OPINION OF ADVOCATE GENERAL JACOBS

delivered on 17 July 1997 *

1. In the present case the Arbeitsgericht (Labour Court) Hamburg has asked the Court to give a preliminary ruling on the compatibility of a clause of a collective wage agreement for public servants with Article 48 of the Treaty and Article 7(1) of Regulation No 1612/68. [1]

The facts

2. Dr Schöning-Kougebetopoulou, a Greek national, has been employed since 1 August 1993 as a specialist doctor by the City of Hamburg. She occupies the post of an *Angestellte*, that is to say, a contractual employee not having the status of *Beamte* (an established official). As such her employment relationship is governed, under the terms of her contract of employment, by the *Bundes-Angestelltentarifvertrag* (Federal Collective Wage Agreement for Contractual Employees, hereinafter 'the BAT').

3. As a specialist doctor employed as such Dr Schöning-Kougebetopoulou is graded under the BAT in Salary Group Ib. She considers however that she should be graded in a higher salary group, namely Group Ia. Under the BAT a specialist doctor employed as such is classified in Salary Group Ia after eight years' practice as a doctor (either generalist or specialist) in Salary Group Ib. By stipulating that the eight years' practice must be completed in Salary Group Ib the BAT leaves out of account periods of employment which a national or non-national may have completed abroad, or indeed in Germany with a private employer, as an established official in the German public service or as a contractual employee not covered by the BAT or by Salary Group Ib of the BAT.

4. Before taking up employment with the City of Hamburg Dr Schöning-Kougebetopoulou spent the period from 1 October 1986 to 31 August 1992 working as a specialist doctor in the Greek public service. She considers that, by disregarding that experience for the purposes of her grading, the City of Hamburg contravened Article 48 of the Treaty and Article 7(1) and (4) of Regulation No 1612/68.

* Original language: English.

1 — 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.

5. Article 7(1) and (4) 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 authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

6. The national court notes that, although the BAT does not discriminate directly on grounds of nationality, the condition for access to Salary Group Ia cannot be fulfilled abroad but only by nationals and foreigners working in Germany. The national court considers that the proportion of foreigners among those adversely affected by the rule is likely to be significantly higher than the proportion of foreigners among those favoured by the rule. However, in the national court's view it is unnecessary to consider whether the figures are sufficiently significant because the requirement for access to the higher grade is objectively justified. Subsequent promotion to the higher grade represents the reward for loyalty and also provides motivation by allowing an employee to improve his financial circumstances without changing his job. It therefore serves to tie specialist staff to their public employer and is comparable to a private sector bonus scheme based on years of service with an employer. The national court points out finally that, if the opposite view were taken, there would be discrimination against German and foreign doctors whose experience was gained in Germany but not under the relevant salary group of the BAT.

7. Although apparently in little doubt about the correctness of its view the national court decided to put the following questions to the Court:

'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 instead take no such decision and leave this matter to the parties to the collective agreement, having regard to their freedom to agree terms?'

8. The Court has received written and oral argument from Dr Schöning-Kougebetopoulou, the French and German Governments and the Commission. The Spanish Government, although not presenting written observations, was represented at the hearing. In addition the Court, in response to a written question put to the Member States, received replies from the Austrian, Danish, Finnish, French, German, Greek, Irish, Luxembourg, Netherlands, Spanish, Swedish and United Kingdom Governments.

Question 1

9. Dr Schöning-Kougebetopoulou contends that the BAT rule infringes Article 48 of the Treaty and Article 7 of Regulation No 1612/68. It discriminates indirectly on grounds of nationality and is not objectively justified. Dr Schöning-Kougebetopoulou is supported in her view by the Commission.

10. The German Government, on the other hand, considers that the rule is neither directly nor indirectly discriminatory and, in any event, is objectively justified. It is supported in that view by the French and Spanish Governments.

11. It is common ground that the BAT rule does not discriminate directly on grounds of nationality. It remains to be considered, however, whether it does so indirectly. A comprehensive summary of the Court's case-law on indirect discrimination in the context of Article 48 of the Treaty is to be found in the recent case of *O'Flynn*, [2] where the Court held:

'Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers (see Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 24; Case 33/88 *Allué and Another* v *Università degli Studi di Venezia* [1989] ECR 1591, paragraph 12; and *Le Manoir*, paragraph 11) or the great majority of those affected are migrant workers (see Case C-279/89 *Commission* v *United Kingdom* [1992] ECR I-5785, paragraph 42, and Case C-272/92 *Spotti* v *Freistaat Bayern* [1993] ECR I-5185, paragraph 18), where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers (see *Commission* v *Luxembourg*, paragraph 10, and Case C-349/87 *Paraschi* v *Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, paragraph 23) or where there is a risk that they may operate to the particular detriment of migrant workers (see Case C-175/88 *Biehl* v *Administration des Contributions* [1990] ECR I-1779, paragraph 14, and Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, paragraph 9).

