JUDGMENT OF THE COURT (Grand Chamber)

18 July 2006 *

In Case C-119/04,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 4 March 2004,

Commission of the European Communities, represented by E. Traversa and L. Pignataro, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I. M. Braguglia, acting as Agent, and M. Fiorilli, Avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Malenovský, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr, J. N. Cunha Rodrigues (Rapporteur), J. Klučka, U. Lõhmus and E. Levits, Judges,

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 November 2005,

after hearing the Opinion of the Advocate General at the sitting on 26 January 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to:

— declare that, by not taking all the measures necessary to comply with the judgment of 26 June 2001 in Case C-212/99 *Commission* v *Italy* [2001] ECR I-4923, the Italian Republic has failed to fulfil its obligations under Article 228 EC;

— order the Italian Republic to pay into the Commission's 'European Community own resources' account, a penalty payment of EUR 309 750 for each day of delay in taking the measures necessary to comply with the judgment in Case C-212/99 *Commission* v *Italy,* from the day on which judgment in the present case is delivered until the judgment in that case is complied with;

— order the Italian Republic to pay the costs.

Legal context

Community legislation

2 Article 39(1) EC reads as follows:

'Freedom of movement for workers shall be secured within the Community.'

3 Under Article 39(2) EC, freedom of movement for workers is to entail 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.

National legislation

4 On 14 January 2004, the Italian Government adopted Decree-Law No 2, laying down urgent provisions relating to the economic treatment of linguistic associates in certain universities and concerning equivalent qualifications (GURI No 11 of 15 January 2004, p. 4) ('Decree-Law No 2/2004').

5 Article 1(1) of Decree-Law No 2/2004 provides:

'In compliance with the judgment delivered by the Court of Justice ... on 26 June 2001 in Case C-212/99, the financial treatment of linguistic associates, former foreign-language assistants (the "former assistants") at the universities of La Basilicata, Milan, Palermo, Pisa,"La Sapienza" in Rome, and the Eastern University Institute in Naples ("the universities in question") ... shall correspond to that afforded to part-time tenured researchers, on a pro rata basis according to the number of hours worked and on the basis that full-time employment is equal to 500 hours per year, with effect from the original date of recruitment, save where more advantageous treatment may be afforded; ...'

6 Under Article 1 of Decree-Law No 57 of 2 March 1987, converted into Law No 158 of 22 April 1987 (GURI No 51 of 3 March 1987) amending Article 32 of Decree of the President of the Republic No 382 of 11 July 1980 (Ordinary Supplement to GURI No 209 of 31 July 1980), the maximum number of teaching hours to be completed each year by tenured researchers is 350 for a full-time post and 200 for a part-time post. The salary of part-time tenured researchers is a standard figure, comprising remuneration for 200 hours' teaching and for an unspecified number of hours of research.

7 Article 51 of the 1994–1997 national collective employment agreement for university staff ('the CCNL') provided that associates and mother-tongue linguistic associates ('associates and linguistic experts') were to work 500 actual hours per year. Derogations from that general reference framework were permitted.

The judgment of 26 June 2001 in *Commission* v *Italy*

8 At the first paragraph of the operative part of the judgment in Case C-212/99 *Commission* v *Italy* the Court declared that:

'[b]y not guaranteeing recognition of the rights acquired by former ... assistants who have become associates and ... linguistic experts, even though such recognition is guaranteed to all national workers, the Italian Republic has failed to fulfil its obligations under Article [39] EC'.

Pre-litigation procedure

9 By letter of 31 January 2002, the Commission reminded the Italian authorities that it was necessary to comply with their obligations under the judgment in Case C-212/99 *Commission* v *Italy*.

10 By letters of 10 April, 8 July and 16 October 2002, the Italian authorities replied to that reminder letter by sending the Commission the following:

— a copy of a letter, dated 27 March 2002, by which the Minister for Education, Universities and Scientific Research called upon the universities in question to comply with the provisions of the judgment in Case C-212/99 within 45 days;

— information concerning the measures adopted by those universities to 'ensure recognition of the length of service of ... former assistants, on the basis of the judgment delivered by the Court of Justice';

— explanations as to the content and effects of the decisions taken by each of those universities.

