Judgment of the Court of 15 January 1998. - Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg. - Case C-15/96.

In Case C-15/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Arbeitsgericht (Labour Court) Hamburg, Germany, for a preliminary ruling in the proceedings pending before that court between

Kalliope Schöning-Kougebetopoulou

and

Freie und Hansestadt Hamburg

on the interpretation of Article 48 of the EC Treaty and Article 7(1) and (4) 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,

composed of: C. Gulmann, President of the Third and Fifth Chambers, acting for the President, H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mrs Schöning-Kougebetopoulou, by Klaus Bertelsmann, Rechtsanwalt, Hamburg,

- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Sabine Maass, Regierungsrätin zur Anstellung in the same Ministry, acting as Agents,

- the French Government, by Claude Chavance, Attaché Principal d'Administration Centrale in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director in the same Directorate, acting as Agents,

- the Commission of the European Communities, by Peter Hillenkamp, Legal Adviser, and Pieter van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Schöning-Kougebetopoulou, represented by Klaus

Bertelsmann, of the German Government, represented by Ernst Röder, of the Spanish Government, represented by Santiago Ortiz Vaamonde, Abogado del Estado, acting as Agent, of the French Government, represented by Claude Chavance, and of the Commission, represented by Bernhard Jansen, Legal Adviser, acting as Agent, at the hearing on 13 May 1997,

after hearing the Opinion of the Advocate General at the sitting on 17 July 1997,

gives the following

Judgment

1 By order of 1 December 1995, received at the Court on 19 January 1996, the Arbeitsgericht (Labour Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Article 48 of that Treaty and Article 7(1) and (4) 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).

2 Those questions have been raised in proceedings between Mrs Schöning-Kougebetopoulou, of Greek nationality, and the Freie und Hansestadt Hamburg (Free Hanseatic City of Hamburg) concerning her classification in a higher salary group under the Bundes-Angestelltentarifvertrag (Federal Collective Wage Agreement for Contractual Employees, hereinafter `the BAT').

3 Annex 1a to the BAT lays down salary scales. Thus, `specialist doctors employed as such after eight years' practice as a doctor in Salary Group Ib' are to be classified in Salary Group Ia, sub-group 4.

4 Since 1 August 1993 Mrs Schöning-Kougebetopoulou has been employed under a contract of employment as a specialist doctor in the public service of the Freie und Hansestadt Hamburg in Germany. In her contract of employment, drawn up on the basis of the BAT, she is classified in Salary Group Ib, sub-group 7, as a `specialist doctor employed as such'.

5 From 1 October 1986 until 31 August 1992 Mrs Schöning-Kougebetopoulou worked in the Greek public service as a specialist doctor under the staff regulations applicable to civil servants of that State.

6 Since that period was not taken into account for the purposes of calculating her seniority, she brought an action on 22 June 1995 before the Arbeitsgericht Hamburg seeking classification in a higher salary group under the BAT. In support of that claim she submits that she has suffered indirect discrimination contrary to Article 48 of the Treaty and to Article 7(1) and (4) of Regulation No 1612/68.

7 Article 7(1) and (4) of Regulation No 1612/68 provides:

`1. 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

unemployed, reinstatement or re-employment;

...

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States.'

8 The Arbeitsgericht Hamburg decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

`1. Is there an infringement of Article 48 of the EC Treaty and Article 7(1) and (4) of Regulation (EEC) No 1612/68 of the Council, on freedom of movement for workers within the Community, where a collective agreement for the public service provides for promotion on grounds of seniority after eight years' service only in a particular salary bracket provided for by the collective wage agreement in force for all employees in the public service of the Federal Republic of Germany ("the BAT") and therefore does not take account of comparable activities carried out in the public service of another Member State of the EC?

2. If the reply to Question 1 is in the affirmative:

Does Article 48 together with Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community require that, where doctors have worked as such in the public service of another Member State of the EC, the time spent in such employment should likewise be taken into account for the purposes of promotion on grounds of seniority as provided for in the BAT or should the court take no such decision and leave this matter instead to the parties to the collective agreement, having regard to their freedom to agree terms?'

The first question

9 The Court has consistently held that, in the context of the application of Article 177 of the Treaty, it has no jurisdiction to decide whether a national provision is compatible with Community law. The Court may, however, extract from the wording of the questions formulated by the national court, having regard to the facts stated by it, those elements which concern the interpretation of Community law for the purpose of enabling that court to resolve the legal problem before it (see, inter alia, Joined Cases C-332/92, C-333/92 and C-335/92 Eurico Italia and Others [1994] ECR I-711, paragraph 19).

10 In the present case, the person concerned claims only that periods during which she worked as a specialist doctor in the public service of another Member State should be taken into account.

