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The Lack of Legal Protection of Union Rights on Termination of Fixed Term Academics at Public Universities in the Flemish Community of Belgium. Admissibility Issues of an Application Based on the Framework Agreement on Fixed-term Work at Public Universities in the Assessment by the Supreme Administrative Court of Belgium

Abstract: The question of sufficient protection of academics employed with successive fixed-term employment contracts or relationships in the university sector had been raised in several procedures before the Court of Justice of the European Union (hereafter: CJEU)[2]. These cases deal with the substantive basis of the claims of the academics. Admissibility of their claims was not an issue. Unlike the research dealing with the substantive basis of the claims of academics based on the Framework agreement on fixed-term work, this article deals with a ruling on the admissibility of the plea based on the Framework agreement on fixed-term work encountered by academics in the Flemish Community of Belgium. The article first outlines the exception from general labour law in the Higher Education Code of the Flemish Community of Belgium that allows universities to employ academics indefinitely

1 The author expresses her deep gratitude to Professor Roberto Toniatti whose guidance on Italian education law and on the 2014 Mascolo case was very enlightening.

2 The cases were primarily Article 267 TFEU cases (preliminary rulings). However, in 2015, the Commission decided to bring a case against Estonia for failure to fulfil its obligations under EU law before the CJEU (Article 258 TFEU) for not providing effective protection against abuse arising from successive fixed-term employment in the academic sector as required by the Framework agreement on fixed-term work.

with fixed-term relationships through the practice of a mosaic combination of a part-time statutory employment under administrative law and a part-time contractual employment under labour law.[3] It then discusses the impact of the exceptions on the admissibility of claims for damages, compensation and reinstatement by fixed-term academics at a Flemish public university based on the violation of Council Directive 1999/70/EC and Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP[4] brought before the Council of State, which is the supreme administrative court of Belgium.[5] The author argues that the Belgian Council of State incorrectly applied Directive 1999/70/EC and the Framework agreement on fixed-term work in judgment no. 247.434 of April 21, 2020, while it was – in its capacity of supreme administrative court of Belgium – under the obligation of Article 267 TFEU[6] to refer for a preliminary ruling to the CJEU. The refusal by the Belgian Council of State to refer questions for a preliminary ruling to the CJEU and a wrong interpretation of Union law could result i. a. in State liability for damage resulting from breach of its obligations under Community law[7] whereas the

3 The problems encountered by the academics with the substantive basis of their claims based on the Framework agreement on fixed-term work are not dealt with in this article and are subject of a separate research paper. The substantive basis of the claims brought by an academic against an higher education sector employer concern the national definition of 'successive', the 'objective reasons' in national law, preventive national measures to avoid abuse of successive fixed-term relationships, and national measures to punish the abuse of successive fixed-term contracts accompanied by an effective and dissuasive penalty mechanism. Cfr. i.a. R. Blanpain, European Labour Law, 12th edition, Wolters Kluwer, 2010, p. 472 and following; C. de la Porte P. and Emmenegger, The Court of Justice of the European Union and fixed-term workers: still fixed, but at least equal, European trade union institute Working Paper 2016.01, ETUI aisbl, Brussels, 2016; K. Sulpice, S. Picard S. and S. Clauwaert, Fixed-term work in EU-25: one protective framework, several national contexts: an ETUC perspective, (in:) R. Blanpain and C. Grant (eds.) Fixed-term employment contracts: a comparative study, Brugge, Vanden Broele 2009, p. 59–75; A. Koukiadaki, I. Katsaroumpas, Temporary contracts, precarious employment, employees' fundamental rights and EU employment law, Directorate-General For Internal Policies, Policy Department C, Citizens' Rights And Constitutional Affairs Of The European Parliament, European Union, 2017 (http://www.europarl.europa.eu/supporting-analyses).

4 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed--term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43–48.

5 Case no. 247.434, Belgian Council of State, X. v Universiteit Antwerpen, April 21, 2020 (Judges of the Administrative Litigation Section in Case no. 247.434 are G. Van Haegendoren, D. Moons, B. Thys). The reasoning of courts on the substance of fixed term academics will be discussed in more depth in a separate article.

6 TFEU = Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, p. 47–390.

7 According to the settled and well-established case-law of the Court, national courts have an obligation to apply Union law and to set aside any provision of national law which may conflict with it. This is the logical consequence of the precedence of Union law. In the judgment in Simmenthal, the Court held in this regard that a national court must give effect to Community law and must accordingly '… set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule …'. See also the judgments in Case C-213/89 Factortame [1990] ECR I–2433, paragraph 20, and Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I–5357, paragraph 32. Case – 106/77 [1978] ECR 629, paragraphs 21 to 23. 'Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals'.

CJEU could have helped the Belgian Council of State in a preliminary ruling to determine the concept of 'successive' employment relationships, preventive measures and measures to punish abuse of fixed term contracts in Flemish universities, rule whether the articles in the Flemish Higher Education Code on vacancies and employment of fixed-term academic staff violate the Council Directive 1999/70/EC and Framework agreement on fixed-term work, and whether national Belgian procedural law makes the application for fixed-term academic staff at a Flemish public university virtually impossible or excessively difficult and therefore incompatible with the principle of effectiveness of Union law.
Keywords: fixed-term contracts, rights guaranteed by Union law, Flemish Community, admissibility of a case, public universities

Introduction

The applicant had worked as an academic staff member without interruption for 25 years at Flemish universities: 9 years at KULeuven and 16 years at the Universiteit Antwerpen (hereafter: UA). At UA, the applicant was employed from 1999 till 2015 with 24 successive fixed-term employment relationships, before being dismissed at the turn of the year 2015/2016 officially on financial considerations.

The applicant worked from 1999 till 2006 as special fixed-term researcher (BAP) and from 2006–2015 as special independent academic staff (BAPZAP) in renewable fixed-term contractual employment relationships pending the opening of competitive selection procedures for a full-time permanent position.

In 2012 UA finally held a competitive selection procedure although for 40% only. The applicant was ranked in the first place and was awarded a three-year fixed--term statutory independent academic staff (ZAP) employment relationship which the applicant combined for the remaining percentage with a fixed-term independent academic staff (BAPZAP) contractual employment relationship.

In 2016, the positions which the (now former) academic staff member had fulfilled, were assigned through internal procedures to an academic staff member who was ranked after the applicant in the 2012 competitive selection procedures[8]and to the president of the department himself who did not take part in the selection procedures of 2012 at all.

