JUDGMENT OF THE COURT

27 January 2000 *

In Case C-190/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberlandesgericht Linz (Austria) for a preliminary ruling in the proceedings pending before that court between

Volker Graf

and

Filzmoser Maschinenbau GmbH

on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, L. Sevón and R. Schintgen (Rapporteur), Presidents of Chambers, P.J.G.

* Language of the case: German.

Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Graf, by K. Mayr, Secretary of the Kammer für Arbeiter und Angestellte für Oberösterreich,

— Filzmoser Maschinenbau GmbH, by S. Köck and T. Eilmansberger, Rechtsanwälte, Vienna,

— the Austrian Government, by F. Cede, Ambassador in the Federal Ministry of Foreign Affairs, acting as Agent,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor in the same ministry, acting as Agents,

— the Danish Government, by J. Molde, Legal Adviser, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

— the Italian Government, by Professor U. Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, and I.M. Braguglia, Avvocato dello Stato,

— the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, and S. Masters, Barrister,

— the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, acting as Agent, and I. Brinker and R. Karpenstein, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Graf, Filzmoser Maschinenbau GmbH, the Italian Government and the Commission at the hearing on 18 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

Judgment

1 By order of 15 April 1998, received at the Court on 19 May 1998, the Oberlandesgericht Linz (Higher Regional Court, Linz) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC).

2 That question was raised in proceedings between Mr Graf, a German national, and Filzmoser Maschinenbau GmbH ('Filzmoser'), whose registered office is in Wels, Austria, concerning the latter's refusal to pay Mr Graf the compensation on termination of employment to which he claimed entitlement under Paragraph 23 of the Angestelltengesetz (Law on Employees; 'the AngG') when he terminated his contract of employment with Filzmoser in order to go and work in Germany.

National legislation

3 Paragraph 23 of the AngG provides:

'(1) If the employment relationship has continued uninterruptedly for three years, the employee shall be entitled to a compensation payment on termination of that relationship. That payment shall amount to twice the salary due to the employee for the last month's employment and after five years' service shall increase to three times, after ten years' service to four times, after 15 years' service to six

times, after 20 years' service to nine times and after 25 years' service to 12 times the monthly salary....

...

(7) Without prejudice to Paragraph 23a, there shall be no entitlement to compensation if the employee gives notice, leaves prematurely for no important reason or bears responsibility for his premature dismissal.

...'

4 Paragraph 23a of the AngG has no bearing on the main proceedings.

The main proceedings

5 By letter of 29 February 1996, Mr Graf terminated the contract of employment which he had had with Filzmoser since 3 August 1992, in order to move to Germany and take up new employment in that country from 1 May 1996 with G. Siempelkamp GmbH & Co., whose registered office is in Düsseldorf.

6 Filzmoser refused, on the basis of Paragraph 23(7) of the AngG, to pay Mr Graf the compensation on termination of employment equal to two months' salary which he was claiming from it under Paragraph 23(1). Mr Graf thereupon brought proceedings against his former employer before the Landesgericht Wels (Regional Court, Wels) for payment of that compensation, contending in particular that Paragraph 23(7) of the AngG was contrary to Article 48 of the Treaty.

7 By judgment of 4 February 1998 the Landesgericht Wels dismissed Mr Graf's action, holding, in particular, that Paragraph 23(7) of the AngG was not discriminatory and did not constitute an obstacle prohibited by Article 48 of the Treaty since, first, it did not restrict cross-border mobility to a greater extent than mobility within Austria and, second, the loss of compensation on termination of employment equal to two months' salary was not such as to result in a perceptible restriction on freedom of movement for workers, as stated by the Court in Case C-415/93 *Union Royal Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921.

8 The Landesgericht also found that the provision at issue in the main proceedings served in particular to provide maintenance and temporary assistance and thus pursued legitimate social-policy objectives, so that it was in any event justified by overriding reasons in the public interest. In this connection, it observed in particular that, where an employer terminated a contract of employment, the employee found himself, through no fault of his own and very often to his complete surprise, in a situation where temporary assistance was needed, whereas an employee who voluntarily gave up his job by giving notice himself could plan for the resulting consequences.

9 Mr Graf appealed against the judgment of the Landesgericht Wels to the Oberlandesgericht Linz, before which he amplified the arguments already rejected at first instance with the submission that it could not be inferred from the judgment in *Bosman*, cited above, that a restriction on freedom of movement

had to be 'perceptible' in order to be prohibited by Article 48 of the Treaty. He also disputed the validity of the social-policy grounds adopted by the Landesgericht to justify payment of compensation on loss of employment, at any rate so far as concerns the loss of compensation entitlement by virtue of Paragraph 23(7) of the AngG.

10 The Oberlandesgericht Linz found first of all that there was no case-law of the Court of Justice relating to a comparable set of facts, that while the arguments of the parties were irreconcilable they all appeared cogent at first sight, that the Landesgericht reached its decision only after careful and detailed assessment, and that in the most recent legal literature published in Austria the view had almost unanimously been taken that the loss of compensation on termination of employment when the employee himself gave notice was irreconcilable, or at least difficult to reconcile, with the principle of freedom of movement.