11 Second, it is clear from the first question that her activity as a specialist doctor in the public service of her Member State of origin and her activity as a specialized doctor in the public service of the host

Member State must be regarded as comparable. The profession concerned is, moreover, one which is regulated at Community level.

12 Third, Article 48 of the Treaty lays down the fundamental principle of freedom of movement for workers. Article 7(4) of Regulation No 1612/68, which merely clarifies and gives effect to rights already conferred by Article 48 of the Treaty (Case C-419/92 Scholz v Opera Universitaria di Cagliari [1994] ECR I-505, paragraph 6), guarantees equal treatment of workers who are nationals of other Member States in regard to any clause of a collective or individual agreement or any other collective regulation concerning, in particular, pay.

13 Fourth, the derogation in Article 48(4) of the Treaty, according to which the provisions on freedom of movement for workers are not to apply to `employment in the public service', concerns only access for nationals of other Member States to certain posts in the civil service (Case C-248/96 Grahame and Hollanders [1997] ECR I-0000, paragraph 32). It does not concern the activities of a specialist doctor, which do not involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of public authorities (see, in that regard, Case 149/79 Commission v Belgium [1980] ECR 3881, paragraph 10).

14 In those circumstances, the first question asked by the Arbeitsgericht must be read as seeking to ascertain whether Article 48 of the Treaty and Article 7(1) and (4) of Regulation No 1612/68 prohibit a clause of a collective agreement applicable to the public service of a Member State, such as the clause in question, which provides for promotion on grounds of seniority of employees of that public service after eight years' employment in a salary group determined by that agreement, without regard to previous periods of comparable employment completed in the public service of another Member State.

15 The German Government argues that the BAT clause at issue has neither the object nor the effect of treating only, or mainly, nationals of other Member States less favourably than German nationals. It points out that the clause at issue not only takes no account of periods of employment completed abroad but also takes no account of periods completed in Germany that are not covered by the BAT or of periods completed in a Salary Group other than Group Ib.

16 According to the Spanish Government, the clause at issue cannot be characterized as discriminatory. Years of seniority acquired in the German and Greek public administrations are based on different rules and are not comparable. Clauses which treat such situations differently cannot be regarded as contrary to the principle of equal treatment.

17 The German, Spanish and French Governments consider in any event that the clause at issue is based on objectively justified factors unconnected with any discrimination. In that regard, they put forward two arguments.

18 First, the French and Spanish Governments submit that the conditions for promotion on grounds

of seniority laid down by the BAT may be justified by characteristics specific to employment in the public service. In the absence of harmonization or even coordination of national organizational and operating rules applicable to the public service, the recognition of service completed in the public service of another Member State would disrupt the application of the various schemes applicable to public service posts in the different Member States, in particular as regards the rules for taking seniority into account for the purposes of internal promotion and career progression.

19 Second, although the national court's questions are based on the premiss that the BAT is a public sector agreement which aims to engender loyalty amongst qualified staff throughout the sector, the German Government submits that the aim of promotion on grounds of seniority provided for by that agreement is, like that of collective agreements in the private sector, to reward an employee's loyalty to the whole of a given group of employers and to motivate him by the prospect of improvement in his financial situation. Community law does not preclude an employee's loyalty to a private-sector employer from being rewarded in that way.

20 The French and Spanish Governments also point out the difficulties in comparing the rules on promotion on grounds of seniority in the public sector with those in the private sector.

21 The questions for consideration are therefore whether a clause of a collective agreement applicable to the public service of a Member State, such as the clause in question, is such as to infringe the principle of non-discrimination laid down in Article 48 of the Treaty and Article 7(1) and (4) of Regulation No 1612/68 and, if so, whether such rules are justified by objective considerations independent of the nationality of the employees concerned and whether they are proportionate to the legitimate aim of the national provisions (see, inter alia, the judgment in Case C-237/94 O'Flynn v Adjudication Officer [1996] ECR I-2617).

The principle of non-discrimination

22 It is common ground that the BAT does not allow periods of employment completed in the public service of another Member State to be taken into account.

23 As is explained in paragraphs 12 to 14 of the Advocate General's Opinion, the conditions for promotion on grounds of seniority laid down in the BAT thus manifestly work to the detriment of migrant workers who have spent part of their careers in the public service of another Member State. For that reason they are such as to contravene the principle of non-discrimination laid down by Article 48 of the Treaty and Article 7(1) and (4) of Regulation No 1612/68.

24 That finding is not called into question in the circumstances of the present case either by the fact that some employees of the German public service might encounter the same situation as migrant workers or by the fact that the public service is governed by different organizational and operational rules in the Member States.

