JUDGMENT OF THE COURT (Fourth Chamber)

15 April 2010 *

In Case C-542/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 12 November 2008, received at the Court on 4 December 2008, in the proceedings

Friedrich G. Barth

v

Bundesministerium für Wissenschaft und Forschung,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, C.W.A. Timmermans (Rapporteur), P. Kūris and L. Bay Larsen, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 4 February 2010,

after considering the observations submitted on behalf of:

— Dr Barth, by R. Laurer and K.-A. Arlamovsky, Rechtsanwälte,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Czech Government, by M. Smolek, acting as Agent,

— the French Government, by G. de Bergues, B. Cabouat and A. Czubinski, acting as Agents,

— the Italian Government, by I. Bruni, acting as Agent, and by F. Arena, avvocato dello Stato,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the European Commission, by V. Kreuschitz and G. Rozet, 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 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) and the principle of effectiveness.

2 The reference has been made in the context of proceedings between Dr Barth and the Bundesministerium für Wissenschaft und Forschung (Austrian Federal Ministry of Science and Research) concerning a decision by which Dr Barth's application for a special length-of-service increment was in part time-barred.

Legal context

Community legislation

3 Pursuant to Article 7(1) of Regulation No 1612/68:

'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.'

National legislation

4 The Law on Salaries of 1956 (Gehaltsgesetz 1956, 'GehG'), as amended by the law published in the BGBl. I, No 109/1997, provides in Paragraph 50a(1):

'A university professor … who has completed 15 years service in that capacity in Austrian universities … and who for four years has been in receipt of the length-of-service increment provided for in Paragraph 50(4) shall be eligible, with effect from the date on which those two conditions are fulfilled, for a special length-of-service increment to be taken into account in the calculation of his retirement pension, the amount of which shall correspond to that of the length-of-service increment provided for in Paragraph 50(4).'

5 The law published in the BGBl. I, No 130/2003, inserted the following subparagraph 4 in Paragraph 50a of the GehG:

'In calculating the 15 years' service required under subparagraph (1), account shall also be taken of periods effected:

1. after 7 November 1968 in a comparable capacity at a university in a State (or its successor) which is now a Member State of the European Economic Area, or

...'

6 The GehG, in the version applicable at the date of appointment of the applicant in the main proceedings (BGBl. No 318/1973), provides in Paragraph 13b(1):

'An entitlement to benefits shall be time-barred if no claim to that entitlement is made within three years of the date on which the services or activities giving rise to the entitlement were effected.'

7 Pursuant to Paragraph 169a of the GehG, inserted by the Law published in the BGBl. I, No 130/2003:

'1. If a university professor in post or retired or an emeritus university professor has completed periods of service as defined in Paragraph 50a(4), as inserted by the Federal Law published in BGBl. I, No 130/2003, to which regard shall be had henceforth by reason of the said Federal Law, on an application by that person the special length-of-service increment pursuant to Paragraph 50a shall be adjusted accordingly. When the qualifying conditions are satisfied, application may also be made by former university professors; ...

2. Adjustment of the special length-of-service increment pursuant to subparagraph (1) shall take effect retroactively, at the earliest, however, as from 1 January 1994.

3. Applications pursuant to subparagraph (1) shall be admissible if made, at the latest, by 30 June 2004.

4. In relation to entitlements to remuneration and pension arising pursuant to the application of subparagraph (1) in respect of periods prior to 1 July 2004, the period from 30 September 2003 to 30 June 2004 shall not apply for the purposes of the three-year limitation period under Paragraph 13b of the present law …'

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

8 According to the order for reference, the applicant in the main proceedings, a German national, was employed as a university professor from 1 January 1975 to 28 February 1987 at the Johann Wolfgang Goethe University in Frankfurt am Main (Germany). With effect from 1 March 1987 he was appointed to the position of an ordinary university professor at the University of Vienna (Austria). By that appointment, the applicant in the main proceedings also acquired Austrian nationality.

9 Since the period of service completed by Dr Barth at the University of Frankfurt am Main was not taken into account for the purposes of the special length-of-service increment under Paragraph 50a(1) of the GehG, he did not receive that increment.

