Judgment of the Court (Fifth Chamber) of 12 March 1998. - Commission of the European Communities v Hellenic Republic. - Case C-187/96.

In Case C-187/96,

Commission of the European Communities, represented by Maria Patakia, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Ioanna Galani-Maragkoudaki, Special Deputy Legal Adviser to the Special Department for Contentious Community Affairs of the Ministry of Foreign Affairs, and Stamatina Vodina, Special Assistant in the same department, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that by excluding, by regulation or administrative practice, the taking into account of previous employment in the public service of another Member State for the purposes of granting to an employee in Greek public service a seniority increment and of grading him on the salary scale, on the sole ground that that previous employment was not performed in Greek public service, the Hellenic Republic is in breach of its obligations under Community law, in particular under Articles 5 and 48 of the EC Treaty and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

THE COURT

(Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, D.A.O. Edward (Rapporteur), P. Jann and L. Sevón, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 20 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 11 December 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 3 June 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that by excluding, by regulation or administrative practice, the taking into account of previous employment in the public service of another Member State for the purposes of granting to an employee in Greek public service a seniority increment and grading him on the salary scale, on the sole ground that that previous employment was not performed in Greek public service, the Hellenic Republic is in breach of its obligations under Community law, in particular under Articles 5 and 48 of the EC Treaty and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

The relevant provisions

2 Article 7(1) of Regulation No 1612/68 provides:

`A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become un-employed, reinstatement or re-employment.'

3 Article 16(1) of Greek Law No 1505/84 on the pay scale for public service staff, as amended by Law No 1810/88 (`the contested legislation'), provides:

`Years of employment conferring entitlement to a salary increase and the seniority allowance

1. The years of employment taken into account for the purposes of progression on the salary scale laid down in Article 3, the award of the seniority increment provided for in Article 9 and the determination of employees' salary provided for in Article 15(2) of the Law shall be the following:

(a) Years of employment completed in the public service or for legal persons governed by public law or local authorities under a contract of employment governed by public law;

(b) Years of employment for the abovementioned bodies, under a contract of employment governed by private law, in so far as they are treated as pensionable by the competent local agency or have been taken into account for the purposes of grading or any increase in salary;

(c) Years of employment for legal persons governed by private law which have been taken into account on the basis of special provisions relating to appointment, posting, grading or any other increase in salary, or which are treated as pensionable by the competent local agency (...) periods of employment completed by teachers in schools in Cyprus and in recognised Greek schools abroad, and a maximum period of eight years, in so far as the relevant provisions require a "qualification" period for the

purpose of appointment. This "qualification" may consist of a period of employment or of time spent acquiring specialist knowledge or experience;

(d) Years of service in the armed forces, security forces or harbour police as a professional or volunteer or after re-enlistment, after subtraction of the period during which the employee would have served as a conscript or reservist if he had not been engaged as a member of the armed forces (whether as a professional or volunteer or after re-enlistment);

(e) Years of employment taken into account before the entry into force of this Law as an essential condition for appointment (...);

(f) Years of employment in socialist countries by repatriated political refugees;

(g) Years of employment as an instructor in private schools.'

4 Under Article 3 of special collective agreement No 128 of 10 October 1989, those provisions are applicable to staff employed under a private-law contract in the public sector or by legal persons governed by public law.

Pre-litigation procedure

5 The contested legislation was brought to the Commission's attention by a complaint lodged by a Greek national who since April 1986 has worked as a musician in the Thessalonika orchestra, which is a legal person governed by public law, under an employment contract governed by private law. Previously he had worked for five years for the Nice Municipal Orchestra (France).

6 The person concerned complained that the Greek authorities had refused to take account of his five years' employment in France for the purposes of his grading on the salary scale and the award of additional seniority, whereas that period would have been taken into account if it had been served in a municipal orchestra in Greece.

7 By letter of 13 November 1991 the Commission requested the Greek authorities to provide it with information concerning the matters raised in the complaint. They replied that the individual's period of employment in France had not been taken into account because this would be contrary to the legislation at issue.

8 Taking the view that that legislation was contrary to the requirements of Community law, the Commission, by letter of 5 October 1993, gave the Hellenic Republic formal notice to submit its observations within a period of two months.

9 The Commission was not satisfied by the answer given by letter of 10 March 1994, and so on 18 May 1995 it sent the Hellenic Republic a reasoned opinion requesting it to comply therewith within two months of its notification.