After having terminated the applicant's employment relationships upon its expiry on the turn of the year 2015/2016 based on financial consideration, the Faculty of Social Sciences at UA started in 2017 the organisation of the recruitment

8 The CV of the academic who replaced the applicant, mentions law studies at UA, director of a vocational training school and staff member involved in quality assurance issues. She obtained in 2009 as a lawyer a PhD in educational sciences with a pedagogy promotor at UA. She was assigned a 100% ZAP position in 'construction & urban planning law' and representative of the (liberal) labour union at UA. The first year (2016), mainly guest lecturers taught the course, the second year the students had to follow courses at a partner university in Ghent, and the third year the formerly successful subject was erased from the curriculum. Her position in 2020 mentions 'legal advisor for the Flemish Minister for Mobility and Public Works'.

procedure for a 100% tenured permanent position. The applicant participated in the open selection procedures but was not invited because the applicant had brought a claim before the Rectorate[9], the external prevention service and the Belgian Council of State. The post held by the fixed-term applicant from 1999 till the turn of the year 2015/2016 was assigned after open selection procedures from which the applicant was cleared, in 2018 to the PhD student within the Faculty of Social Sciences of UA.

Having covered a vacant post for more than 16 years of service with 24 successive fixed-term employment relationships till the Faculty of Social Sciences at UA would decide on a full-time open vacancy and competitive selection procedure, the fixed--term worker concerned thus brought an action in the Belgian Council of State for the annulment of the decision of the (public) UA against the termination of the contract upon expiry of the agreed term, not to renew the 24th. employment relationship for permanent staffing needs and the refusal to offer a permanent position at the end of the fixed-term contract.

Under Belgian and Flemish law, no compensation is payable at the end or upon the termination of a fixed-term contract. Abuse and compensation under Council Directive 1999/70/EC and the Framework agreement on fixed-term work was therefore at issue in this case.

1. Applicable National Law and Practice

1.a. Belgian Labour Law

Directive 1999/70/EC concerning the Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP was implemented in Belgian federal labour law. Article 10bis of the (federal) Employment Contracts Act of 3 July 1978 provides for a maximum of four successive fixed-term contracts of three months within the maximum limit of two years, even if non-continuous, entailing equivalent duties for the same employer, following which the fixed-term contract would be deemed to be a permanent contract.[10]

The (federal) Employment Contracts Act of 3 July 1978 provides that the abuse of successive fixed-term employment contracts is sanctioned in an identical manner in the public sector and in the private sector by the conversion of the fixed-term contract into an employment contract of indefinite duration.[11]

9 In the period 2012–2016, the position of vice-rector was held by the Professor of European Union Law and Private International Law atUA.

10 Article 10 bis § 2. Employment Contracts Act of 3 July 1978 (*Wet betreffende de arbeidsovereen komsten*, 3–07-1978, B.St. 22–08-1978). https://overheid.vlaanderen.be/personeel/regelgeving/opeenvolgende-arbeidsovereenkomsten-voor-bepaalde-duur

11 European Centre of Expertise (ECE) based on reports submitted by the Network of Labour Law Experts, Flash Reports on Labour Law, March 2018, Summary and country reports 03/2018,

The Law of 5 June 2002 on the non-discrimination of fixed-term employment contracts[12] implements Clause 4(1) of the framework agreement which prohibits, in a general manner and in unequivocal terms, any difference in treatment of fixed--term workers in respect of employment conditions which is not objectively justified. Clause 4(1) is unconditional and sufficiently precise for individuals to be able to rely upon it before a national court.[13]

The standard type of employment contract used in Belgium is the open--ended employment contract. The employer has to prove that he has objective and material reasons for issuing a fixed term contract when fixed term contracts have been concluded successively without any interruption imputable to the worker.

1.b. The Higher Education Code of the Flemish Community and Internal Regulations of the Universities

However, in matters of education and training, in Belgium the communities have legislative power and issue community decrees which have the force of law. The (federal) Employment Contracts Act of 3 July 1978 is applicable to employment relations in public universities to the extent that the matter is not covered by the Flemish Higher Education Codex of 11 October 2013. Thus the legal framework and the legal status and the conditions of service for academic staff at universities is shaped primarily in the Flemish Higher Education Code of 11 October 2013, including the conditions for being employed as independent academic staff (ZAP) at universities including lecturers, senior lecturers, professors and full professors.

The first condition for being appointed as independent academic staff (ZAP) is recruitment in a vacant position after completion of an open competitive selection procedure.

Pending the open vacancy for recruitment in a vacant position for an independent academic staff member (ZAP), academic staff can be employed as special fixed--term independent academic staff in a contractual position (BAP or BAPZAP) while performing the same teaching, research and academic services as permanent tenured independent academic staff (ZAP).[14]

The second condition is that the open vacancy for recruitment as permanent tenured independent academic staff (permanent statutory ZAP) is done for a full

Belgium (Expert Prof. Dr. Wilfried Rauws), page 16, Implications of CJEU Rulings and ECHR, Remarks on the CJEU case C-494/16, 07 March 2018, Santoro.

12 Law of 5 June 2002 on the non-discrimination of fixed-term employment contracts (*Wet betreffende het non-discriminatiebeginsel ten voordele van werknemers met een arbeidsovereenkomst voor bepaalde tijd*) of 5–06-2002, B.St. 26–06-2002; entrance into force 06–07-2002.

13 Case C-268/06 (Grand Chamber), Impact v Minister for Justice, Equality and Law Reform and Others, [15 April 2008] EU:C:2008:223, paragraphs 57–58, 60, 68, 70, 73, 79–80, operative part 2.

14 Article V.4 Higher Education Code of the Flemish Community of Belgium.

time or a structural percentage, to be defined by the university. A public vacancy for recruitment for a non-structural percentage leaves the academic staff member being employed in a renewable fixed-term non-structural statutory independent academic staff employment relationship (fixed-term statutory ZAP) regulated by administrative law eventually in combination with a position of renewable fixed-term special contractual independent academic staff member (BAPZAP) or renewable fixed-term contractual researcher (BAP) which are both regulated under labour law for the purposes of satisfying lasting and permanent staffing needs pending the opening of a structural selection procedure.

1.c. Legal Categories of Academic Staff Performing the same Permanent Teaching, Research and Academic Services

Independent academic staff is appointed as full-time or as part-time. Full-time independent academic staff (permanent statutory ZAP) is appointed permanent.[15] Part-time independent academic staff with a structural percentage is appointed permanent (permanent statutory ZAP) and with a non-structural percentage is appointed renewable fixed-term(fixed-term statutory ZAP).[16] The internal regulations of each university define the percentage 'structural'.