10 After the Austrian legislature, taking account of the Court's judgment of 30 September 2003 in Case C-224/01 *Köbler* [2003] ECR I-10239, amended the GehG by law published in the BGBl. I, No 130/2003, Dr Barth applied, by letter of 2 March 2004 addressed to the University of Vienna, for the adjustment of his special length-of-service

increment so that account be taken of the period during which he had worked at the University of Frankfurt am Main. The decision issued following that administrative appeal provided in Point 1 that Dr Barth had been eligible for the special length-of-service increment since 1 January 1994 because of the taking into account of that period. However, Point 2 of that decision stated that the adjustment pursuant to Point 1 would take effect for remuneration purposes as from 1 October 2000.

11 In his action before the national court, Dr Barth, who expressly challenges only Point 2 of that decision, does not call into question the date from which it was considered, pursuant to Point 1, that he could claim adjustment of the special length-of-service increment. He argues, in essence, that the application, in Point 2 of the decision, of the limitation rule is not compatible with Community law, in particular, with Article 39 EC.

12 Taking the view that resolution of the dispute before it called for interpretation of Community law, the Verwaltungsgerichtshof (Austrian Administrative Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the application of a limitation rule providing for a time-limit of three years in which to make claims in cases such as that which is the subject of the main proceedings, in which on grounds of a domestic law situation incompatible with Community law, prior to the [judgment in *Köbler*], migrant workers were refused special length-of-service increments, constitute for the purposes of Article 39 EC and Article 7(1) of Regulation … No 1612/68 indirect discrimination against migrant workers or a restriction on the right to freedom of movement for workers guaranteed by those provisions?

(2) If the first question is answered in the affirmative: Do Article 39 EC and Article 7(1) of Regulation … No 1612/68 – in cases such as that which is the subject of the main proceedings – preclude the application of such a limitation rule to claims seeking payment of special length-of-service increments refused to migrant workers prior to [the judgment in *Köbler*] on grounds of a domestic law situation which was incompatible with Community law?

(3) In circumstances such as those at issue in the main proceedings, in relation to claims seeking to enforce an entitlement to length-of-service increments previously denied – contrary to Community law – on the basis of unambiguously worded national legislation, does the principle of effectiveness preclude the application of limitation rules providing for a time-limit of three years in which to bring claims?'

The questions referred

13 By the questions referred, which should be examined together, the national court essentially seeks to ascertain whether European Union law precludes legislation such as that at issue in the main proceedings, making claims for payment of special length-of-service increments – which a worker who had exercised his rights to freedom of movement was denied, prior to the delivery of the *Köbler* judgment, on the basis of a domestic law incompatible with Community law – subject to a three-year limitation period.

14 It should be noted that, in *Köbler*, the Court held essentially that Article 39 EC and Article 7(1) of Regulation No 1612/68 must be interpreted as precluding the grant of a special length-of-service increment which, pursuant to a provision such as Paragraph 50a of the GehG, in the version prior to amendment by the law published in

the BGBl. I, No 130/2003, was given solely to university professors who had served 15 years in Austrian universities.

15 The order for reference states that the Republic of Austria complied with that judgment by inserting in Paragraph 50a of the GehG, by the law published in the BGBl. I, No 130/2003, the subparagraph 4 cited in paragraph 5 of this judgment. The application for the special length-of-service increment further to that legislative amendment is subject, pursuant to Paragraph 13b(1) of the GehG, to a three-year limitation1 period, extended, where appropriate, by the nine-month period referred to in Paragraph 169a(4) of the GehG.

16 In that regard, it should be noted, first, that, in the circumstances of the case in the main proceedings, such a limitation period constitutes a procedural condition governing an action intended to ensure that a right derived by an individual, such as the applicant in the main proceedings, from European Union law is safeguarded. Secondly, the law of the European Union does not regulate the question as to whether the Member States may, in such circumstances, provide for a limitation period.

17 It follows that it is for the domestic legal system of each Member State to lay down such a procedural rule, provided, first, that the rule is not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that it does not render in practice impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness) (see, to that effect, Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 18 and case-law cited).

18 It is therefore in the light of those two principles that it is necessary to consider the questions referred by the national court.

