

Anonymised version

Translation

C-265/20 — 1

Case C-265/20

Request for a preliminary ruling

Date lodged:

15 June 2020

Referring court:

Hof van beroep Antwerpen (Belgium)

Date of the decision to refer:

24 March 2020

Appellant:

FN

Respondents:

Universiteit Antwerpen

Vlaamse Autonome Hogeschool Hogere Zeevaartschool

PB

ZK

NG

ZN

UM

Hof van beroep (Court of Appeal)

Antwerpen (Antwerp)

Judgment

B7M kamer (B7M Chamber)

burgerlijke zaken (Civil matters)

[...]

[Or. 2]

FN, lawyer,

residing in 2000 Antwerp, [...]

- appellant,
- appearing in person at the hearing of 25 February 2020 and assisted by [...] [, lawyers];

against the judgment of kamer (Chamber) AB8 of the Rechtbank van eerste aanleg Antwerpen (Court of First Instance, Antwerp), afdeling Antwerpen (Antwerp Division) of 24 January 2018 [...]

v:

1. DE UNIVERSITEIT ANTWERPEN (THE UNIVERSITY OF ANTWERP),

having its registered office in 2000 Antwerp, [...]

[...]

2. DE VLAAMSE AUTONOME HOGESCHOOL HOGERE ZEEVAARTSCHOOL (THE FLEMISH AUTONOMOUS COLLEGE ANTWERP MARITIME ACADEMY),

having its registered office in 2030 Antwerp, [...]

[...]

3. PB, [...]

residing in 2060 Antwerp [...]

4. ZK, [...]

residing in 2018 Antwerp, [...]

5. NG, [...]

residing in 2040 Antwerp, [...] **[Or. 3]**

6. ZN, [...]

residing in 3150 Haacht, [...]

7. UM, [...]

residing in 2570 Duffel, [...]

- respondents,
- all represented by [...] [, lawyers];

* * *

1. Facts

The facts were set out in detail in the contested judgment so that the Hof van beroep will refer to the latter.

In summary, the dispute concerns the claim by FN (the appellant) for damages due to the alleged wrongful termination of his appointments as a professor at the Universiteit Antwerpen (first respondent, 'UA'). FN argues that a covert sanction has been applied because of his protests regarding the phasing out of his subject area, maritime and transport law, and his protests regarding his status. He argues that his status was phony ('nepstatuut') which, inter alia, is contrary to EU law.

Over a period of twenty years, FN developed an academic career by virtue of some twenty consecutive temporary and part-time appointments. He was employed in the Faculty 'Rechten en Toegepaste Economische Wetenschappen' ('Law and Applied Economic Sciences', 'TEW'). He argues that, by contrast, other colleagues with similar duties were appointed on a permanent and full-time statutory basis. [Or. 4]

FN's university career is as follows:

Institution	Start date	Function	Appointment percentage
UFSIA	1.1.1990	Research Assistant	50
UFSIA	1.1.1992	Research Assistant	50
UFSIA	1.2.1994	Research Assistant	50
UFSIA	1.2.1995	Postdoc	50
UIA	1.1.1995	Lecturer	10
UFSIA	1.2.1997	Postdoc	30
UIA	1.10.1997	Lecturer	10
UIA	1.2.1998	Researcher	10

UFSIA	15.03.1998	Researcher	50
UFSIA	1.4.1998	Lecturer	10
UIA	1.10.1998	Lecturer	10
UIA	22.2.1999	Researcher	75
UFSIA	1.10.2001	Lecturer	10
UFSIA	1.10.2003	Senior Lecturer	20
UFSIA	1.10.2004	Senior Lecturer	40
UFSIA	1.10.2004	Senior Lecturer	30
UA — TEW	1.10.2007	Senior Lecturer	50
UA — Rechten	1.10.2007	Senior Lecturer	10
UA — TEW	1.10.2008	Professor	50
UA — Rechten	1.10.2008	Professor	10

When his appointment came to be renewed in 2009, an appointment at 15% was proposed for TEW and at 5% for law, whereas previously those appointment percentages were 50% and 10% respectively, with a proposed decrease in the number of teaching hours from 165 hours to 135 hours.