The Flemish Higher Education Code does not contain transparent and objective criteria for an open vacancy for recruitment of an independent academic staff member (ZAP), neither for the percentage of the open vacancy.[17]

Nor does it have objective and transparent criteria for determining whether the conclusion and renewal of renewable fixed-term employment relationships under administrative or labour law actually meet a genuine need and whether they are capable of achieving the objective pursued and are necessary for that purpose, or no other preventive measure to eliminate the risk of abusive use of such contracts.

2. The Reasoning of the Belgian Council of State in Judgment no. 247.434

The applicant raised questions concerning the constitutionality and the compatibility with Union law of the national legislation on the recruitment and status of independent academic staff in universities in the Flemish Community of Belgium, on the ground that there are no appropriate measures to sanction discrimination and to prevent the abuse of fixed-term employment relationships and that no compensation for the abuse of fixed-term contracts within university employment was payable.

15 Article V.28 (1) Higher Education Code of the Flemish Community of Belgium.
16 Article V.28 (2) Higher Education Code of the Flemish Community of Belgium.
17 Article V.10 and V.11 Higher Education Code of the Flemish Community of Belgium.

The Belgian Council of State simply stated that employment relationships concluded for a fixed-term always end automatically – thereby refusing to take into account the 24 successive fixed-term employment relationships. It held that financial reasons stated in a non-binding internal faculty education plan that – in this case – was applied on part-time academic staff only, was an 'objective' reason. It did not investigate whether the conclusion and renewal of 24 contracts actually meet a genuine need and whether they are capable of achieving the objective pursued and are necessary for that purpose, and whether they entailed the specific risk of abusive use of such contracts.

According to the Belgian Council of State, there was no obligation of UA to take any action and thus no abuse because fixed-term employment relationships always end automatically. Legal costs and the expenses incurred for the purpose of the proceedings before the court had to be borne by the applicant with 24 fixed-term successive contracts in a precarious position during 16 years at the UA.

Although the applicant argued that Article V.28 in the Flemish Higher Education Code, discriminating non-structural academic staff, must be disapplied by the court as a result of the vertical effect of Directive 1999/70/EC against the Belgian state and the public university as EU law obligations towards non-structural statutory independent academic staff (fixed-term ZAP) and contractual special independent academic staff (BAPZAP) in permanent jobs in public universities was not being respected without any appropriate, adequate and equivalent preventive protection and sanctions, the Belgian Council of State did not seek a preliminary ruling concerning the compatibility of Flemish legislation on fixed-term employment relationships in the university sector with Directive 1999/70/EC and the Framework agreement. Nor did it ensure effective protection to non-structural fixed term statutory independent academic staff (fixed-term ZAP) and special fixed-term independent academic staff (BAPZAP) by not applying the provisions that precluded the application of the Belgian federal labour law and the full effect of Directive 1999/70/EC and the Framework Agreement through disapplication of the provisions in the Flemish Higher Education Code.

Ruling that the case was inadmissible, the Belgian Council of State did not investigate the substantive issues including preventive measures and measures to penalise the misuse of fixed-term contracts at Flemish universities such as whether the university has to convert these contracts into a permanent position. Neither did it investigate whether the renewal of 24 fixed-term contracts during 16 years covered temporary staff needs or in fact permanent needs.

No reference was made to the case law on fixed-term employment in the higher education sector of the CJEU such as Case C274/18 Minoo Schuch-Ghannadan, or Case C190/13 Antonio Márquez Samohano.[18]

By contrast, the Tribunale Amministrativo Regionale per il Lazio (Italy) lodged on 23 April 2019 a request for a preliminary ruling on Italian law and the practice of fixed-term contracts between researchers and universities in EB v Presidenza del Consigliodei Ministri and Others (Case C-326/19).[19]

18 Case C-274/18 Minoo Schuch-Ghannadan v Medizinische Universität Wien [3 October 2019] EU:C:2019:547; Case C190/13 Antonio Márquez Samohano v Universitat Pompeu Fabra [13 March 2014] EU:C:2014:146; The author also mentions the Joined Cases C22/13, C61/13 to C63/13 and C418/13, Raffaella Mascolo and others v Ministero dell'Istruzione, dell'Università e della Ricerca [26 November 2014] EU:C:2014:2401. The Mascolo case is especially relevant with regard to the practice in the public education sector of the use of fixed-term labour relationships for long term permanent positions of the authorities concerned, pending the requirement to fulfil the successful selection in open competitions for which no precise time frame has been fixed, thereby keeping the staff member in a position of precariousness because of the complete uncertainty when such competitions will be held. The case will also be dealt with in Complaint No.144/2017, Council of Europe – European Committee of Social Rights, Confederazione Generale Sindacale CGS v. Italy, Case Document No. 1, 12 April 2017, Registered at the Secretariat on 7 March 2017.

19 Paragraph 109 section 2 of the Austrian law on universities states: "*1. Employment contracts can be entered into for an indefinite or a definite period of time. Unless otherwise provided in this federal law, fixed-term employment contracts have a maximum duration of six years under penalty of invalidity. 2. A sequence of consecutive [fixed-term contracts] is only permitted for female employees or employees employed in externally funded projects or research projects and for personnel employed exclusively for educational purposes as well as for replacement personnel. The total duration of consecutive employment contracts of an employee or employee may not exceed six years, or eight years in the case of part-time work. A one-time extension up to a maximum duration of ten years, and of twelve years in the case of part-time work, is permitted if there is objective justification, in particular the continuation or completion of research projects and publications.*"

Advocate General Pitruzzella referred to previous case law stating that such a purely formal provision does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose. That provision therefore carries a real risk that it will result in abusive use of that type of contract and, accordingly, is not compatible with the objective of the framework agreement and the requirement that it have practical effect (G. Pitruzzella's Opinion of 27 June 2019 EU:C:2019:547 in case C-274/18, Schuch-Ghannadan v Medizinische Universität Wien [3 October 2019] EU:C:2019:828, paragraph 19–40).

