Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

15 June 2023 (*)

(Reference for a preliminary ruling – Freedom of movement for workers – Article 45 TFEU – Regulation (EU) No 492/2011 – Article 3(1) – Obstacle – Equal treatment – Procedure for compiling lists for awarding posts in certain national public institutions – Requirement for admission linked to prior professional experience gained at those institutions – National legislation not allowing professional experience gained in other Member States to be taken into account – Whether justified – Objective of combating job insecurity)

In Case C-132/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 13 December 2021, received at the Court on 25 February 2022, in the proceedings

BM,

NP

v

Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR,

THE COURT (Sixth Chamber),

composed of P.G. Xuereb, President of the Chamber, A. Arabadjiev (Rapporteur), President of the First Chamber, and A. Kumin, Judge,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– BM and NP, by D. Terracciano, avvocata,

– the Italian Government, by G. Palmieri, acting as Agent, and by L. Fiandaca and A. Jacoangeli, avvocati dello Stato,

– the European Commission, by B.-R. Killmann and D. Recchia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45(1) and (2) TFEU and of Article 3(1)(b) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

2 The request has been made in proceedings between, on the one hand, BM and NP, Italian nationals who gained professional experience in Member States other than the Italian Republic, and, on the other hand, the Ministero dell'Istruzione, dell'Università e della Ricerca – MIUR (Ministry of Education, Universities and Research, Italy) ('the Ministry'), concerning the lawfulness of a ministerial decree that provides that only candidates who have gained a certain amount of professional experience at Italian public higher-education institutions for the fine arts, music and dance are to be admitted to the procedure for inclusion on the lists compiled for the purpose of recruiting, on permanent or temporary employment contracts, staff in those institutions.

Legal context

European Union law

Regulation No 492/2011

3 Article 3(1) of Regulation No 492/2011 provides:

'Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

…

(b) where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

…'

The framework agreement on fixed-term work

4 Clause 5 of the framework agreement on fixed-term work, concluded on 18 March 1999, which is annexed 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), entitled 'Measures to prevent abuse', is worded as follows:

‘1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

(a) shall be regarded as “successive”

(b) shall be deemed to be contracts or relationships of indefinite duration.’

Italian law

5 Article 1(653) and (655) of legge n. 205 – Bilancio di previsione dello Stato per l’anno finanziario 2018 e bilancio pluriennale per il triennio 2018-2020 (Law No 205 on the estimated State budget for the financial year 2018 and the multiannual budget for the three-year period from 2018 to 2020) of 27 December 2017 (GURI No 302 of 29 December 2017) (‘Law No 205/2017’), provides:

‘653. In order to address job insecurity in higher-education institutions for the fine arts, music and dance, EUR 1 million shall be allocated for 2018, EUR 6.6 million for 2019, EUR 11.6 million for 2020, EUR 15.9 million for 2021, EUR 16.4 million for 2022, EUR 16.8 million for each of the years 2023 to 2025, EUR 16.9 million for 2026, EUR 17.5 million for 2027, EUR 18.1 million for 2028 and EUR 18.5 million per year as from 2029. …

…

655. Teaching staff who do not already hold a permanent contract in the institutions referred to in paragraph 653, who have passed a competition for the purpose of inclusion on the lists and who have accrued, up to and including the 2017/2018 academic year, at least three academic years of teaching, even if non-consecutive, in the last eight academic years, in one of the abovementioned institutions and on the courses provided for in Article 3 of the regulation referred to in Presidential Decree No 212 of 8 July 2005, and on the training courses provided for in Article 3(3) of the regulation implementing Decree No 249 of the Minister for Education, Universities and Research of 10 September 2010, shall be entered into the special national lists for the award of permanent and temporary teaching posts, subject to the current national lists based on qualifications and those referred to in paragraph 653, within the limits of the vacancies available. The inclusion process is defined by decree of the Minister for Education, Universities and Research.’

6 Article 2(1) of decreto ministeriale n. 597 – Costituzione graduatorie riservate per il personale docente delle Istituzioni AFAM (Ministerial Decree No 597 on the procedure for compiling lists for teaching staff in higher-education institutions for the fine arts, music and dance), of 14 August 2018

(‘Ministerial Decree No 597/2018’), provides that only candidates who have taught for at least three academic years on courses provided for in Article 3 of Presidential Decree No 212 of 8 July 2005, or on training courses provided for in Article 3(3) of Decree No 249 of the Minister for Education, Universities and Research of 10 September 2010, may take part in that procedure.

7 Article 8(1)(A) of Ministerial Decree No 597/2018 provides for the possibility of taking into account, for the purpose of assessing the qualifications of the candidates admitted to that procedure, professional experience gained at peer institutions of Italian higher-education institutions for the fine arts, music and dance, located abroad.