FN bases his claim on Articles 1382 et seq. of the Burgerlijk Wetboek (buitencontractuele aansprakelijkheid) (Civil Code (noncontractual liability)). Alternatively, he alleges unlawful dismissal.

It is alleged that the Hogere Zeevaartschool (second respondent) colluded in UA's misconduct. NG (fifth respondent) was the Director of the Hogere Zeevaartschool.

PB (third respondent) was the Rector. ZK (fourth respondent) was Vice-Rector. ZN and UM (sixth and seventh respondents) were Deans. [Or. 5]

2. The contested judgment

In the contested judgment, FN's claim against the UA and the Hogere Zeevaartschool was declared admissible but unfounded. The claim against the other respondents was declared inadmissible. FN was ordered to pay the legal costs.

3. Claims on appeal

In summary, FN lodged an appeal with a view to having the contested judgment set aside, and to obtain a ruling from the court, considering the case anew, declaring the original claim admissible and well-founded and ordering the respondents, jointly and severally, to pay provisional damages of EUR 1, and appointing a panel of three legal experts to assess the material and non-material damage suffered and ordering the respondents to pay the legal costs.

If the claim is not declared directly well-founded, FN asks that, before judgment is given, the following questions be referred to the Court of Justice for a preliminary ruling:

‘Do Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and [CEEP], Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-term work concluded by UNICE, [CEEP] and the ETUC, and the general prohibition of discrimination under European Union law, preclude the interpretation and application by a university governed by public law of national legislation under which independent academic staff with full-time positions are appointed on a permanent basis, and staff with part-time positions may either be “appointed”, or be “employed on a temporary basis for renewable periods of a maximum of six years”:

1. pursuant to which a professor charged with ongoing teaching assignments, research, chairing a scientific institute and social services, is employed over a period of twenty years on the basis of twenty consecutive, short-term and part-time employment contracts and statutory appointments of between one and three years, using the justification of “freedom of policy”, while all his colleagues with similar duties were appointed on a permanent and full-time basis?

2. pursuant to which that university stipulates in its staff regulations only a general minimum limit of an appointment percentage at 50 percent in order to be eligible for a permanent appointment, but does not lay down a single criterion on the basis of which the part-time staff appointed at 50 percent or greater can be appointed on a permanent or temporary basis? [Or. 6]

3. pursuant to which that university employs a part-time professor charged with academic assignments belonging to the ongoing, structural activities of the university, on a temporary basis, not for consecutive periods totalling six years, but, throughout their entire career, for consecutive short periods of a maximum of six years each, more specifically, periods of one or three years?

4. pursuant to which that university awards appointment percentages to a part-time professor, using the justification of unlimited ‘freedom of policy’, without laying down objective criteria, and without applying any objective workload measurement?

5. pursuant to which that university denies a temporary and part-time professor who has been treated in a manifestly arbitrary and discriminatory manner for twenty years, when, using the justification of the university’s “freedom of policy”, his employment is suddenly not renewed, the right to invoke the abusive nature of the employment conditions unilaterally imposed on him in the past, because he had, so to speak, always “accepted” those conditions by carrying out the allocated work, with the result that he forfeits the protection afforded by European Union law?’

[...] [claim regarding legal costs]

The first, third, fourth, sixth and seventh respondents submit that FN's claim is unfounded and ask that FN be ordered to pay the legal costs.

The second and fifth respondents submit that the appeal is unfounded and ask that FN be ordered to pay the legal costs. They each lodge an individual counterclaim, claiming damages of EUR 2 000 per party on the ground of a vexatious and reckless appeal.

4. Assessment

4.1. Admissibility

[...]The appeal is [...] admissible. [Or. 7]

4.2. Exclusion [of a conclusion and of procedural documents from the deliberations]

[...] [T]here are no reasons to exclude those documents [and the conclusion] from the deliberations. [Or. 8]

4.[3]. The merits

It is common ground between the parties that FN's appointments are statutory.

Inter alia, FN alleges discrimination and infringement of EU law. He refers to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, to Council Directive 97/81/EC of 15 [December] 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, to the prohibition of discrimination, and to Article 91 of the Universiteitendecreet (Decree concerning universities) of 12 June 1991.