In Estonian law, the cumulated duration of successive fixed-term employment with an interval between fixed-term contracts of less than 2 months is 5 years after which they are converted to a permanent contract. In the specific context of the academic sector, the long closures over the summer period (first half of June till the beginning of September) allowed universities in Estonia to employ academics indefinitely on fixed-term contracts covering the academic year, by interrupting the employment contract over the summer closure period. According to the Commission, this does not provide effective protection against abuse arising from successive

The author also incites a certain curiosity why the Belgian Council of State in judgment no. 247.434[20] did not follow analogously its own reasoning developed in case nr. 226.345 of 5 February 2014 in compulsory education. "In education, fixed--term appointment precedes a permanent employment relationship, as it were concluded as concluded for a trial period. If there are no available job opportunities for a permanent position, the staff member acquires the right to a fixed-term appointment for an indefinite period after a number of years. Even if the employment relationship ends by law at the end of the school year, the teacher as a rule starts working at the same employer at the start of the new school year gaining further seniority. According to the Council of State, a fixed-term appointment in that regard must be nuanced taking account of all the relevant circumstances of the case, namely whether the staff member in concrete terms, demonstrates that the contested decision deprives the applicant of the opportunity for (…) a permanent employment relationship."[21]

The Government of the Flemish Community of Belgium did not set out a plan to stabilise precarious employment of fixed-term academic staff members in the university sector. Neither did university administrations take measures to avoid situations of precarious employment through the award of structural percentage employment relationships to successful candidates in competitions to fill permanent staffing needs for teaching, research and academic services.

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fixed-term employment. The Commission referred Estonia to the EU Court of Justice, (https://ec.europa.eu/social/main.jsp?langId=en&catId=706&newsId=2224&furtherNews=yes).

Case C326/19 deals with the Italian law and the conclusion and extension for a total period of five years (three years and a possible extension of two years) of fixed-term contracts between researchers and universities, making the conclusion of the contract subject to the availability of 'the resources for planning for the purposes of carrying out research, teaching, non-curricular activities and student service activities' and also making an extension of the contract subject to a 'positive appraisal of the teaching and research activities carried out', without laying down objective and transparent criteria for determining whether the conclusion and renewal of those contracts actually meet a genuine need and whether they are capable of achieving the objective pursued and are necessary for that purpose, and therefore entails a specific risk of abusive use of such contracts, thus rendering them incompatible with the purpose and practical effect of the framework agreement, and the difference in treatment of persons employed by public authorities under a flexible employment contract governed by the rules of labour law who have the right to maintain the employment relationship, and staff employed on fixed-term contracts by public authorities under administrative law who do not have such a right in general in which case no other effective measure is available under the national legal system to penalise such abuse with regard to these workers. The judgment of the Court of Justice of the European Union in this case is still pending.

20 Belgian Council of State (Raad van State), judgment no. 247.434 of April 21, 2020.

21 Belgian Council of State (Raad van State), judgment no. 226.345, 5 February 2014, paragraph 5.8.2

3. Admissibility *ratione personae* Issues in the Claim of an Academic Staff Member Consenting to the Renewal of 24 Successive Fixed-term Employment Relationships and Judgment no. 247.434 of the Belgian Council of State Running Contrary to EU law

According to the assessment of the Belgian Council of State in judgment no. 226.345, the fixed-term academic did not contest the successive 24 renewals and only disputed the lawfulness at the termination of the 24th employment relationship. "*Too late*"[22] – according to the Belgian Council of State.[23] The fact that the academic staff member of the public Flemish university UA thus (implicitly) consented to the renewal of 24 successive fixed-term employment relationships was thus capable of removing the abusive element from that public university's conduct in the event of abusive use by a public university of successive fixed-term employment relationships.

However, in the CJEU cases C-274/18 Minoo Schuch-Ghannadan and C190/13 Antonio Márquez Samohano[24], applicants employed with successive fixed--term employment relationships in Austria and Spain disputed the lawfulness at the termination of their employment relationship and not at the beginning or renewals of the successive employment relationship.

So did the applicant consenting with 8 successive fixed-term employment relationships for a duration of 11 years at a Flemish state-funded university before being dismissed on financial considerations in Case 2016/AP/1117 before the Brussels Labour Court of Appeal without encountering any admissibility problems.

22 The author expresses the following major concerns which the "too late" qualification of the Belgian Council of State. As the request for annulment of administrative acts, such as the employment by a public university, based on the plea of illegality of successive fixed-term contracts and on the non-compliance with the Framework agreement on fixed-term work must – at least according to the Belgian Council of State – be lodged with the Belgian Council of State within sixty days after the notification of the employment decision by the university, the academic employed with a fixed--term employment relationship would have to take the university to court in order to preserve the protection of the Framework agreement on fixed-term work directly after being re-appointed for another fixed-term. A claim of an academic being lodged directly after the re-appointment for another fixed-term by the university may lead to a lack of comprehension by the decision makers at the university and alienate the actors. Moreover, as the majority of academics at the universities are employed under a fixed-term employment relationship, this could result in a significant rise of claims of academics employed by a public university with a fixed-term employment relationship to safeguard their rights conferred by the Framework agreement on fixed-term work. This is undesirable or even impossible for those academics who are not informed in advance of their rights or this practice.

23 Belgian Council of State (Raad van State), X v Universiteit Antwerpen, judgment nr. 247.434 of 21 April 2020.

24 Case C274/18 Minoo Schuch-Ghannadan v Medizinische Universität Wien [3 October 2019] EU:C:2019:547; Case C190/13 Antonio Márquez Samohano v Universitat Pompeu Fabra [13 March 2014] EU:C:2014:146.

Moreover, on the substance of the case, the Brussels Labour Court of Appeal ruled that the limits of Article 10a of the (federal) employment contract law were not respected and that the Flemish state-funded university improperly applied the provisions of the university decree (included after codification in the present Flemish Higher Education Code) and its internal regulations to make use of successive employment relationships and that it did not rebut the presumption of Article 10 of the (federal) employment contract act and that it did not adduce specific evidence of justification or objective reasons to justify the renewal of such contracts or relationships.[25] It further held that it is for the national court to establish objective reasons justifying that a fixed-term appointment exists in the particular case before it, thereby referring to recital B.16.2 of judgment 55/2016 of 28 April 2016 of the Belgian Constitutional Court.[26] The Brussels Labour Court of Appeal established the classification of the employment relationship between the applicant with the Flemish state-funded university and the legality of the decision terminating that relationship, reminding the parties that the Court may substitute its own assessment for that of the parties and replace the contractual qualification individually negotiated by the parties with its own qualification.[27]

Also the Belgian Council of State has the right to establish the right classification of employment relationship and measures taken within that relationship. In judgment no. 219.605, a tenured academic staff member claimed she lived life at work in a culture of fear at a public university college and that she was given a research-only-assignment against her will after she had arranged a private conversation with the assessment committee. The Belgian Council of State ruled that this new assignment, relieving her of her teaching assignments against her will, could be indicated with reasonable assurance to be a disciplinary measure. It held for the applicant and ordered the university college to reinstate her to her former position.[28] Surprisingly, the Belgian Council of State did not elaborate in judgment no. 247.434 on the measure of dismissal on financial considerations followed by a full-time open selection procedure once the applicant had been dismissed and it left out of consideration that the applicant was not called to an interview after bringing a case before the Council of State.