The dispute in the main proceedings and the question referred for a preliminary ruling

8 By separate actions brought in 2018 before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which is the referring court, the applicants in the main proceedings sought annulment of Ministerial Decree No 597/2018, claiming, inter alia, that, by failing to recognise, for the purpose of participation in the procedure for awarding permanent and temporary teaching posts in Italian public higher-education institutions for the fine arts, music and dance, provided for in Article 1(655) of Law No 205/2017, professional experience of three or more academic years gained at peer institutions in Member States other than the Italian Republic, that ministerial decree infringes Article 45 TFEU and Article 3 of Regulation No 492/2011.

9 The Ministry argues that Ministerial Decree No 597/2018 cannot be regarded as unlawful, since it was adopted on the basis of Law No 205/2017, which is intended, as is apparent from Article 1(653) thereof, to address the record of job insecurity in the sector of higher education in the fine arts, music and dance, and puts the Ministry in a position where its powers are circumscribed. Furthermore, there is no infringement of Article 45 TFEU or of Regulation No 492/2011, since there is no difference in treatment based on the nationality of the candidates, as the procedure provided for in Article 1(655) of Law No 205/2017 is open both to Italian citizens and to foreigners. Moreover, allowing persons who have gained experience in other Member States to take part in that procedure would undermine the logic of the national legislation at issue, which is intended to encourage the elimination of job insecurity in Italian public higher-education institutions for the fine arts, music and dance, by compiling lists of teachers who have accrued their professional experience in those institutions, and not abroad.

10 The referring court notes that, when adopting Ministerial Decree No 597/2018, the Ministry had to refer to the provisions of Law No 205/2017 in order to identify the requirements for participating in the procedure referred to in Article 1(655) of that law.

11 According to the referring court, Law No 205/2017 appears to constitute a restriction on the freedom of movement for workers, since it restricts access to the procedure for awarding permanent and temporary teaching posts in Italian public higher-education institutions for the fine arts, music and dance, by reserving it only for teachers who have prior experience of at least three years in those institutions.

12 However, it follows from the judgments of 10 October 2019, *Krah* (C-703/17, EU:C:2019:850), and of 23 April 2020, *Land Niedersachsen (Previous periods of relevant activity)* (C-710/18, EU:C:2020:299), that measures restricting freedom of movement for workers may be permitted where they are aimed at pursuing one of the objectives set out in the FEU Treaty or are justified by overriding reasons in the public interest and comply with the principle of proportionality.

13 As for whether the objective of ‘counter[ing] the phenomenon of job insecurity’ in Italian public higher-education institutions for the fine arts, music and dance, set out in Law No 205/2017, constitutes a public-interest objective capable of justifying that restriction and whether that restriction is proportionate to that objective, the referring court submits, in the first place, that it follows from the judgment of 26 November 2014, *Mascolo and Others* (C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401), that the adoption by Member States of measures designed to combat job insecurity in the public service, resulting from the repeated conclusion of temporary contracts, is intended to satisfy not only national interests but also those of the European Union.

14 In the second place, participation in the procedure referred to in Article 1(655) of Law No 205/2017 is not the only means of obtaining a permanent or temporary teaching post in Italian public higher-education institutions for the fine arts, music and dance. Up to half of the permanent staff members of those institutions are recruited on the basis of special national lists, while the rest of those staff members are recruited following public selection procedures based on qualifications and tests. Furthermore, temporary employment contracts are concluded as a matter of priority with teachers on those lists. Where it is not possible to fill all vacant posts in that way, the institutions concerned may launch calls for applications in order to draw up lists specific to each institution.

15 In the third place, it follows from the case-law of the Corte costituzionale (Constitutional Court, Italy) that rules that, like those at issue in the dispute before the referring court, provide for extraordinary competitions are in principle consistent with the Italian Constitution, provided that they are enacted in order to ensure the proper functioning of the administration, to give certainty to legal relations and to address job insecurity and provided that they do not unreasonably restrict the right of access to public posts or the principle of open competition.

16 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 45(1) and (2) TFEU and Article 3(1)(b) of [Regulation No 492/2011] be interpreted as precluding a rule, such as that laid down in Article 1(655) of Law No 205/2017, according to which, in order to take part in the procedure for inclusion on the lists compiled for the award of permanent and temporary teaching contracts in Italian [higher-education establishments for the fine arts, music and dance], professional experience gained by candidates at those national institutions alone is taken into account, and not experience gained at peer institutions in other European countries, given that the procedure in question is specifically intended to counter the phenomenon of precarious employment in Italy? If the Court of Justice does not hold the Italian legislation to be contrary, in abstract terms, to the European regulatory framework, can the measures envisaged by that legislation be regarded as proportionate, in concrete terms, in view of the abovementioned public-interest objective?’