Clause 4.1 of the framework agreement on fixed-term work concluded on 18 March 1999, and set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, provides as follows:

'1. In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.'

It is common ground that FN can invoke clause 4 of that framework agreement [...] in respect of the first, third, fourth, sixth and seventh respondents [...].

Clause 4.1 of the Framework Agreement on part-time work set out in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC provides as follows:

‘1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.’ [Or. 9]

Moreover, it is also common ground between the parties that the (old) Article 91 of the Decreet van 12 juni 1991 betreffende de universiteiten in de Vlaamse Gemeenschap (Decree of 12 June 1991 concerning universities in the Flemish Community; ‘Universiteitendecreet’) is applicable to the present dispute. The (old) article 91 of the Universiteitendecreet provided as follows:

‘A member of the independent academic staff with a full-time position shall be appointed. A member of the independent academic staff with a part-time position may either be appointed or temporarily employed for renewable periods of a maximum of six years’

Article 7 of the Statuut zelfstandig academisch personeel (Independent Academic Staff Regulations; ‘ZAP-statuut’) provides that a permanent appointment is possible in the case of employment at 50% or greater. No further criteria were laid down.

There was a certain period during which FN was employed at 50% but he was never appointed permanently.

FN argues that the way in which the UA applies the (old) Article 91 of the Universiteitendecreet is incompatible with the aforementioned European rules. The question is therefore whether Article 91 of the Universiteitendecreet is consistent with the aforementioned directives and framework agreements.

The resolution of the present dispute therefore requires the prior interpretation of Community provisions, namely, with regard to their compatibility with Article 91 of the Universiteitendecreet, so that it would seem appropriate here, since the Court of Justice of the European Union has not yet ruled on the possible interpretations to be given to Clause 4.1 of the framework agreements contained in Directive 1999/70/EC and Directive 97/81/EC which is at issue here, in conjunction with Article 91 of the Universiteitendecreet and the specific facts characterising the present dispute, to refer a question to the Court of Justice of the European Union for a preliminary ruling.

However, the Hof van beroep considers it appropriate to reformulate the question proposed by FN as set out in the operative part of this judgment.

[...] [instruction to a number of parties to lodge certain documents] **[Or. 10]**

5. Decision

[...]

Before giving judgment, refers the following question to the Court of Justice of the European Union for a preliminary ruling in accordance with Article 234 of the EC Treaty:

‘Must Clause 4.1 of the framework agreement on fixed-term work concluded on 18 March 1999, as set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, and Clause 4.1 of the Framework Agreement on part-time work set out in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, be interpreted as precluding a university, on the basis of national legislation (Article 91 of the Decree concerning universities) under which independent academic staff with full-time positions are appointed on a permanent basis, and staff with part-time positions may either be appointed, or employed on a temporary basis for renewable periods of a maximum of six years, from being permitted to:

1. employ a professor, using the justification of “freedom of policy”, over a period of twenty years on the basis of some twenty consecutive, short-term and part-time employment contracts and statutory appointments of between one and three years, without any limit on the total number of renewals, while other colleagues with similar duties were appointed on a permanent and full-time basis?

2. stipulate in its staff regulations only a general minimum limit of an appointment percentage at 50 percent in order to be eligible for a permanent appointment, but not lay down a single criterion on the basis of which the part-time staff appointed at 50 percent or greater can be appointed on a permanent or temporary basis?

[Or. 11]

3. award appointment percentages to a part-time professor, using the justification of unlimited ‘freedom of policy’, without laying down objective criteria, and without applying any objective workload measurement?

4. deny a temporary and part-time professor, when his employment is not renewed, using the justification of the university’s “freedom of policy”, the right to invoke the allegedly abusive nature of the past employment conditions, because he had, so to speak, always accepted those conditions by carrying out the allocated work, with the result that he forfeits the protection afforded by European Union law?’

Rules that the proceedings be stayed pending the judgment of the Court of Justice in the matter [...].

[...] [instructions to a number of parties to lodge certain documents]

[...]

[...] [procedural information] [**Or. 12**]

This judgment was delivered in open court at the hearing of **24 March 2020**:

[...]

[signatures]

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