25 Case 2016/AP/1117, Arbeidshof Brussel, Chimkovitch v. Vrije Universiteit Brussel, 2 July 2018, paragraph 36. The applicant in this case had been employed for 11 years continuously at a state--funded university from October 2004 till September 2013 with 8 successive fixed-term contracts before being dismissed officially on financial considerations.

26 This case concerned part-time visiting professors in university colleges.

27 Case 2016/AP/1117, Arbeidshof Brussel, Chimkovitch v. Vrije Universiteit Brussel, 2 July 2018, paragraph 20 and 21 with reference to Cass. 23 December 2002, JTT 2003, 271 with note; Cass. 28 April 2003, JTT 2003, 261 and subsequent similar judgement.

28 Belgian Council of State (Raad van State), nr. 219.605, De Wit v. Xios Hogeschool Limburg, 4 June 2012.

The author incites a certain curiosity why the Belgian Council of State in case nr. 247.434[29] did not elaborate on the qualification individually negotiated by the parties, nor on any other issues of applicability of Council Directive 1999/70/EC and the Framework agreement on fixed-term work on academics in successive fixed term employment relationships at Flemish public universities and the deficiencies in the Flemish Code on Higher Education.

Belgian law does not have a rule which would oblige the academic staff member to bring an action for the Belgian Council of State at the moment of the appointment and renewals. And even if such a procedural rule would exist at all, it makes the exercise of the rights conferred upon the fixed-term academic staff member by Union law virtually impossible or excessively difficult and is therefore incompatible with the principle of effectiveness to ensure the full effectiveness of EU law.

In its judgement of 19 March 2020 in joined Cases C-103/18 and C-429/18, the CJEU held that the fact that the worker consented to the establishment and/or renewal of successive fixed-term employment relationships with a public employer, is not capable of removing the abusive element from that employer's conduct, so that the framework agreement would not be applicable to that worker's situation.[30] According to the CJEU, if this consent resulted in the disapplication of the framework agreement, the goal of the framework agreement – which is to counteract the power imbalances between employees and employers – would be fully undermined.

The procedural position of the fixed-term staff member was explained in more detail by Advocate General Kokott in this case.[31] The Advocate General stated that the provisions of the framework agreement, read in conjunction with the principle of effectiveness, must be interpreted as "precluding national procedural requirements which require the fixed-term worker to take an active stance by appealing (when concluding the fixed-term employment relationship) or by appealing against all successive appointments and dismissals in order to benefit from the protection afforded by the Directive and the rights conferred upon the fixed-term worker by the Union legal order."[32]

According to the Advocate General, such a rule amounts to interpreting the passivity of the fixed-term worker as giving consent to the abuse, although, according to the Advocate General, there may be obvious reasons for the passivity, such as unfamiliarity with one's rights, the cost of court procedures or fear of retaliation.[33]

29 Belgian Council of State (Raad van State), judgment no. 247.434 of April 21, 2020.

30 Joined Cases C-103/18 and C-429/18, Domingo Sánchez Ruiz and Others v Comunidad de Madrid [19 March 2020] EU:C:2020:219.

31 Advocate General J. Kokott's Opinion in Joined cases C103/18 and C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 92.

32 *Idem*, paragraph 96.

33 *Idem*, paragraph 93.

The circumstances of the main proceedings of judgment no. 247.434 before the Belgian Council of State are a clear illustration of the risk of retaliation. As a result of a whistleblower complaint to the Rectorate and the lodging of a complaint against the tenured staff of the department with the external prevention service of UA and the initiation of legal proceedings, the fixed-term academic became persona non grata in all subsequent open vacancies at UA and was excluded from all subsequent selection procedures at the faculty because of lack of so-called behavioural competencies and lack of so-called loyalty. By declaring the claim inadmissible, the Belgian Council of State circumvented the obligation to investigate the substance of the claim.

According to Advocate General Kokott, the procedural disadvantage (requiring the fixed-term worker to take an active stance) is clearly contrary to the objective of the framework agreement.

If the fixed-term staff member refrains from challenging the decision on the basis of an incorrect assessment or unfamiliarity with the decision in question, this would always be disadvantageous for the staff member.[34] Such a loss of rights could be an incentive for the responsible authorities to breach Clause 5 of the framework agreement. If the worker objects to successive fixed-term employment relationships, the employment relationship could be terminated without committing any abuse. If workers do not object, they will lose their legal protection from Clause 5.[35]

4. Admissibility *ratione materiae* issues in a Claim of a Fixed-term Academic Staff Member in a Vacant Permanent Post Pending a Selection Procedure

In judgment no. 247.434 of the Belgian Council of State, the successive fixed-term contractual employment relationships (BAP and BAPZAP) in the public university sector were concluded with the academic staff member from 1999 till 2015 combined with a 40% statutory employment relationship (ZAP) from 2012 till the turn of the year 2015/2016 as the result of the failure of UA to arrange for a full-time open selection procedure to definitively fill the permanent post. The university only opened a full-time open selection procedure after dismissing the applicant at the turn of the year 2015/2016 on financial considerations.

This absolute discretion in decision making resulting in arbitrary application of Art. V.25 of the Flemish Higher Education Code regarding the opening of open selection procedures and the percentage for a permanent employment under administrative law for the period 1999–2015 remains without any legal consequence for the UA. Accordingly, the Belgian Council of State ruled that it was possible that the

34 *Idem*, paragraph 93.
35 *Idem*, paragraph 94.

academic staff member who was appointed with 23 successive fixed term employment relationships under labour law followed by one employment relationship governed by the rules of administrative law to fulfil permanent needs of UA, remains in service with renewable fixed-term employment relationships as long as the public university does not take care of the permanent filling of the permanent positions by opening open competitions for a full time position – in this particular case, until the own internal PhD students defended their PhD at the Faculty of Social Sciences at UA and could take up the permanent function.

The question raised whether the 23 contractual relationships followed by one statutory relationship for fulfilling the same permanent needs at the university, have to be considered 'successive'. According to Clause 5(2)a of the framework agreement, Member States shall, where appropriate, determine under what conditions fixed--term employment contracts or relationships: shall be regarded as "successive".