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Article 45 TFEU and Article 3(1)(b) of Regulation No 492/2011 must be interpreted as precluding national legislation that provides that only candidates who have gained a certain amount of professional experience at national public higher-education institutions for the fine arts, music and dance may be admitted to a procedure for inclusion on the lists compiled for the purpose of recruiting, on permanent or temporary employment contracts, staff in those institutions and that thus prevents professional

experience gained in other Member States from being taken into consideration for the purpose of admission to that procedure.

18 In that regard, it should be noted that all the provisions of the FEU Treaty relating to the freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union and preclude measures which might place nationals of the Member States at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (judgments of 23 April 2020, *Land Niedersachsen (Previous periods of relevant activity)*, C-710/18, EU:C:2020:299, paragraph 24, and of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 21).

19 It has been held that recruitment conditions for, inter alia, posts in the public service other than those to which Article 45(4) TFEU relates, fall within the scope of Article 45 TFEU (see, to that effect, judgments of 26 May 1982, *Commission* v *Belgium*, 149/79, EU:C:1982:195, paragraph 11, and of 11 February 2021, *Katoen Natie Bulk Terminals and General Services Antwerp*, C-407/19 and C-471/19, EU:C:2021:107, paragraph 82).

20 National provisions which preclude or deter a national of a Member State from leaving his or her country of origin in order to exercise his or her right to freedom of movement constitute restrictions on that freedom, within the meaning of Article 45(1) TFEU, even if they apply without regard to the nationality of the workers concerned (judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 23 and the case-law cited).

21 Moreover, Article 45 TFEU is intended in particular to prevent a worker who, by exercising his or her right to freedom of movement, has been employed in more than one Member State from being treated, without objective justification, less favourably than one who has completed his or her entire career in only one Member State (judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 24 and the case-law cited).

22 The free movement of persons would not be fully realised if the Member States were able to refuse to grant the benefit of that provision to those of their nationals who have taken advantage of the provisions of EU law to acquire vocational qualifications in a Member State other than that of which they are nationals (judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 25 and the case-law cited).

23 The Court has thus held that national legislation which does not take into consideration in full previous periods of equivalent activity completed in a Member State other than the Member State of origin of a migrant worker is likely to render less attractive the freedom of movement for workers, in breach of Article 45(1) TFEU (see, to that effect, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 74; of 10 October 2019, *Krah*, C-703/17, EU:C:2019:850, paragraph 54; of 23 April 2020, *Land Niedersachsen (Previous periods of relevant activity)*, C-710/18, EU:C:2020:299, paragraph 26 and the case-law cited; and of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 26).

24 Furthermore, it is apparent from the case-law that, where a public body of a Member State, in recruiting staff for posts which do not fall within the scope of Article 45(4) TFEU, provides for account to be taken of candidates' previous employment in the public service, that body may not make a distinction according to whether such employment was in the public service of that particular Member State or in the public service of another Member State (see, to that effect,

judgments of 23 February 1994, *Scholz*, C-419/92, EU:C:1994:62, paragraph 12, and of 12 May 2005, *Commission* v *Italy*, C-278/03, EU:C:2005:281, paragraph 14).

25 It should be noted that the national legislation at issue in the main proceedings is liable to deter a worker from exercising his or her right to freedom of movement provided for in Article 45 TFEU, inasmuch as it lays down a condition requiring a minimum period of professional experience for the purpose of the inclusion of candidates on the lists compiled pursuant to Ministerial Decree No 597/2018 for recruiting, on permanent or temporary employment contracts, staff in Italian public higher-education institutions for the fine arts, music and dance, but precludes taking into consideration, for that purpose, experience gained in Member States other than the Italian Republic.

26 Such a worker may be deterred from leaving his or her Member State of origin to work or establish himself or herself in another Member State if he or she would thus be deprived of the possibility of having, on his or her return to the first Member State, his or her professional experience gained in the second Member State taken into account for the purpose of inclusion on those lists.

27 Furthermore, it should be recalled that Article 45(2) TFEU states that freedom of movement for workers requires the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment (see, to that effect, judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 29 and the case-law cited).

28 It should be recalled, in that regard, that the principle of equal treatment laid down in Article 45 TFEU prohibits not only direct discrimination on the ground of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, to that effect, judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 30 and the case-law cited).