19 In relation to the principle of equivalence, it should be borne in mind that, according to settled case-law, this requires that all the rules applicable to actions apply without distinction to actions alleging infringement of European Union law and to similar actions alleging infringement of national law (Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 33 and case-law cited).

20 In order to determine whether the principle of equivalence has been complied with in the case in the main proceedings, it is therefore necessary to examine whether there exists, in addition to a limitation rule, such as that at issue in the main proceedings, applicable to actions intended to ensure that the rights derived by individuals from European Union law are safeguarded under domestic law, a limitation rule applicable to domestic actions and whether, having regard to their purpose and essential characteristics, the two limitation rules may be considered similar (see, to that effect, Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 49, and *Transportes Urbanos y Servicios Generales*, paragraph 35).

21 It should first be noted that, as is clear from the file submitted to the Court, a limitation rule such as that laid down in Paragraph 13b of the GehG applies both to actions intended to ensure that the rights derived by individuals from European Union law are safeguarded under domestic law and to domestic actions. It thus appears that the limitation rules applicable to each of those two types of action are identical.

22 Moreover, as the governments which submitted observations to the Court also point out, the exception resulting from a provision such as Paragraph 169a(4) of the GehG, enabling the extension of the limitation period by nine months, applies only to actions intended to ensure that the rights derived by individuals from European Union law are safeguarded under domestic law.

23 The applicant in the main proceedings and the European Commission both submit in essence that, pursuant to Paragraph 169a(1) of the GehG, the university professors who have completed their service at least in part in universities of Member States other than the Republic of Austria must, unlike the professors who have spent their whole working life in Austria, make an application for the special length-of-service increment. Such a situation implies that a limitation rule such as that at issue in the main proceedings has a scope of application which is, in the case of actions intended to ensure the rights derived by individuals from European Union law are safeguarded under domestic law, broader than in the case of domestic actions.

24 The applicant in the main proceedings and the Commission claim that the limitation rule has an impact, in respect of professors who have spent their whole working life in Austria, only in specific rare cases where, for example, as a result of an error, elements of the salary of the parties concerned were not granted and those concerned failed in due time to make an application for examination of their situation. By contrast, in respect of professors who have completed their service at least in part in universities of Member States other than the Republic of Austria, the application of the limitation rule is systematic.

25 However, such a factor does not support the conclusion that there are in actual fact two limitation rules which should not be considered similar.

26 As the Austrian, Italian and Polish Governments observe in substance, the need to make an application concerns not only professors who have completed their service at least in part in universities of Member States other than the Republic of Austria, but also professors who have spent their whole working life in Austria and whose special length-of-service increment was not correctly calculated. It follows that the need to make an application applies, in actual fact, to all professors who were subject to an

incorrect application of the legal rules governing the grant of that increment and who would like to have the error rectified, whether it is an error under domestic rules or under legal rules of the European Union, which the competent national authorities should have applied directly.

27 In these circumstances, a limitation rule, such as that applied against the applicant in the main proceedings, cannot be regarded as being contrary to the principle of equivalence.

28 As regards the principle of effectiveness, the Court has stated that it is compatible with European Union law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the individual and the authorities concerned. Such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law. In that regard, a national limitation period of three years appears to be reasonable (see, to that effect, *Aprile*, paragraph 19, and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 32 and case-law cited).

29 Therefore, in the absence of particular circumstances brought to the attention of the Court, a limitation rule such as that applied against the applicant in the main proceedings, providing for a three-year limitation period, which may be extended by nine months, cannot be regarded as being contrary to the principle of effectiveness.

30 That interpretation is not invalidated by the fact that the effects of the *Köbler* judgment date back to the time at which the rule interpreted entered into force, since the effects were not temporally limited by the Court. The application of a procedural rule, such as the limitation period at issue in the main proceedings, must not be confused with a limitation on the effects of a judgment of the Court ruling on a request

for interpretation of a provision of European Union law (see, to that effect, Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 17 and 18).

31 The applicant in the main proceedings and the Commission observe, however, that the Austrian legislature had excluded, by an unambiguous legislative provision, the taking into account of periods of employment completed in universities of Member States other than the Republic of Austria.