A restrictive national legal classification of fixed-term employment relationship being 'successive' within the meaning of Clauses 1 and 5(2) of the framework agreement[36] and the legality of the decision terminating that relationship undermines the purpose and the practical effect of the framework agreement. The CJEU ruled that the need for the efficacy of the framework agreement meant that the interpretation of Union concepts such as 'successive' in fixed-term employment relationships cannot be left to the discretion of Member States, even if the state's rules are of a constitutional nature.[37]

Clause 5 of the framework agreement does in the CJEU's view preclude national law (whether legislation or case law) that considers successive fixed-term contracts to be justified for 'objective reasons' of necessity or urgency where that necessity or urgency could be avoided by the conclusion of a permanent appointment process. The CJEU criticizes the use of fixed-term contracts that are not replaced with permanent appointment processes and the continuation of the employment of the employees in 'fixed-term' posts for years on end as the result of the failure of the employers to arrange for a procedure to definitively fill the post in that particular public sector[38] experiencing a structural problem, in that there is a high percentage of temporary workers and a general failure to comply with the legal obligation to fill posts permanently where they are temporarily covered.[39]

36 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 (OJ 1999 L 175, p. 43).

37 Joined Cases C103/18 and C429/18, Domingo Sánchez Ruiz and Others v Comunidad de Madrid [19 March 2020] EU:C:2020:219.

38 Spanish public health sector.

39 Case C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [19 March 2020] EU:C:2020:219; Advocate General J. Kokott's Opinion in Joined cases C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874,

Failure by UA to hold legally prescribed competitive selection procedures for filling permanent positions leads to a temporally unlimited continuation in fixed--term employment relationships. The practice in Flanders to retain academic staff as fixed-term contractual special academic staff (BAP or BAPZAP) until the permanent position is filled after an open vacancy and selection procedure, amounts to the employment of fixed-term academic staff in a permanent position for an indefinite renewable period without stating a definite period for the completion of those procedures and without any guarantee that an open vacancy and selection procedures will be held at all.[40]

The question whether the uninterrupted 16-year employment relationship in different statutes for the same tasks with 24 consecutive appointments should be qualified as 'successive' must be distinguished from the follow-up question as to whether such failure can justify abuse of successive employment contracts or employment relationships. The first question concerns the admissibility whereas the last question concerns the substance of the case.[41]

5. Admissibility of Claims of a Fixed-term Academic Staff Member with 23 Successive Contracts Followed by 1 Statutory Employment at a Flemish University: National Procedural Law and Competencies and the European Requirements of Equivalence and Effectiveness

The question in judgment no. 247.434 of the Belgian Council of State, whether Clause 5 (2)a of the framework agreement protects the right to maintain the employment relationship of an academic staff member employed by a Flemish public university under 23 successive employment relationships governed by the rules of labour law followed by 1 employment relationship at the same public university under administrative law, is raised against the background of national procedural law on the one hand and the obligation of the national judge to interpret national law in conformity with Community law on the other hand.[42]

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paragraph 39. See also Case C190/13 Antonio Márquez Samohano v Universitat Pompeu Fabra [13 March 2014] EU:C:2014:146 with regard to the practice in the public education sector in Italy of the use of fixed-term labour relationships for long term permanent positions of the authorities concerned, pending the requirement to fulfil the successful selection in open competitions for which no precise time frame has been fixed.

40 By analogy with the case-law on employment in compulsory education in Joined Cases C22/13, C61/13 to C63/13 and C418/13, Mascolo and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Comune di Napoli [26 November 2014] EU:C:2014:2401.

41 The judgments dealing with the substance of cases based on the Framework agreement on fixed term work will be discussed in a separate article..

42 See K. Lenaerts, I. Maselis, and K. Gutman, EU Procedural Law, 1st ed., Oxford 2014.

It is not disputed by the parties in judgment no. 247.434 of the Belgian Council of State that the applicant was employed by the Flemish public UA for more than 16 years as an academic staff member, successively as special contractual academic staff (BAP), fixed-term contractual independent academic staff (BAPZAP) and later in a combination of fixed-term non-structural statutory independent academic staff (fixed-term ZAP) and fixed-term contractual independent academic staff (BAPZAP) and that the applicant performed for a permanent position exactly the same tasks of academic teaching, research and services as permanent (structural) statutory independent academic staff (permanent ZAP) for which the applicant was positively evaluated.

The Advocate General stated in the joined cases C103/18 and C429/18 that the substantive scope of the framework agreement implies a limitation of the margin of discretion of the Member States, which consists in the interpretation of national provisions by national courts, which is limited by the requirement that the objective of the framework agreement is not affected or would not render the framework agreement unusefull. In particular, national authorities should not exercise their discretion in a way that could lead to abuse and thus interfere with that objective. Indeed, the protection envisaged by Clause 5 of the framework agreement to prevent a fixed-term worker from entering a precarious situation would be largely eroded if the national legislator were able to decide to extend long-term but nevertheless fixed-term employment relationships out of the scope of application, for example by designating it as one employment relationship regardless of any changes.[43]

The circumstances of judgment no. 247.434 of April 21, 2020 of the Belgian Council of State illustrate this risk. On the one hand, UA challenges the applicability of Clause 5 of the framework agreement by pointing out that the academic staff member concerned was *formally* employed on the basis of only 1 statutory agreement, being the fixed-term employment relationship governed by the rules under administrative law and thus ruled out the use of 'successive' employment relationships, while according to the *factual findings* the termination of the more than 20 relationship governed by the rules of labour law were immediately followed not by one but by two consecutive appointments of which one of 40% was governed by the rules of administrative law and the other for the remaining % was governed by the rules of labour law, a combination that could never give access to a permanent tenured position according to the Flemish Higher Education Code and the internal statutes of UA. Both simultaneous contracts of which one was governed by the rules of administrative law and the other was governed by the rules of labour law respectively, could only be renewable fixed term employment relationships and are in practice

43 Advocate General J. Kokott's Opinion in Joined cases C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 37 and paragraph 38.

used to keep academic staff in a precarious situation and to exclude them from civil servant pension rights.