Justification

25 As regards the argument based on the particular characteristics of employment in public service, it is sufficient to point out, as is explained in paragraph 13 of this judgment, that the dispute before the national court concerns only the occupation of specialist doctor which does not fall within the scope of Article 48(4) of the Treaty.

26 As regards the argument claiming, as a ground of justification, that one purpose of the BAT is to reward an employee's loyalty to his employer and to motivate him by the prospect of improvement in his financial situation, the German Government explained at the hearing that the BAT covers not only the majority of German public institutions but also undertakings performing public interest tasks.

27 However, if that is the case, to take into account periods of employment completed with one of those institutions or undertakings in determining seniority for the purposes of promotion cannot, given the multiplicity of employers, be justified by the desire to reward employee loyalty. On the contrary, the system affords employees covered by the BAT considerable mobility within a group of legally separate employers.

28 Consequently, the answer to be given to the first question must be that Article 48 of the Treaty and Article 7(1) and (4) of Regulation No 1612/68 preclude a clause in a collective agreement applicable to the public service of a Member State which provides for promotion on grounds of seniority for employees of that service after eight years' employment in a salary group determined by that agreement without taking any account of previous periods of comparable employment completed in the public service of another Member State.

The second question

29 The second question concerns the consequences which, given the freedom of contract of the parties to a collective agreement, would arise from the national court's finding that a clause in a collective agreement, such as that at issue in the main proceedings, is incompatible with Article 48 of the Treaty and Article 7(1) and (4) of Regulation No 1612/68.

30 A clause in a collective agreement applicable to the public service of a Member State which provides for promotion on grounds of seniority after eight years' employment in a salary group determined by that agreement but which takes no account of periods of comparable employment previously completed in the public service of another Member State is null and void under Article 7(4) of Regulation No 1612/68 in so far as it lays down or authorizes discriminatory conditions in relation to workers who are nationals of other Member States.

31 Therefore, having regard to the answer given to the first question, it is necessary to determine the consequences which ensue from Article 7(4) of Regulation No 1612/68 pending the adoption by the

parties to the collective agreement of the amendments necessary to eliminate the discrimination.

32 As Mrs Schöning-Kougebetopoulou and the Commission have submitted, it is appropriate to apply here the Court's case-law on the principle of equal pay for men and women.

33 According to that case-law, where a provision discriminates against women, the members of the disadvantaged group are to be treated in the same way and to have applied to them the same rules as the other workers and, failing correct implementation of Article 119 of the Treaty in national law, those rules remain the only valid point of reference (see the judgments in Case C-154/92 Van Cant v Rijksdienst voor Pensionen [1993] ECR I-3811, paragraph 20; Case C-184/89 Nimz v Freie und Hansastadt Hamburg [1991] ECR I-297, paragraph 18; Case C-33/89 Kowalska v Freie und Hansastadt Hamburg [1990] ECR I-2591, paragraph 20, and Case 286/85 McDermott and Cotter v Minister for Social Welfare and Attorney General [1987] ECR 1453, paragraph 19).

34 As was found in paragraph 11 of this judgment, the activities of specialist doctor pursued by Mrs Schöning-Kougebetopoulou in this case, in the public service of the Member State of origin and in that of the host Member State, must be regarded as comparable.

35 In reply to the second question, it is therefore sufficient to state that a clause in a collective agreement entailing discrimination contrary to Article 48 of the Treaty and to Article 7(1) of Regulation No 1612/68 is null and void by virtue of Article 7(4) of that regulation. Without requiring or waiting for that clause to be abolished by collective negotiation or by some other procedure, the national court must therefore apply the same rules to the members of the group disadvantaged by that discrimination as those applicable to the other workers.

Costs

36 The costs incurred by the French, German and Spanish Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arbeitsgericht Hamburg by order of 1 December 1995, hereby rules:

1. Article 48 of the EC Treaty and Article 7(1) and (4) of Regulation (EEC) No 1612/68 of the

Council of 15 October 1968 on freedom of movement for workers within the Community preclude a clause in a collective agreement applicable to the public service of a Member State which provides for promotion on grounds of seniority for employees of that service after eight years' employment in a salary group determined by that agreement without taking any account of previous periods of comparable employment completed in the public service of another Member State.

2. A clause in a collective agreement entailing discrimination contrary to Article 48 of the Treaty and to Article 7(1) of Regulation No 1612/68 is null and void by virtue of Article 7(4) of that regulation. Without requiring or waiting for that clause to be abolished by collective negotiation or by some other procedure, the national court must therefore apply the same rules to the members of the group disadvantaged by that discrimination as those applicable to the other workers.