11 Following on from those communications, by letter of 11 December 2002, the Commission requested clarification from the Italian authorities as to the method and criteria used by the universities in question to calculate the increases in the remuneration of former assistants who, since 1994, had formed part of a newly-established body of associates and linguistic experts.

12 The Italian Government replied to that request by letter of 24 January 2003, sending the Commission a draft CCNL agreement — second two-year financial period 2000-2001 — signed on 18 December 2002 by the governmental agency responsible for negotiating employment contracts in the public sector (ARAN) and by the trade union organisations for university staff. That draft agreement contained specific rules for associates and linguistic experts (former assistants) in order to 'comply with the judgment delivered by the Court of Justice on 26 June 2001 in Case C-212/99'.

13 Since it considered that those measures did not demonstrate that the infringement had been remedied, on 30 April 2003 the Commission sent the Italian Republic a reasoned opinion in which it concluded that, by failing to take all the measures necessary to comply with the judgment in Case C-212/99 *Commission* v *Italy*, that Member State had failed to fulfil its obligations under Article 39 EC. The Commission drew the attention of that Member State to the fact that, if the dispute were brought before the Court, it would seek an order for a penalty payment. Further, the Italian Republic was required to adopt the necessary measures to comply with the reasoned opinion within two months of its notification.

14 In response to that reasoned opinion, the Italian Government sent the Commission a number of documents, including, inter alia, letters of 16 June and 12 November 2003, which, respectively, provided the Commission with the final version of the CCNL, signed on 13 May 2003, and notified it of the measures the competent authorities intended to take shortly thereafter. On 28 January 2004, that government sent the Commission a copy of Decree-Law No 2/2004.

15 It was in those circumstances that the Commission, taking the view that the Italian Republic had not fully complied with the judgment in Case C-212/99 *Commission* v *Italy*, decided to bring the present action.

Failure to fulfil obligations

Arguments of the parties

16 The Commission points out that Article 22(3) of the final version of the CCNL states that 'upon further negotiation, the judgment delivered by the Court of Justice

... on 26 January 2001 in Case C-212/99 ... will be given effect ... by the drawing up of a salary scale which will taken into account experience acquired in respect of the category of [associates and linguistic experts]'. For the Commission, that final version does not itself identify a category of workers whose functions can be regarded as equivalent to those exercised by former assistants.

17 The Commission states, further, that Decree-Law No 2/2004 treats former assistants in the same way as part-time tenured researchers. However, a full-time, foreign-language assistant should receive treatment equivalent to that of a full-time tenured researcher, if the former is not to be disadvantaged with regard to arrears of salary and retirement pension rights. The fact that former assistants were awarded pay increases with effect from a certain date does not, of itself, mean that discrimination based on nationality has been removed.

18 The Commission submits that the Italian Republic has failed to prove that the universities paid all the arrears of salary and salary increases due or amounts on account of the social security contributions to which former assistants were entitled in view of the teaching hours they had actually worked.

19 The Italian Republic contends that the steps taken must be considered in the light of the Italian system for regulating employment relationships, which is based on collective agreement.

20 According to that Member State, the purpose of Decree-Law No 2/2004 was specifically to deal with the deadlock reached in the collective negotiations within the universities. To that end, that decree-law required the defaulting universities to reconstruct the career of former assistants by taking the remuneration of part-time tenured researchers as their standard of reference.

21 The Italian authorities maintain that the choice of that category of national workers is justified by the fact that it is not possible to treat the functions of a full-time tenured researcher in the same way as those of a former assistant.

22 Firstly, the principal function of researchers is to carry out scientific research, whilst teaching is merely a secondary, marginal feature of their work. To see it otherwise would be to undervalue that part of a university researcher's remuneration that is allocated for scientific research.