According to the Advocate General in accordance with their obligation to interpret national legal provisions in accordance with a directive[44], national courts should ensure that the existence of successive contracts or employment relationships for the application of Clause 5 of the framework agreement, is accorded a *substantive* interpretation thereby taking into account the objective of the framework agreement,[45] i.e. the Advocate General explicitly rejects the purely formal approach when ruling about 'successive' employment relationships as applied by the Belgian Council of State in judgment no. 247.434 of April 21, 2020 in favour of a substantive interpretation. The strictly formal approach allowed the Belgian Council of State to refrain from acknowledging that it is for the authorities of the Member State concerned to ensure, for matters within their respective spheres of competence, that Clause 5(1)(a) is complied with by ascertaining that the renewal of successive fixed-term employment relationships is actually intended to cover temporary needs and that the provisions in the Flemish Higher Education Code are not, in fact, being used to meet fixed and permanent needs.[46]

In addition, Clause 5 of the framework agreement should in fact also be applied to the continuation of a single part-time fixed-term statutory employment relationship if this continuation of 23 contractual employment relationships results from the absence of competitive selection procedures by UA. The Advocate General points out that employment of academic staff in the context of such long-term in absolute and relative terms, gives rise to a presumption that fixed-term employment relationships are in fact used to meet permanent needs in terms of employment of academic staff.[47]

The complexity of contractual and statutory and structural and non-structural employment relationships at the Flemish public university and the respective exclusive competences of the administrative or labour court to rule on labour

44 See case C212/04, Adeneler e.a., 4 July 2006, C:2006:443, paragraph 108 and 109 "This obligation to interpret national law in conformity with Community law concerns all provisions of national law, whether adopted before or after the directive in question".

45 Advocate General J. Kokott's Opinion in Joined cases C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 40.

46 By analogy, see Advocate General G. Pitruzzella's Opinion of 27 June 2019 EU:C:2019:547 in case C274/18, Schuch-Ghannadan v Medizinische Universität Wien [3 October 2019] EU:C:2019:828, paragraph 37–40 with reference to C586/10, Kücük v Land Nordrhein-Westfalen, EU:C:2012:39, paragraph 39 and case C614/15, Popescu v Direcția Sanitar Veterinară și pentru Siguranța Alimentelor Gorj [21 September 2016] EU:C:2016:726, paragraph 65.

47 Advocate General G. Pitruzzella's Opinion of 27 June 2019 EU:C:2019:547 in case C274/18, Schuch-Ghannadan v Medizinische Universität Wien [3 October 2019] EU:C:2019:828, paragraph 37–40; by analogy Advocate General J. Kokott's Opinion in Joined cases C103/18 and C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, paragraph 37.

disputes relating to individual contracts of employment or statutory employment relationships, illustrates that it is highly problematic to determine which court has competences to rule over all the fixed-term employment relationships when investigating potential abuses resulting from the use of successive fixed-term employment relationships at Flemish public universities.

The circumstances of judgment no. 247.434 of the Belgian Council of State are a clear illustration of this complexity. According to its interpretation, it is sufficient to have 23 successive contractual employment relationships followed by one statutory part-time employment relationship to make the Belgian Council of State disregard the 23 previous successive employment relationships ruled by labour law based on its exclusive competences in Belgian procedural law.

According to Belgian procedural law and the scope of competencies of administrative and labour courts, the Belgian Council of State rules over statutory employment relationships disputes whereas the labour court rules over contractual employment relationships disputes.

Taking into account that the labour courts are competent for individual contractual employment disputes including contractual employment relationships at the public university and that procedures have to be initiated within 12 months after dismissal before the labour court, it was sufficient for the public UA to employ the fixed-term academic staff member with one fixed-term statutory employment relationship for exactly the same (previous) permanent duties of teaching, research and academic service as permanent statutory independent academic staff to make the labour court reject the claim of the successive fixed-term contractual relationships because the claim was too late.

At the same time, the Belgian Council of State ruled that it is only competent to rule on statutory employment relationships when applying Directive 1999/70/EC and the Framework agreement on fixed-term contracts. As it was the first statutory employment relationship of the fixed-term academic after 23 successive fixed-term contractual employment relationships, based on Belgian procedural law, the Belgian Council of State in judgment no. 247.434 ruled that the fixed-term academic staff member with 24 successive fixed-term employment relationships in 16 years was not unlawfully dismissed and thus the UA should not make any payments for wrongful dismissal. This creates in reality an 'easy and cheap' dismissal ground for public universities that does not exist for private state-funded universities as all the employment relationships with a private state-funded university are brought before the labour courts, both the employment relationships based on general labour law (BAP and BAPZAP) as those based on the Flemish Higher Education Code (ZAP).

The provisions of the framework agreement, in conjunction with the principle of effectiveness, should be interpreted as precluding the Belgian Council of State's interpretation of national procedural rules requiring the fixed-term academic staff member to actively engage by objecting or bringing an action (against all successive

appointments and dismissals) in order to benefit, in this way, from the protection afforded by the Directive 1999/70/EC and the framework agreement on fixed-term contracts and the rights conferred by the Union legal order.[48] The Belgian Council of State had to take all the 24 fixed-time employment relationships into account and not only the last statutory employment relationships.

It is clear that the Belgian national rules of procedural law affected and interfered with the realization of EU rights at the national level and infringed the principle of effective legal protection. In the Simmenthal[49] and the Factortame cases[50], the CJEU ruled that it is not only national substantive laws that must give way to EU law, but also any national rules of procedure, including constitutional rules that might get in the way of the effective application of an EU law right, regardless of the origin of the rules. National remedies must also provide an effective remedy. Any rule that actually prevents individuals from relying on an EU law right would be incompatible with the principle of effective protection.[51]

The requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law, apply equally to the designation of the courts having jurisdiction to hear and determine actions based on EU law. A failure to comply with those requirements at EU level is — just like a failure to comply with them as regards the definition of detailed procedural rules — liable to undermine the principle of effective judicial protection.[52] "It is the Member States' responsibility to ensure that the rights in question are effectively protected in each case. In that connection, it should be recalled that the Member States' obligation arising from a directive to achieve the result envisaged by the directive, and their duty under Article 4(3) TEU[53] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that

48 Advocate General J. Kokott's Opinion in Joined cases C103/18 en C429/18, Ruiz and Others v Comunidad de Madrid [17 October 2019] EU:C:2019:874, conclusion 4.

49 Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 22 "Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of community law".

50 Case C213/89 Factortame [1990] ECR I–2433, paragraph 20, 21, 22.

51 Case C224/01, Gerhard Köbler v. Republik Österreich [30 September 2003] EU:C:2003:513, paragraph 25.

52 Joined Cases C184/15 and C197/15, Andrés v Servicio Vasco de Salud and López v Ayuntamiento de Vitoria [14 September 2016] EU:C:2016:680, paragraph 59 with reference to judgment of 15 April 2008, Impact, C268/06, EU:C:2008:223, paragraphs 47 and 48, and order of 24 April 2009, Koukou, C519/08, not published, EU:C:2009:269, paragraph 98.