It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law (see, to that effect, *Bachmann*, paragraph 27; *Commission* v *Luxembourg*, paragraph 12; and Joined Cases C-259/91, C-221/91 and C-332/91 *Allué and Others* v *Università degli Studi di Venezia* [1993] ECR I-4309, paragraph 15).' [3]

12. In my view it is clear that the BAT arrangements work to the particular detriment of migrant workers. Any specialist doctor who has spent part of his career in the public service of another Member State incurs the disadvantage that his employment in that Member State can never be taken into account for grading purposes. By contrast any specialist doctor who has been continuously employed under the BAT is entitled to have the whole period of his employment as a doctor taken into account.

13. Of the public servants who spend their careers in Germany, it is only those who move from non-BAT to BAT employment who are liable to incur the same disadvantage as migrant workers. Such persons are likely to represent a small proportion of German public servants. The broad scope of the BAT allows public servants extensive mobility

2 — Case C-237/94 *O'Flynn* v *Chief Adjudication Officer* [1996] ECR I-2617.

3 — Paragraphs 18 and 19 of the judgment.

between German public service employers without any pay disadvantage. Moreover, it cannot be suggested that all doctors who are public servants in non-BAT employment are actually disadvantaged by the BAT rule. Most employees not covered by the BAT will be subject to their own — in some cases superior — career arrangements, such as the regulations applicable to officials or to other collective agreements or contractual arrangements specific to their employer. [4] By contrast the BAT rule works to the disadvantage of every migrant worker joining the German public service.

14. The fact that owing to the hiatuses between the arrangements applicable to the different categories of staff some German public servants suffer the same disadvantage as migrant workers scarcely justifies denying all migrant workers who take up employment in the German public sector the advantages enjoyed by an entire — and apparently the largest — category of German public servants.

15. The untenability of the German Government's position is particularly clear if one considers what the position would be if the BAT rule were repeated in the arrangements applicable in the case of other public-service employers or categories of staff. On the German Government's analysis none of the arrangements considered individually would be discriminatory owing to the existence of other categories of staff and public-service employers not covered by the arrangements; yet the cumulative effect would be to place migrant workers at a disadvantage for the purposes of grading in the entire German public sector.

Whether the rules are objectively justified

16. In the present proceedings two — conflicting — lines of argument have been put forward in order to show that the BAT arrangements are objectively justified. On the one hand, the French and Spanish Governments, developing the arguments of the national court, [5] consider that restrictions on mobility are justified by considerations specific to public service. The German Government, on the other hand, contends that the BAT can be compared to collective agreements in the private sector and even denies that it is exclusively a public service arrangement. Its purpose is to promote a stable

4 — For example, the German Government's reply to the Court's written questions states that the *Land* Berlin, although no longer subject to the BAT, has concluded a specific collective agreement adopting the collective conventions concluded under the BAT by the body representing the other *Länder*, the Tarifgemeinschaft deutscher Länder.

5 — Set out at paragraph 6 above.

workforce by rewarding loyalty to BAT employers viewed collectively. I shall consider those arguments in turn.

Public service justification

17. It is first of all common ground that the post of specialist doctor is outside the scope of Article 48(4) of the Treaty. The Court has held that that provision applies solely to posts which 'presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality'. [6] In any event Article 48(4) cannot permit discrimination on the grounds of nationality, for instance in pay or working conditions, if in fact a non-national is appointed to the post in question. [7]

18. One cannot therefore in the present case speak of allegiance to the State in the above sense. There nevertheless remains the question whether the BAT rule can be justified by the particular features of public service employment. The starting point in considering this issue is the Court's ruling in *Scholz*. [8] There a public body, namely an Italian university, based its selection criteria for appointment to a post as a university canteen assistant partly on length of previous employment in the public service. The Court held that the failure by the university to take account of experience gained by the applicant in the public service of another Member State (the German post office) constituted unjustified indirect discrimination.

19. The French and Spanish Governments consider, however, that the ruling in *Scholz* relating to appointment to a post in the public service cannot be transposed to the present case, which concerns grading. They argue that under systems such as theirs public service entails the undertaking of reciprocal obligations by employee and employer. In the absence of harmonised regulations on career structures and pay, recognition of public service completed in another Member State would disrupt their public service structures.