23 Secondly, the analogy drawn between former assistants and part-time tenured researchers is essentially based on the fact that the employment relationship between the latter and their employer lacks any exclusivity, which enables such researchers to do other professional work.

24 In the circumstances, compliance with the judgment in Case C-212/99 *Commission* v *Italy* required merely that the collective agreement concluded by the universities in question be supplemented by an additional clause setting out the criteria to ensure that former assistants could retain the rights they had acquired in the course of their earlier employment relationships.

Findings of the Court

25 As a preliminary point, it is to be noted that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations arising under Community law (see, inter alia, Case C-212/99 *Commission* v *Italy,* paragraph 34, and Case C-195/02 *Commission* v *Spain* [2004] ECR I-7857, paragraph 82).

26 The Italian Republic's argument that the problem of recognition of rights acquired by former assistants must be considered in the light of the Italian system for regulating employment relationships, which is based on collective agreement, cannot, therefore, be accepted.

27 Further, according to settled case-law, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 30, and Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 20).

28 In the present case, it is common ground that, on the date of expiry of the period prescribed in the reasoned opinion of 30 April 2003, the Italian Republic had not yet taken all of the measures necessary to comply with the judgment in Case C-212/99 *Commission* v *Italy*.

29 As is clear from paragraphs 21 and 22 of the judgment in Case C-212/99 *Commission* v *Italy*, the principle of equal treatment laid down by Article 39 EC required that, where former assistants who have been employed under a fixed-term contract have that contract replaced by one of indeterminate duration, they should retain all the rights acquired from the date of their original recruitment. That guarantee had consequences not only with regard to increases in salary, but also with regard to seniority and to payment by the employer of social security contributions.

30 It is apparent from the file that, by way of compliance with the judgment in Case C-212/99 *Commission* v *Italy*, as an initial step, the Italian Republic implemented the following measures:

— at the University of Milan, a collective agreement concerning associates and linguistic experts, signed on 27 November 1999, provided that work done by the

latter as foreign-language assistants was to be taken into account for the purposes of determining their remuneration. Subsequently, by letter of 7 May 2002, that university informed the Italian Government that the remuneration of associates and linguistic experts had been increased and that arrears of salary had been calculated on the basis of a maximum of 450 teaching hours per year;

— at the University of Pisa, by decision of the Administrative Director of 13 March 2002 and of the Rector of 10 May 2002, former assistants were to receive arrears of salary on the basis of three seniority increments;

— on 17 May 2002, a decision of the Administrative Director of 'La Sapienza' University in Rome established that the seniority of former assistants had been calculated on the basis of an annual teaching commitment of 400 hours;

— the University of Palermo announced, by letter of 27 May 2002, that it intended to bring up to date the remuneration of former assistants on the basis of calculations that remained to be completed;

— by decision of the Rector of the Eastern University Institute in Naples of 20 May 2002, associates and linguistic experts received arrears of salary calculated on the basis of a 318-hour annual teaching commitment;

— a decision of the Administrative Director of the University of La Basilicata of 22 May 2002 provided that the seniority of associates and linguistic experts was to be determined on the basis of five increments and a standard annual teaching commitment of 400 hours.

31 Those measures could not be regarded as either adequately or definitively complying with the judgment in Case C-212/99 *Commission* v *Italy* and the Italian Government itself did not regard them as so doing.

32 Therefore, notwithstanding the measures set out at paragraph 30 above, on the date of the expiry of the period prescribed in the reasoned opinion, the Italian Republic had still not complied with the judgment in question.

33 Since the Commission seeks the imposition of a penalty payment on the Italian Republic, it must be ascertained whether the alleged breach of obligations has continued up to the Court's examination of the facts (see Case C-304/02 *Commission* v *France,* paragraph 31, and Case C-177/04 *Commission* v *France,* paragraph 21).

34 On 14 January 2004, the Italian Republic adopted Decree-Law No 2/2004, the purpose of which was to provide the legal and financial framework necessary finally to enable each of the universities in question to reconstruct precisely the career of former assistants.

