JUDGMENT OF THE COURT (Seventh Chamber)

15 May 2008 *

In Case C-276/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Corte d'appello di Firenze (Italy), made by decision of 18 May 2007, received at the Court on 11 June 2007, in the proceedings

Nancy Delay

v

Università degli studi di Firenze,

Istituto nazionale della previdenza sociale (INPS),

Repubblica italiana,

THE COURT (Seventh Chamber),

composed of U. Lõhmus, President of the Chamber, J.N. Cunha Rodrigues (Rapporteur) and A. Arabadjiev, Judges,

* Language of the case: Italian.

Advocate General: J. Mazák,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 6 March 2008,

after considering the observations submitted on behalf of:

— Ms Delay, by L. Picotti, avvocato,

— the Università degli studi di Firenze, by R. de Angelis and S. de Felice, avvocatesse,

— the Istituto nazionale della previdenza sociale (INPS), by L. Maritato, A. Coretti and F. Correra, avvocati,

— the Italian Republic, by I.M. Braguglia, acting as Agent, and S. Fiorentino, avvocato dello Stato,

— the Commission of the European Communities, by E. Traversa and L. Pignataro, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 39 EC.

2 The reference was made in the course of proceedings between Ms Delay and the Università degli studi di Firenze (University of Florence), the Istituto nazionale della previdenza sociale (INPS) (National Institute of social insurance) and the Italian Republic concerning the recognition of her rights acquired while performing the duties of an exchange assistant.

Legal context

The relevant provisions of national law

3 In the Italian legal order there exists a special category of foreign-language teachers, commonly known as 'exchange assistants', governed by cultural agreements between the Kingdom of Belgium and the Italian Republic, and by Law No 62 of 24 February 1967 (GURI No 65 of 13 March 1967, 'Law No 62/1967').

4 Article 24 of Law No 62/1967 provides:

'1. In accordance with duly ratified cultural agreements, annual appointments, renewable in subsequent years, may be conferred on foreign nationals in derogation from the last subparagraph of Article 13 of Law No 349 of 18 March 1958, corresponding to posts for tenured assistants.

2. The appointment shall be made by decision of the Rector, after deliberation by the Faculty and School, on a proposal by the professor holding the relevant chair who shall select from a list drawn up by the authorities of the country of origin.

3. The documents usually required shall be replaced by statements by the competent diplomatic authorities certifying that the person selected satisfies all the conditions, including possession of diplomas, required for the post of university assistant in the competent country of origin.

4. Foreign nationals may be appointed, in accordance with the same rules as in the subparagraphs above, and again in accordance with duly ratified cultural agreements, to special posts of foreign-language and foreign-literature and -language assistant in addition to tenured assistant posts. Appointment to such posts shall be subject to authorisation by the Minister for public education.

...'

5 Article 28 of Presidential Decree No 382 of 11 July 1980 (ordinary supplement to GURI No 20 of 31 July 1980, 'DPR No 382/80') stated:

'Within the funding limits laid down …, Rectors may engage on contracts governed by private law, upon reasoned proposals from the faculty concerned in order to meet the actual needs for practice of students attending language courses, if necessary not covered by specific international agreements, assistants of foreign mother tongue of proved and recognised competence, verified by the faculty, the number of such assistants not exceeding the ratio of 1 assistant to 150 students actually attending the course. …

The contracts referred to in the first paragraph may not be extended beyond the academic year for which they are concluded and may be renewed annually for a maximum period of five years. …'

6 In response to the judgments in Case 33/88 *Allué and Coonan* [1989] ECR 1591 and in Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, the Italian Republic adopted Decree-Law No 120 of 21 April 1995, converted into Law No 236 of 21 June 1995 (GURI No 143 of 21 June 1995, p. 9) ('Law No 236/95'), the purpose of which was to reform foreign-language teaching in Italian universities.

7 Law No 236/95 laid down four fundamental rules:

(a) the post of foreign-language assistant, as established by Article 28 of DPR No 382/80, was abolished and replaced by that of 'associate and mother-tongue linguistic expert' ('linguistic associate');

(b) linguistic associates are to be engaged by universities on the basis of an employment contract governed by private law (and no longer on a self-employed basis), usually concluded for an indeterminate period and, in exceptional circumstances, in order to meet temporary requirements, for a fixed term;

(c) linguistic associates are to be engaged following a public selection procedure, the detailed rules of which are laid down by universities according to their respective statutes;

(d) those who were previously foreign-language assistants, and persons who have reached the end of their contract, unless the non-renewal of the contract is due to the person's lack of aptitude or to the removal of the post, are entitled to a preferential right of employment and, in addition, they retain, under Article 4(3) of Law No 236/95, the rights acquired in the course of previous employment relationships.