20. At the hearing the Spanish Government gave the example of two teachers or doctors employed in different Member States. The employee in Member State A must wait patiently for a number of years for his pay to increase automatically according to length of service; the employee in Member State B is

6 — Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraph 10 of the judgment; Case 307/84 *Commission* v *France* [1986] ECR 1725, paragraph 12.

7 — Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 4 of the judgment.

8 — Case C-419/92 [1994] ECR I-505.

paid more highly from the start by virtue of more flexible grading rules. According to the Spanish Government, to require Member State A to take account of the latter employee's experience in Member State B would be to assimilate years of service that were not comparable.

21. The French Government nevertheless suggested at the hearing that the interest in free movement and the integrity of national public services might be reconciled in cases such as the present, first, by requiring that the employment of the migrant worker should have been in a public service or a body pursuing public-service aims and, secondly, by requiring a comparison of the functions performed, the level of qualifications required and the level of remuneration.

22. As I stated in my Opinion in *Scholz*, [9] I am prepared to accept that public servants share a special ethos which may be relevant in assessing whether periods of employment should be taken into account for the purposes of recruitment and promotion in the public service. Public servants may be motivated by factors that differ essentially from those obtaining in the private sector. Typically, employment in the public service implies a willingness to accept relatively modest financial rewards in return for greater long-term security, together, perhaps, with the satisfaction of rendering service to the collectivity. Promotion may be viewed in part as a reward for such service.

23. Notwithstanding the potential difficulty in defining the limits of public service, I therefore accept the French Government's suggestion that a Member State may restrict periods of qualifying employment to those completed in public service. However, as I noted in my Opinion in *Scholz*, I do not think the special ethos of public service can justify the disregarding of periods of public service completed in another Member State.

24. As regards the French and Spanish Governments' argument concerning differences in career structures, I accept that there are significant differences between the Member States in the rules governing the employment of public servants. In its abovementioned written question, the Court asked the Member States to state whether periods of service completed in another Member State were taken into account for the purposes of determining seniority in their public services. The replies reveal considerable diversity in the public service structures of the Member

9 — See paragraphs 27 and 28 of the Opinion.

States, ranging from a highly flexible system based on individually determined remuneration in Sweden to the rather more rigid systems applied in France, Spain and Germany. It appears that in a number of Member States, including Austria, Denmark, the Netherlands, Sweden and the United Kingdom, relevant previous experience, including experience gained in another Member State, is taken into account, at least to some extent, upon initial appointment but length of service plays no automatic role in future grading. In other Member States, in particular France, Germany, Luxembourg and Spain, length of service plays a formal role in subsequent grading and salary progression. Moreover, it appears that at present no or little account is taken of previous employment in another Member State; [10] an apparent exception is Greece which, although also applying a system of automatic advancement, recently adopted a law [11] expressly providing for periods completed in the public service of another Member State to be taken into account for the purposes of advancement.

25. Despite the differences in public service structure public servants in the various Member States perform broadly similar functions and doubtless share similar types of motivation. The fact that a public servant was subject to different conditions in the public service of another Member State cannot justify non-recognition of periods of employment in the service of that State. To accept that would be to allow a Member State to place a migrant worker at a permanent disadvantage by comparison with national public servants simply because he benefited, or may have benefited, from a more flexible career structure in the past. It would serve to compartmentalize national public services and constitute a significant obstacle to public sector mobility in the Community.

26. In any event, it seems to me that the French and Spanish Governments overlook part of the equation. It may be true that the more flexible career structures in the public services of some Member States may allow higher initial salaries and more rapid promotion for some public servants. However, greater flexibility brings with it greater demands on public servants: promotion and even continued employment may depend to some degree on performance. The argument that it would be unfair to a migrant worker's colleagues to recognise his public service in another Member State ignores the comparative disadvantages to which he may have been subject.

10 — It appears that under a law of 16 December 1996 France now takes account of compulsory national service completed in another Member State or EEA country for the purposes of calculating seniority.

11 — Law No 2470 of 21 March 1997.

27. It has moreover not been suggested that the different career structures would of themselves induce public servants to switch from the public service of one Member State to that of another. In any event, significant differences in career structures may exist between Member States even in the private sector, particularly in the professions.

Loyalty to an employer or group of employers

28. The German Government has not sought to rely on considerations specific to public sector employment. It argues that, by rewarding loyalty for continuous service, the BAT rule does no more than a private employer or a number of private employers collectively would do. Indeed the German Government has sought to show that the BAT is also in part a private sector arrangement.