35 The legal framework laid down by Decree-Law No 2/2004 is based on two principles, under which, save where more advantageous treatment may be afforded:

— the reconstruction of the career of former assistants was to be effected by taking the remuneration of part-time tenured researchers as the standard of reference;

— that remuneration was to be granted to former assistants on a pro rata basis according to the number of hours worked and on the basis that full-time employment was equal to 500 teaching hours a year.

36 The criterion of 500 hours per year is based on the number of hours worked by associates and linguistic experts (former assistants) as provided for under the CCNL for the period 1994 to 1997. It is an objective criterion which makes it possible to deal with the difficulties inherent in assessing the careers of all former assistants on a case by case basis. In that connection, it is sufficient to note that not all of the universities indicated that they had collective agreements setting out the criteria necessary for the precise reconstruction of the career of former assistants.

37 As to the choice of part-time tenured researchers as the appropriate national reference category of national workers for reconstructing the career of former assistants, such a choice is a matter for the national authorities. It does not follow from the judgment in Case C-212/99 *Commission* v *Italy* that the Italian Republic was required to identify a category of workers comparable to former assistants and to treat the latter in exactly the same way as that category of workers.

38 In the light of the foregoing, the Court is not able, on the basis of the information provided by the Commission, to establish that the criteria set out at paragraphs 36 and 37 above are inadequate, particularly so since it would appear that the application of those criteria does not, in certain cases, preclude the career of a former assistant from being reconstructed on more advantageous terms.

39 Decree-Law No 2/2004 cannot therefore be regarded as having provided an incorrect legal framework for the purposes of enabling each of the universities in question to reconstruct precisely the career of former assistants.

40 It remains to be ascertained whether the measures taken by the universities in question after the adoption of Decree-Law No 2/2004 achieved the declared objectives.

41 According to settled case-law, it is for the Commission to provide the Court, in the course of these proceedings, with the information necessary to determine the extent to which a Member State has complied with a judgment declaring it to be in breach of its obligations (Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraph 73). Moreover, where the Commission has adduced sufficient evidence to show that the breach of obligations has persisted, it is for the Member State concerned to challenge in substance and in detail the information produced and its consequences (Case C-304/02 *Commission* v *France*, paragraph 56).

42 In addition to the statements by the universities in question confirming that the acquired rights of former assistants had been fully recognised, the Italian Government produced detailed tables relating to how such recognition had been put into effect in each of those universities.

43 Admittedly, the payment declarations in the file were produced by the universities and not by the parties entitled and, in the case of the Eastern University Institute in Naples, payment was to be made at a date after the month in which the declaration itself was drawn up (October 2004).

44 However, the information provided to the Court does not call into question the facts set out at paragraph 42 above.

45 Accordingly, the Court does not have sufficient information to permit it to find that, on the date of the Court's examination of the facts, the breach of obligations persisted.

46 The imposition of a penalty payment is not, therefore, justified.

47 In the light of the foregoing, the Court finds that, by not ensuring, at the date of expiry of the period prescribed in the reasoned opinion, recognition of the rights acquired by former assistants who have become associates and linguistic experts, even though such recognition is guaranteed to all national workers, the Italian Republic has failed to take all the measures necessary to comply with the judgment in Case C-212/99 *Commission* v *Italy* and has therefore failed to fulfil its obligations under Article 228 EC.

Costs

48 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 in the successful party's pleadings. Since the Commission applied for costs and the Italian Republic's failure to fulfil its obligations has been established, the latter must be ordered to pay the costs.

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

1. **By not ensuring, at the date of expiry of the period prescribed in the reasoned opinion, recognition of the rights acquired by former assistants who have become associates and linguistic experts, even though such recognition is guaranteed to all national workers, the Italian Republic has failed to take all the measures necessary to comply with the judgment of 26 June 2001 in Case C-212/99 *Commission* v *Italy* and has therefore failed to fulfil its obligations under Article 228 EC.**

2. **Dismisses the action as to the remainder.**

3. **Orders the Italian Republic to pay the costs.**

[Signatures]