11 It then expressed doubts that social-policy objectives, however legitimate they might be, or overriding reasons in the public interest could, in view of the case-law of the Court of Justice on the principle of proportionality, justify an exclusion from entitlement to compensation on termination of employment as broad and general as that laid down in Paragraph 23(7) of the AngG. It held that the line of argument of the court at first instance was founded in that regard on incomplete and incorrect premisses. It was not evident that every termination of a contract by an employer took the employee by surprise and occurred through no fault of his own. Conversely, all sorts of circumstances relating to the undertaking, whether or not the employer was responsible for them, could equally prompt an employee who was long-serving and therefore entitled to a large amount of compensation on termination of employment to change jobs without him necessarily being at fault. Finally, there were terminations which were not decisively influenced by either the employee or the employer but were brought about by outside factors affecting one or other of the parties to the contract of employment.

12 The Oberlandesgericht Linz considered, finally, that the import of *Bosman* for labour law in general was no longer clear either, given in particular that in that

case the Court had, on the one hand, accepted broad grounds of justification for restrictions, including non-economic grounds, but had, on the other, referred to the very general formulations used in Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119 and Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663. It therefore decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Does Article 48 of the EC Treaty preclude national provisions under which an employee who is a national of a Member State is not entitled to compensation on termination of his employment relationship simply because he himself gave notice terminating that relationship in order to take up employment in another Member State?'

Consideration of the question submitted

13 By its question, the national court essentially asks whether Article 48 of the Treaty precludes national provisions which deny a worker entitlement to compensation on termination of employment if he terminates his contract of employment himself in order to take up employment in another Member State, when those provisions grant him entitlement to such compensation if the contract ends without the termination being at his own initiative or attributable to him.

14 First, it must be borne in mind that Article 48(2) of the Treaty expressly provides that 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. In addition, according to the Court's case-law, the rule of equal treatment,

laid down in Article 48, prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result (see, in particular, Case C-350/96 *Clean Car Autoservice* v *Landeshauptmann von Wien* [1998] ECR I-2521, paragraph 27).

15 Legislation such as that at issue in the main proceedings applies irrespective of the nationality of the worker concerned.

16 Moreover, legislation of that kind denies compensation on termination of employment to all workers who end their contract of employment themselves in order to take up employment with a new employer, regardless of whether the latter is established in the same Member State as the previous employer or in another Member State. In those circumstances, it cannot be maintained that such legislation affects migrant workers to a greater extent than national workers and that it might therefore place at a disadvantage the former in particular.

17 Furthermore, as the national court expressly stated in its order for reference, there is nothing on the file to indicate that such legislation operates to the disadvantage of a particular group of workers wishing to take up new employment in another Member State.

18 Second, it is clear from the Court's case-law, in particular from the judgment in *Bosman*, cited above, that Article 48 of the Treaty prohibits not only all discrimination, direct or indirect, based on nationality but also national rules

which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement.

19 According to Mr Graf, the loss of compensation on termination of employment where the worker himself terminates the contract constitutes such an obstacle to freedom of movement for workers, comparable to the obstacle which was at issue in *Bosman*. In his submission, it is largely immaterial in this connection whether the worker suffers a financial loss because he changes employer or the new employer is required to make a payment in order to take him on.

20 By contrast, the other parties who have submitted observations to the Court maintain that national legislation applicable irrespective of the nationality of the workers concerned which is liable to dissuade the latter from deciding to exercise their right to freedom of movement does not necessarily constitute an obstacle to freedom of movement for workers.

21 In that regard, the Court has held on numerous occasions that the Treaty provisions relating to freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, in particular, *Bosman*, cited above, paragraph 94, and Case C-18/95 *Terhoeve* v *Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345, paragraph 37).

22 Nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity (see, in particular, *Bosman*, paragraph 95, and *Terhoeve*, paragraph 38).

23 Provisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom. However, in order to be capable of constituting such an obstacle, they must affect access of workers to the labour market.

24 Legislation of the kind at issue in the main proceedings is not such as to preclude or deter a worker from ending his contract of employment in order to take a job with another employer, because the entitlement to compensation on termination of employment is not dependent on the worker's choosing whether or not to stay with his current employer but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him.

25 Such an event is too uncertain and indirect a possibility for legislation to be capable of being regarded as liable to hinder freedom of movement for workers where it does not attach to termination of a contract of employment by the worker himself the same consequence as it attaches to termination which was not at his initiative or is not attributable to him (see to that effect, with regard to the free movement of goods, in particular Case C-69/88 *Krantz* v *Ontvanger der Directe Belastingen* [1990] ECR I-583, paragraph 11, and Case C-44/98 *BASF* v *Präsident des Deutschen Patentamts* [1999] ECR I-6269, paragraphs 16 and 21).

26 In view of all the foregoing considerations, the answer to the question submitted must be that Article 48 of the Treaty does not preclude national provisions which

deny a worker entitlement to compensation on termination of employment if he terminates his contract of employment himself in order to take up employment in another Member State, when those provisions grant him entitlement to such compensation if the contract ends without the termination being at his own initiative or attributable to him.

Costs

27 The costs incurred by the Austrian, Danish, German, Italian and United Kingdom Governments and by the Commission, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Oberlandesgericht Linz by order of 15 April 1998, hereby rules:

Article 48 of the EC Treaty (now, after amendment, Article 39 EC) does not preclude national provisions which deny a worker entitlement to compensation

on termination of employment if he terminates his contract of employment himself in order to take up employment in another Member State, when those provisions grant him entitlement to such compensation if the contract ends without the termination being at his own initiative or attributable to him.

Rodríguez Iglesias		Moitinho de Almeida
Sevón	Schintgen	Kapteyn
Gulmann	Puissochet	Hirsch
Jann	Ragnemalm	Wathelet

Delivered in open court in Luxembourg on 27 January 2000.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President