29. I agree with the Commission that arrangements adopted by an undertaking (or group of undertakings in common ownership) in order to reward employees for long service do not necessarily entail unjustified discrimination. However, as the Commission points out, it is difficult to see how the arrangements under the BAT can be equated with the rewarding of loyalty by a specific private employer when service with any BAT employer is treated as qualifying employment. It is apparent that the BAT applies to an array of legally separate employers, sometimes with conflicting interests and policies and with only limited common structures, operating methods or institutional goals.

30. The German Government replies that it is conceivable that a number of private employers might collectively agree on arrangements such as those of the BAT. At the hearing it gave the example of two car manufacturers who enter into a collective agreement with the relevant unions under which they each agree to provide, in their loyalty schemes, for recognition of service under the other company.

31. However, such an agreement — on the assumption that it were able to withstand scrutiny under Article 85 of the Treaty — would not, in the absence of a single employer, involve the rewarding of loyalty in any normal sense of the word. Service with a competitor can hardly be thought of as demonstrating loyalty to one's employer. At the very least its sole purpose could not be to reward loyalty since that purpose would be better served by agreements specific to each employer.

32. The same applies to the BAT. If the aim of the BAT were solely to reward an employee's loyalty to his employer it would be sufficient for each employer to adopt its own arrangements or, if uniform conditions were sought, to agree collectively on conditions to be applied independently by each employer without any provision for mutual recognition of periods of service. That would however presumably be unacceptable to the parties to the BAT for the very reason which causes migrant workers to be placed at a disadvantage under the present arrangements. It would preclude mobility, not only for migrant workers (and a small number of German public servants), but for the majority of German public servants by compartmentalizing the German public sector. Thus the BAT goes beyond the mere rewarding of loyalty by allowing in addition for extensive mobility for the majority of public servants.

33. Finally, the German Government's assertion that the BAT is in part a private sector arrangement casts doubt on whether it would even be lawful to restrict qualifying periods of employment to those completed in the public sector. However, the national court's questions are posited on the basis that the BAT is a public sector agreement, and in any event it seems clear that Dr Schöning-Kougebetopoulou's previous employment as a doctor was in the Greek public service.

Question 2

34. By its second question the national court asks whether, on the assumption that the BAT rule is unlawful, it should require the periods of service in another Member State to be taken into account or refer the matter back to the parties to the collective agreement, having regard to their freedom to contract.

35. On this question I share the Commission's view that guidance may be sought from the Court's case-law on sex discrimination, in particular the judgments in *McDermott and Cotter* [12] and *Van Cant*. [13] By virtue of Article 7(4) of Regulation No 1612/68 the BAT rule is null and void in so far as it lays down or authorises discriminatory conditions for workers who are nationals of other Member States. It will be for the parties to the BAT to make the necessary amendments to it in order to eliminate the discrimination. However, until such amendments are made the rules applied to the advantaged group provide the only appropriate point of reference.

12 — Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and Attorney-General* [1987] ECR 1453, paragraph 19 of the judgment.

13 — Case C-154/92 *Van Cant* v *Rijksdienst voor Pensionen* [1993] ECR I-3811, paragraph 20 of the judgment.

36. As the Commission points out, it will be necessary for the national court in such circumstances to examine the equivalence of the periods of service completed in the public service of the other Member State. However, there appears to be no dispute on that issue in relation to Dr Schöning-Kougebetopoulou. The BAT requires eight years' employment as a doctor for promotion to Group Ia, and it appears to be common ground that the years of service for which she seeks recognition were spent as a doctor in the Greek public service.

Conclusion

37. Accordingly, I am of the opinion that the questions referred by the Arbeitsgericht Hamburg should be answered as follows:

(1) A clause of a collective agreement for the public service of a Member State which provides for promotion on grounds of seniority after eight years' service in a particular career bracket under the agreement and does not take account of comparable employment in the public service of another Member State infringes Article 48 of the Treaty and Article 7(1) of Regulation (EEC) No 1612/68 and is null and void under Article 7(4) of that regulation in so far as it lays down or authorises discriminatory conditions for workers who are nationals of other Member States.

(2) Until such time as the terms of the collective agreement are amended so as to eliminate the discrimination, Article 48 of the Treaty, together with Article 7(1) of Regulation No 1612/68, requires that the advantages conferred by the agreement should be extended to a migrant worker, so that comparable employment in the public service of another Member State is given equivalent recognition.