8 Article 1(1) of Decree-Law No 2 of 14 January 2004 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) provides:

'In compliance with the judgment delivered by the Court of Justice … on 26 June 2001 in Case C-212/99 [*Commission* v *Italy* [2001] ECR I-4923], the financial treatment of linguistic associates, former foreign-language assistants … at the universities of La Basilicata, Milan, Palermo, Pisa, "La Sapienza" in Rome, and the Eastern

University Institute in Naples … 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, with effect from the original date of recruitment, save where more advantageous treatment may be afforded; …'

9 Article 2 of Law No 230 of 18 April 1962 on the regulation of fixed-term contracts (GURI No 125 of 17 May 1962, 'Law No 230/62'), applicable to all Italian workers whose employment relationship is governed by contracts under private law, provides that, 'if the employment relationship continues after the date of expiry originally fixed or if the period is subsequently extended, the contract of employment shall be deemed to be a contract for an indeterminate period from the date on which the worker was first employed'.

10 It is apparent from the decision for reference that the category of exchange assistants has never been abolished.

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

11 Ms Delay, a Belgian citizen, was employed as an exchange assistant by the Università degli Studi di Firenze from 1 November 1986 to 31 October 1994 under fixed-term contracts successively renewed. She had first taken part in a competition organised by the General Commissariat for International Relations in Brussels for French-language and -literature assistants. Then, Ms Delay having being successful, her curriculum vitae was sent to the university in question, together with the names of other successful candidates, so that the university should choose an exchange assistant.

12 On 31 October 1994 her contract was not renewed, her name no longer appearing in the list supplied to the Università degli studi di Firenze by the Belgian authorities.

13 On 28 December 1994, after two months without working, Ms Delay concluded with that same university a contract for an indefinite period governed by Law No 236/95 applicable, from 1 January 1994, to linguistic associates.

14 Although her duties were similar, the remuneration payable under the new system was less than that previously received by Ms Delay. Upon its proving impossible to reach any agreement with the Università degli studi di Firenze, the applicant brought an action before the Tribunale di Firenze (District Court, Florence) on 21 July 2003 claiming, in particular, that her contract should be recognised as having been for an indefinite period since 1 November 1986, that is to say, from the beginning of her employment relationship with the Università degli studi di Firenze. In essence, she claimed to be entitled to be covered by the rules laid down in Decree-Law No 2 of 14 January 2004 on the recognition of the rights acquired by former foreign-language assistants.

15 The Tribunale di Firenze dismissed her action, taking the view, in particular, that exchange assistants formed a category quite separate from that of foreign-language assistants, remaining subject to special legislation.

16 Ms Delay brought an appeal against that judgment before the Corte d'appello di Firenze (Court of Appeal, Florence) which, considering that it was not clear that the

principles set out by the Court in its judgment in Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885 had been observed in the case of exchange assistants, has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'On a proper construction of Article 39 [EC] and secondary acts (in particular, the interpretations given in Case C-212/99 [*Commission* v *Italy*] and Case C-119/04 [*Commission* v *Italy*]), are the rules valid which are applied to so-called "exchange assistants", who were previously bound by fixed-term contracts (under Law No 62/1967), and who, when such contracts are replaced by contracts of indefinite duration, are not guaranteed the protection of all their rights from the date of their original recruitment, in respect not only of salary increases but also of seniority and the payment by the employer of social security contributions?'

Concerning the question referred for a preliminary ruling

17 By this question the national court seeks, in substance, to ascertain whether it is contrary to Article 39 EC that, when a fixed-term contract of employment as an exchange assistant is replaced by a contract of employment for an indefinite period as a linguistic associate, a person in the position of the applicant in the main proceedings should be refused recognition of the rights acquired since the date of her first recruitment, with consequences with regard to remuneration, the account to be taken of seniority and the payment, by the employer, of contributions to a social security scheme.