10 By letter of 24 August 1995 the Hellenic Republic repeated its argument that it was not the purpose of the contested legislation to create discrimination between Greek nationals or between Greek workers and nationals of other Member States and that, in any event, they had no discriminatory effect.

11 At the end of the period prescribed for the Hellenic Republic to comply with the reasoned opinion, the Commission brought this action.

Substance

12 In the Commission's view, the contested legislation contravenes in two respects the principle of freedom of movement for workers set out in both Article 48 of the Treaty and Article 7(1) of Regulation No 1612/68.

13 First, even though the wording of the contested legislation is `neutral', its actual effect is to discriminate indirectly on the basis of nationality. Its provisions are such as to place migrant workers at a particular disadvantage, since they are denied recognition of periods of employment which they have completed in the public services of other Member States on the sole ground that those periods were not spent in Greek public administration.

14 Second, the Commission maintains that this unconditional refusal to recognise such periods constitutes an obstacle to the freedom of movement of Greek workers in that it could also discourage them from exercising that freedom.

15 The Hellenic Republic considers that the problem of treating periods of employment in the public service of another Member State like those completed in Greek administration can be resolved only by the adoption of rules at Community level.

16 It argues that it is not always easy to establish whether activity carried out in another Member State was carried out in public service or not, because the boundary between the public sector and the private sector varies from one Member State to another. Furthermore, comparing the tasks which a worker performed in the public services of two Member States may in practice give rise to difficulties.

17 The Court must observe, first of all, that the derogation contained in Article 48(4) of the EC Treaty, by virtue of which the provisions concerning freedom of movement for workers do not apply `to employment in the public service', does not apply in the present case since that provision merely provides for the possibility for Member States to exclude nationals of other Member States from access to certain posts in the public service (Case C-248/96 Grahame and Hollanders v Bestuur van de Nieuwe Algemene Bedrijfsvereniging [1997] ECR I-0000, paragraph 32). The exception does not concern the factors which a Member State takes into account when determining conditions governing the pay of a worker who has already been admitted into its public service.

18 The Court has consistently held that the equal treatment rule laid down in Article 48 of the EC

Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result (see, inter alia, Case C-57/96 Meints v Minister van Landbouw, Natuurbeheer en Visserij [1997] ECR I-0000, paragraph 44).

19 Unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (Meints, cited above, paragraph 45).

20 It is clear from the documents before the Court that the provisions of the contested legislation, at least in their application, render it absolutely impossible for periods of employment in the public service of a Member State other than the Hellenic Republic to be taken into account for the purposes of a worker's salary scale grading and the grant of a seniority increment, whereas periods of employment already completed in Greek public service are, in certain cases, taken into account.

21 That rule, which plainly operates to the detriment of migrant workers who have spent part of their working life in the public service of a Member State other than the Hellenic Republic, is therefore such as to contravene the principle of non-discrimination enshrined in Article 48 of the Treaty and Article 7(1) of Regulation No 1612/68.

22 Consequently, even in the absence of specific Community legislation on this matter, it is for the Hellenic Republic to establish, at the request of the person concerned, whether or not the post he held in another Member State is equivalent to a post in Greek public service which is taken into account for the purposes of salary scale grading and the grant of a seniority increment. The fact that the Member State in question considers that in practice it is difficult to carry out that comparison cannot in any circumstances justify its refusal to do so.

23 Since the Hellenic Republic has not adduced any other evidence which could provide objective justification for the discriminatory treatment of migrant workers to which the Commission objects, it must be declared that by excluding, by regulation or administrative practice, the taking into account of previous employment in the public service of another Member State for the purposes of granting to an employee in Greek public service a seniority increment and of grading him on the salary scale, on the sole ground that the previous employment was not performed in Greek public service, the Hellenic Republic is in breach of its obligations under Community law, in particular under Article 48 of the EC Treaty and Article 7(1) of Regulation No 1612/68.

Costs

24 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for. Since the Hellenic Republic has been unsuccessful and the Commission has applied for costs, the defendant must be ordered to pay the costs.

On those grounds,

THE COURT

(Fifth Chamber)

hereby:

1. Declares that by excluding, by regulation or administrative practice, the taking into account of previous employment in the public service of another Member State for the purposes of granting to an employee in Greek public service a seniority increment and of grading him on the salary scale, on the sole ground that the previous employment was not performed in Greek public service, the Hellenic Republic is in breach of its obligations under Community law, in particular under Article 48 of the EC Treaty and Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;

2. Orders the Hellenic Republic to pay the costs.