32 They argue that university professors who completed periods of service in such universities had to expect, in those circumstances, that their applications for the recognition of those periods for the purposes of the special length-of-service increment would be unsuccessful. The conduct of the Austrian legislature was therefore such as to deter university professors who were theoretically entitled to that increment from making in due time the application necessary for the right to be implemented.

33 However, it should be noted that European Union Law does not prohibit a Member State from relying on a limitation period to resist an application for a special length-of-service increment, such as that at issue in the main proceedings, which, in breach of provisions of European Union law, was not granted, even if that Member State has not amended the national rules in order to render them compatible with those provisions. The situation will be different only if the conduct of the national authorities, in conjunction with the existence of a limitation period, had the effect of depriving a person of any opportunity of enforcing his rights before the national courts (see, to that effect, *Aprile*, paragraphs 43 and 45).

34 That is not so in the case in the main proceedings.

35 In particular, the application of a limitation period does not altogether deprive a person, such as the applicant in the main proceedings, of the right to obtain an increment which, in breach of provisions of European Union law, had not been granted to him (see, by analogy, Case 309/85 *Barra and Others* [1988] ECR 355, paragraph 19, and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 37).

36 Moreover, it is not apparent from the file submitted to the Court that the fact that the applicant in the main proceedings was made subject to the limitation period was the result of deliberate misrepresentation by the competent national authorities (see, by analogy, Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 34). As the French Government correctly observes, the fact that there was, previously, unambiguous legislation which was contrary to Community law cannot be treated in the same way as misrepresentation, as this would render impossible in circumstances such as those of the main proceedings, contrary to what is apparent from paragraph 33 of this judgment, any application of a limitation period.

37 Finally, in so far as the questions referred for a preliminary ruling also relate to the interpretation of Article 39 EC and Article 7(1) of Regulation No 1612/68, for the same reasons as those set out in paragraphs 21 to 26 of this judgment, applying a limitation period in circumstances such as those in the main proceedings cannot be considered to constitute indirect discrimination against a worker within the meaning of those provisions.

38 The situation of university professors such as the applicant in the main proceedings must be regarded as comparable to that of university professors who have spent their whole working life in Austria and whose special length-of-service increment was not

correctly calculated under provisions of domestic law. It appears that both these categories of university professors are subject to essentially identical treatment.

39 Similarly, it does not appear that applying a limitation period in circumstances such as those in the main proceedings constitutes, by itself, a restriction on the freedom of movement for workers within the meaning of Article 39 EC. When that limitation period is applied, the application has an impact on the possibility of obtaining the special length-of-service increment for a period entirely in the past. It follows that it is not such as to preclude or deter a worker such as the applicant in the main proceedings from exercising his rights to freedom of movement for workers, because the possibility of obtaining that increment in respect of the past is not dependent on the worker's choosing to exercise those rights (see, to that effect, Case C-190/98 *Graf* [2000] ECR I-493, paragraph 24).

40 Furthermore, there is no evidence that applying a limitation period in circumstances such as those of the main proceedings would have been such as to preclude or deter a worker such as the applicant in the main proceedings, at a given time in the past, from exercising his rights to freedom of movement for workers. As is clear from *Köbler*, it was the refusal itself to grant the special length-of-service increment to the person concerned, where he was exercising those rights, which constituted a restriction on freedom of movement for workers within the meaning of Article 39 EC.

41 The answer to the questions referred is therefore that European Union law does not preclude legislation such as that at issue in the main proceedings, making claims for payment of special length-of-service increments – which a worker who had exercised his rights to freedom of movement was denied prior to the delivery of the *Köbler* judgment, on the basis of a domestic law incompatible with Community law – subject to a three-year limitation period.

Costs

42 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 (Fourth Chamber) hereby rules:

European Union law does not preclude legislation such as that at issue in the main proceedings making claims for payment of special length-of-service increments – which a worker who had exercised his rights to freedom of movement was denied prior to the delivery of the judgment of 30 September 2003 in Case C-224/01 *Köbler*, on the basis of a domestic law incompatible with Community law – subject to a three-year limitation rule.

[Signatures]