal for the public employment system. Intentions to promote the efficient allocation of human resources, coordinate mechanisms of internal and interadministrative mobility to improve the rational use of staff available to the public authorities and generally to implement mechanisms to assess development have not been materialized in specific regulations or in their practical application beyond their mention by the State Administration in Article 15 of Royal Decree-Law 20/2012, of 13 July.

Measures such as organizational flexibility, the streamlining and compacting of professional structures, functional equivalence, internal mobility and the adjustment of working hours are now real needs in public and private organizations. This begs the question as to whether the current Basic Statute of Public Employees contains these measures or allows their implementation and, consequently, if it is a valid instrument for the introduction of the internal flexibility measures acknowledged as essential in modern systems of human resources (Palomar Olmeda, 2012).

Similarly, wage reduction and restraint measures have thwarted any possibility of implementing a process of professionalization and individualization of service relationships specific to public employment. A review of the crisis legislation of the Autonomous Communities shows how the laws on financial sustainability of the various Autonomous Communities have impacted on this possibility. For example, Article 12 of Decree-Law 1/2012 on fiscal, administrative and employment measures and on public finance for the economic rebalancing of the Junta of Andalusia, reduces the amounts allocated to the distribution of variable wage items for reaching targets, performance incentives, productivity bonuses, on-call work allowances and professional career allowances. Articles 34 and 36 of Law 10/2013, of 20 December, of the Junta of Communities of Castile-la Mancha on the 2014 general budget, nullify the budget allocation for target incentives and the recognition of new career levels and payments. Similarly, Article 24 of Decree-Law 10/2012, of 31 August, amending Decree-Law 5/2012, of 1 June 2012, on urgent administrative and staff measures to reduce the public deficit of the public sector of the Autonomous Community of the Balearic Islands and other autonomous institutions temporarily reduces the amount of wage items relating to administrative career.

Clearly, the first victim of the crisis is individual differentiation based on initiative and effort, performance, achieving of results and delivery of a quality service. The traditional *fixism* and *egalitarianism* typical of the statutory system emerge fully unscathed from the crisis period, while policies based on professional conduct and personal development find themselves in a difficult position, ultimately sending a clear signal of the lack of appreciation and recognition of talent and readiness to assume responsibility in public organisations.

Simply put, the most innovative policies introduced in the new Basic Statute of Public Employees in 2007 have been the biggest losers in the crisis. Staff career, the assessment of development and professional public management are forgotten or relegated to the back-burner based on budget adjustment needs, to the point that the reformist spirit of the Statute is openly challenged and none of the proposals that could have improved the system of human resources in public authorities is implemented, a system that must now wait for a new opportunity for reform (Ramió, 2017).

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