53 Former Article 10 EC.

obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective. Moreover, the Court has already held that requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law. A failure to comply with those requirements at that level is – just like a failure to comply with them as regards the definition of detailed procedural rules – liable to undermine the principle of effective judicial protection."[54]

6. What Actions can be Taken by the Applicant in Judgement no. 247.434?

As it is a principle of Union law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Union law[55] and incorrect application of Union law by the courts for which they can be held responsible, the fixed-term academic – being a Belgian national and thus a subject of the Union legal system – has the possibility of obtaining redress from Belgium as the full effectiveness of Union rules is subject to prior action on the part of Belgium and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Union law.[56]

Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Union law correctly in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals[57]. The CJEU cooperates with all the courts of the Member States,

54 Opinion of Advocate General Trstenjak, 31 March 2009, Case C63/08, Virginie Pontin v T-Comalux SA (Reference for a preliminary ruling from the tribunal du travail d'Esch-sur-Alzette (Luxembourg)), ECLI:EU:C:2009:211, paragraph 62 with reference to Case C54/96 Dorsch Consult [1997] ECR I–4961, paragraph 40, paragraph 41, paragraph 42, paragraph 47, footnote 36; Case C268/06 Impact [2008] ECR I–2483, paragraph 45, with further references to established case-law; Case 14/83 von Colson and Kamann [1984] ECR 1891, paragraph 26; Joined Cases C397/01 to C403/01 Pfeiffer and Others [2004] ECR I–8835, paragraph 111.

55 Judgment of 19 November 1991, Francovich and Others (C6/90 and C9/90, EU:C:1991:428, paragraph 40.

56 Case C6/90Francovich with reference to the judgments in Case 26/62 Van Gend en Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585, paragraph 30–37.

57 See in particular the judgments in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 16, and Case C213/89 Factortame [1990] ECR I–2433, paragraph 19.

which are the ordinary courts in matters of European Union law. National courts may, and sometimes must, refer to the CJEU and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law.[58]

As the Belgian Council of State is the highest administrative court, the academic staff could also bring an action before the European Court of Human Rights. Relying on Article 6 §1 (right to a fair hearing), the academic staff could complain not to have access to a court in order to obtain recognition of the existence of a public employment relationship with UA[59] and, consequently, admission to the relevant pension scheme. Moreover, relying on Article 1 of Protocol No. 1 (protection of property), the fixed-term academic could complain to be deprived of pension entitlements for the period of employment as academic, as the application before the Belgian Council of State in judgment no. 247.434 had failed to satisfy the conditions of admissibility, on Article 14 (prohibition of discrimination) in conjunction with Article 6 §1 and Article 1 of Protocol No. 1, the difference in treatment that staff in a fixed-term contractual employment or a fixed-term statutory employment relationship sustained in relation to tenured academic staff at UA who had secured recognition of their pension entitlements.

Finally, the European Commission could decide to refer Belgium to the CJEU for failing to transpose the Directive and the Framework agreement and to adopt all measures necessary in order to transpose the Directive also in the higher education sector.[60]

There is no doubt that the cost of these complex and lengthy legal procedures act as deterrents for individual academic staff to start proceedings whereas the decision makers at the Faculty of Social Sciences and UA pay the legal costs and fees not out of their own pockets but university funding[61] received by the Flemish ministry of education. Even a successful applicant's award of compensation will not cover the

58 Article 267(2) TFEU.

59 For the application of the principles, see Court of Human Rights Vergauwen and Others v. Belgium (dec.), no. 4832/04, §§ 89–90, 10 April 2012.

60 See in particular the judgments in Case C47/08 (Grand Chamber) European Commission v Kingdom of Belgium [24 May 2011] EU:C:2011:334; Case C293/85 Commission of the European Communities v Kingdom of Belgium [2 February 1988] EU:C:1988:40; Case C317/14 European Commission v Kingdom of Belgium [5 February 2015] EU:C:2015:63; Case C149/79 Commission of the European Communities v Kingdom of Belgium [26 May 1982] EU:C:1982:195. In 2015, the Commission decided to bring a case against Estonia for failure to fulfil its obligations under EU law before the CJEU (Article 258 TFEU) for not providing effective protection against abuse arising from successive fixed-term employment in the academic sector as required by the Framework agreement on fixed-term work. (https://ec.europa.eu/social/main.jsp?langId=en&catId=706&newsId=2224&furtherNews=yes).

61 Minutes of the 24–01-2017 meeting of the UA executive board BC/24.01.2017/150/PV (UA, Bestuurscollege, Notulen 150ste zitting van het Bestuurscollege d.d. 24 januari 2017).

legal costs, while refusing to refer a question for a preliminary ruling denied the applicant effective judicial protection and a fair trial[62], injustices which should be overcome.

Conclusion

UA raised the preliminary pleas of inadmissibility that the action was brought out of time and that it solely relates to the last statutory appointment of the 24 successive fixed-term contracts. The Belgian Council of State upheld both pleas. It upheld that the action was brought out of time because the academic staff member consented in their view to the renewal of 24 successive fixed-term employment relationships which it deemed to be capable of removing the abusive element from that conduct of the public UA. It declared the competencies conferred upon it by national procedural law did not cover the 23 successive fixed-term employment contracts based on the constitutional division of the powers of the judicial authorities among the administrative court and the labour courts and thus did not take the successive fixed--term employment relationships ruled by labour law into account when ruling on the lawfulness of the last (and only) fixed-term statutory employment relationship which constituted the 24th successive fixed-term employment relationship of the academic staff member with UA.

Although the interpretation of the framework agreement by the Belgian Council of State contradicts well-established case-law of the CJEU, the Belgian Council of State did not put a preliminary question concerning the interpretation of the framework agreement before the CJEU without stating any reasons.

In the light of the above considerations, the author asks whether this refusal by the Belgian Council of State can be explained by political considerations and the fear for the financial consequences for all the higher education institutions in the Flemish Community of Belgium, whereby independent academic staff employed under fixed-term contractual or fixed-term statutory employment relationships to fulfil permanent needs of the universities while performing the same teaching, research and academic services as permanent tenured independent academic staff would obtain recognition of the existence of a permanent employment relationship between them and the university for the purpose of securing the corresponding social security entitlements.

62 Article 47 EU Charter of Fundamental Rights and Article 6, paragraph 1 (right to a fair trial) European Convention on Human Rights; see also ECtHR Vergauwen et al v Belgium decision of 10 April 2012, Application No. 4832/04; ECtHR, Dhahbi/Italy, decision of 8 April 2014, Application No. 17120/ 09.

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