18 It is to be borne in mind that, as provided for by Article 39(2) EC, freedom of movement for workers entails 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.

19 The principle of equal treatment, of which Article 39 EC is a specific expression, requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such treatment is objectively justified (see, in particular, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56).

20 For it to be found that Ms Delay has been subject to discriminatory treatment it is therefore necessary to establish whether an Italian worker placed in a situation comparable to that of the applicant in the main proceedings would have been entitled to recognition of his rights acquired since the date of his first recruitment.

21 It is important to observe that, when a national worker whose employment relationship is governed by private law is entitled, by virtue of Law No 230/62, to have his fixed-term employment contract converted into one for an indefinite period, all his acquired rights are guaranteed from the date of his original recruitment. That guarantee has 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.

22 The Court has previously held that Law No 230/62 must serve as a measure of comparison to determine whether the new system applying to former foreign-language assistants is similar to the general system applying to the national workforce or whether, on the contrary, it affords them a lower level of protection (Case C-212/99 *Commission* v *Italy*, paragraph 25).

23 If national workers are entitled, under Law No 230/62, to reinstatement from the point of view of increases in salary, seniority and the payment by the employer of social security contributions, from the date of their original recruitment, former foreign-language assistants who have become linguistic associates must also be entitled to similar reinstatement with effect from the date of their original recruitment (Case C-212/99 *Commission* v *Italy*, paragraph 30).

24 It has, however, to be borne in mind that application of Law No 230/62 to national workers presupposes continuance of the employment relationship between employer and workers.

25 The documents submitted to the Court show that Ms Delay's contract of employment as an exchange assistant expired on 31 October 1994 and that her contract of employment as a linguistic associate was not concluded until 28 December, two months later.

26 It is for the national court, which alone has jurisdiction to assess the facts and to interpret the national legislation, to determine whether there exists any continuity linking the duties performed by Ms Delay as an exchange assistant in the service of the Università degli studi di Firenze and those entrusted to her as a linguistic associate by that university.

27 In carrying out that assessment, the national court must determine, first, whether the duties involved in the work carried out by exchange assistants are the same as those involved in the work carried out by linguistic associates, having particular regard to

the definition of the pedagogical profile of the foreign-language teaching courses and to the evaluation of the students' knowledge and, second, whether the two kinds of duties in question meet the same teaching needs of Italian universities.

28 If the national court should find that there is continuity linking the duties of an exchange assistant and those of a linguistic associate performed by Ms Delay, despite the temporary interruption of the employment relationship with her employer, it would be necessary to consider whether a national worker placed in a comparable situation would have been entitled, pursuant to Law No 230/62, to the recognition of rights acquired since the date of his first recruitment.

29 So far as more particularly concerns the effects of an interruption of the employment relationship, it is to be emphasised that, in paragraph 28 of its judgment in Case C-212/99 *Commission* v *Italy*, the Court held that only an analysis concentrating on the substance, rather than the form, of statutory schemes will make it possible to establish whether their actual application to different categories of workers in comparable legal situations leads to situations which are compatible or, in contrast, incompatible with the fundamental principle of non-discrimination on grounds of nationality.

30 Having regard to all the foregoing considerations, the reply to be given to the question referred must be that it is contrary to Article 39(2) EC that, when a fixed-term contract of employment as an exchange assistant is replaced by a contract of employment for an indefinite period as a linguistic associate, a person in the position of the applicant in the main proceedings should be refused recognition of the rights acquired since the date of her first recruitment, with consequences with regard to remuneration, the account to be taken of seniority and the payment, by the employer, of contributions to a social security scheme, inasmuch as a national worker placed in a comparable situation would have been entitled to such recognition. It is for the national court to ascertain whether that is so in the case in the main proceedings.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Seventh Chamber) hereby rules:

It is contrary to Article 39(2) EC that, when a fixed-term contract of employment as an exchange assistant is replaced by a contract of employment for an indefinite period as a linguistic associate, a person in the position of the applicant in the main proceedings should be refused recognition of the rights acquired since the date of her first recruitment, with consequences with regard to remuneration, the account to be taken of seniority and the payment, by the employer, of contributions to a social security scheme, inasmuch as a national worker placed in a comparable situation would have been entitled to such recognition. It is for the national court to ascertain whether that is so in the case in the main proceedings.

[Signatures]