29 In that context, the Court has stated that a provision of national law, even if it applies to all workers regardless of nationality, must be regarded as indirectly discriminatory if it is intrinsically liable to affect workers who are nationals of other Member States more than national workers and if there is a consequent risk that it will place the worker from a different Member State at a particular disadvantage, unless it is objectively justified and proportionate to the aim pursued (judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 31 and the case-law cited).

30 In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States but not nationals of the State in question (judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 32 and the case-law cited).

31 In the present case, by refusing to take into consideration the professional experience gained by a migrant worker at an institution of a Member State other than the Italian Republic, the national legislation at issue in the main proceedings is liable to affect migrant workers more than national workers, placing the former at a particular disadvantage, since they will in all likelihood have accrued professional experience in a Member State other than the Italian Republic before joining the Italian higher-education institutions for the fine arts, music and dance (see, by analogy, judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21,

EU:C:2022:310, paragraph 33). That legislation is therefore capable of creating a difference in treatment indirectly based on nationality.

32 In those circumstances, it must be held that the legislation at issue in the main proceedings constitutes a restriction on the freedom of movement for workers, which is prohibited as a matter of principle by Article 45 TFEU.

33 As regards the justification for such a restriction, it is settled case-law that national measures liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make it less attractive may be allowed only if they pursue an objective in the public interest, are appropriate for ensuring the attainment of that objective and do not go beyond what is necessary to attain that objective (judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 35 and the case-law cited).

34 It is apparent from the information provided by the referring court that the national legislation at issue in the main proceedings is intended to address the record of job insecurity in the sector of higher education in the fine arts, music and dance in Italy, by promoting the elimination of job insecurity in that sector.

35 In that regard, it should be noted that, even if that objective were to be regarded as a legitimate objective in the public interest capable of justifying a restriction on the freedom of movement for workers, the restriction at issue in the main proceedings does not appear to be appropriate for securing the attainment of that objective.

36 As the European Commission rightly observed, the exclusion of candidates who have gained professional experience in a Member State other than the Italian Republic from the procedure referred to in Article 1(655) of Law No 205/2017 does not appear to be, in itself, necessary to promote the elimination of job insecurity, that is to say, to increase the proportion of permanent workers in the sector of higher education in the fine arts, music and dance in Italy, since that procedure allows institutions in that sector to recruit both permanent workers and temporary workers.

37 Furthermore, even supposing that that procedure allows more permanent workers to be recruited than temporary workers, the aim of increasing the proportion of that first category in the sector at issue could be achieved just as effectively by opening that procedure to candidates who have gained professional experience in a Member State other than the Italian Republic, without reserving the permanent posts for ‘long-term’ temporary workers in that sector.

38 Moreover, such a measure would not prevent the Italian Republic from addressing specifically the job insecurity of those latter workers – which results, as the referring court states, from the repeated conclusion of temporary contracts – inter alia, by implementing the measures referred to in clause 5 of the framework agreement on fixed-term work or by making those workers permanent.

39 In those circumstances, the restriction on the freedom of movement for workers created by the national legislation at issue in the main proceedings must be regarded as unjustified.

40 With regard to Article 3 of Regulation No 492/2011, the wording of paragraph 1 of which is identical to that of Article 3(1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475) (judgment of 5 February 2015, *Commission* v *Belgium*, C-317/14, EU:C:2015:63,

paragraph 2), suffice it to reiterate that it makes explicit the principles already laid down in Article 45 TFEU with regard, specifically, to access to employment and that it must therefore be interpreted in the same way as that article (see, by analogy, judgments of 23 February 1994, *Scholz*, C-419/92, EU:C:1994:62, paragraph 6, and of 12 May 2005, *Commission* v *Italy*, C-278/03, EU:C:2005:281, paragraphs 3 and 15).

41 In the light of the foregoing considerations, the answer to the question referred is that Article 45 TFEU and Article 3(1)(b) of Regulation No 492/2011 must be interpreted as precluding national legislation that provides that only candidates who have gained a certain amount of professional experience at national public higher-education institutions for the fine arts, music and dance may be admitted to a procedure for inclusion on the lists compiled for the purpose of recruiting, on permanent or temporary employment contracts, staff in those institutions and that thus prevents professional experience gained in other Member States from being taken into consideration for the purpose of admission to that procedure.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Article 45 TFEU and Article 3(1)(b) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union

must be interpreted as precluding national legislation that provides that only candidates who have gained a certain amount of professional experience at national public higher-education institutions for the fine arts, music and dance may be admitted to a procedure for inclusion on the lists compiled for the purpose of recruiting, on permanent or temporary employment contracts, staff in those institutions and that thus prevents professional experience gained in other Member States from being taken into consideration for the purpose of admission to that procedure.

[Signatures]

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* Language of the case: Italian.