JUDGMENT OF THE COURT (Second Chamber)

26 October 2006 *

In Case C-371/04,

Action under Article 226 EC for failure to fulfil obligations, brought on 30 August 2004,

Commission of the European Communities, represented by M.G. Rozet and A. Aresu, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kūris, J. Klučka (Rapporteur) and G. Arestis, Judges,

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 March 2006,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to take account of the professional experience and seniority gained in another Member State by a Community worker employed in the Italian civil service, the Italian Republic has failed to fulfil its obligations under Articles 10 EC and 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) ('the Regulation').

Legal context

2 Article 7(1) of the Regulation states:

'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.'

Pre-litigation procedure

3 Following a complaint, the Commission asked the Italian Republic, by letter of 18 December 2001, for information on the situation of a Community national who had taught in a French State School, under an employment contract with a comitato d'assistenza scolastica italiana (Committee of Italian School Support, 'Coascit'), and whose professional experience or seniority gained in France were not taken into account, subsequently, in Italy. That request has remained unanswered.

4 By letters of 25 March and 12 August 2002, the Commission asked the Italian Republic once again for information on the situation of the aforementioned national as well as on that of other complainants facing similar problems concerning failure to take into account professional experience or seniority gained in another Member State. It asked more generally for information concerning the Italian legislation and administrative practice on the subject.

5 In the absence of a response to its requests and after having, on 19 December 2002, given the Italian Republic formal notice to submit its observations, the Commission, on 15 May 2003, delivered a reasoned opinion requesting Italy to take the measures necessary to comply with it within two months of its notification.

6 Not being satisfied with the response to that opinion, the Commission brought the present action.

The action

7 In support of its action, the Commission puts forward two complaints, one alleging infringement of Article 10 EC and the other infringement of Article 39 EC and Article 7(1) of the Regulation.

The complaint alleging infringement of Article 10 EC

8 It is appropriate at the outset to note that the Court may of its own motion examine whether the conditions laid down in Article 226 EC for bringing an action for failure to fulfil obligations are satisfied (see, inter alia, Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 8; Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, paragraph 8; and Case C-98/04 *Commission* v *United Kingdom* [2006] ECR I-4003, paragraph 16).

9 In that regard, it is important to note that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission (Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 13, and order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 16). The proper conduct of that procedure thus constitutes an essential guarantee required by the EC Treaty in order to protect the rights of the Member State concerned. It is only when that guarantee is observed that the contentious procedure before the Court can enable it to judge whether that State has in fact failed to fulfil the obligations breach of which the Commission alleges (order in *Commission* v *Spain*, cited above, paragraphs 17 and 18). More specifically, the purpose of the letter of formal notice in the pre-litigation procedure is to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence (Case C-145/01 *Commission* v *Italy* [2003] ECR I-5581, paragraph 17).

10 However, in the present case, the letter of formal notice of 19 December 2002 does not make reference to the complaint alleging infringement of Article 10 EC.

11 It follows that the present action is not admissible in as far as it seeks a declaration that the Italian Republic has failed to fulfil its obligations under that article.

The complaint alleging infringement of Article 39 EC and Article 7(1) of the Regulation

12 In referring to Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47; Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095; Case C-195/98 *Österreischischer Gewerkschaftsbund* [2000] ECR I-10497; and Case C-278/03 *Commission* v *Italy* [2005] ECR I-3747, the Commission submits that the principle of equal treatment of

Community workers, arising from Article 39 EC and Article 7(1) of the Regulation, precludes periods of employment, in a comparable field of activity, completed by one of those workers in one Member State from not being taken into account by the administration of another Member State in the determination of conditions of employment, such as remuneration, grade or promotion prospects, whereas experience gained in the civil service of the second State would be taken into account.

13 In the light of that case-law, it is submitted that the Italian Republic, in the present case, has acted in breach of the provisions in question by failing to take account of the experience or seniority gained in other Member States by workers employed in the Italian civil service, in particular in the public sectors of education and health.

14 The Italian Government argues on the contrary that the obligation for the public authorities of a Member State to recognise, for specified purposes, previous periods of employment in another Member State is subject to two cumulative conditions: first, the fields of the activities pursued in the two States must be comparable and, secondly, the activity pursued in the other Member State must be related to the public service.

15 If a person having pursued his activity in a given public sector was recruited under an employment contract governed by private law, without sitting an open competition, the second condition would not be fulfilled. According to the Italian Government, recognition of professional experience and seniority gained in another Member State by a Community worker subsequently employed in the Italian civil service is subject to recruitment by open competition, as is the case in Italy.

16 In that respect, it follows from settled case-law that, under Article 39 EC, where, in recruiting staff for posts which do not fall within the scope of Article 39(4) EC, a public body of a Member State provides for account to be taken of candidates' previous employment in the public service, that body may not, in relation to Community nationals, make a distinction according to whether such employment was in the Member State of that body or in another Member State (see, inter alia, Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 12; *Commission* v *Italy*, cited above, paragraph 14; and the judgment of 23 February 2006 in Case C-205/04 *Commission* v *Spain*, not published in the ECR, paragraph 14).

17 As regards Article 7 of the Regulation, it must be borne in mind that it constitutes merely the specific expression of the principle of non-discrimination laid down by Article 39(2) EC within the specific field of conditions of employment and work and that it must, therefore, be interpreted in the same way as Article 39 EC (*Commission* v *Spain*, cited above, paragraph 15).

18 It follows from the whole of that case-law that the refusal to recognise the professional experience and seniority gained in the exercise of a comparable activity within the public administration of another Member State by Community nationals employed subsequently in the Italian civil service, on the ground that those nationals would not have sat an open competition prior to working in the public sector of that other State, cannot be allowed, since, as pointed out by the Advocate General in paragraph 28 of her Opinion, not all Member States recruit for all public sector posts by open competition alone. Discrimination can be avoided only if account is taken of comparable periods of employment in another Member State's public sector by a person recruited in accordance with local requirements.

19 Similarly, the fact that a Community national, such as, for example, the one who made the first complaint received by the Commission in the present case, obtained a contract with Coascit has no effect, since it is not disputed that that national

pursued his teaching activity, under such a contract, within the French public service of national education. The Italian Republic has not disputed that that activity was carried out by the national in question in accordance with French national rules.

20 None of the factors put forward by the Italian Government to justify the failure to recognise professional experience and seniority gained by that national in another Member State may therefore be accepted.

21 Accordingly, the complaint alleging infringement of Article 39 EC and Article 7(1) of the Regulation must be regarded as well founded, given that, in respect of jobs not covered by Article 39(4) EC, the Italian Government had not, when the time-limit set in the reasoned opinion expired, taken the necessary measures so that the professional experience and seniority gained in other Member States by Community nationals subsequently employed in the Italian civil service may be recognised.

22 In the light of all the foregoing considerations, it must be declared that, by failing to take account of the professional experience and seniority gained in the exercise of a comparable activity within the public administration of another Member State by a Community worker employed in the Italian civil service, the Italian Republic has failed to fulfil its obligations under Article 39 EC and Article 7(1) of the Regulation.

Costs

23 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 has applied for costs and the Italian Republic has been largely unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by failing to take into account the professional experience and seniority gained in the exercise of a comparable activity within the public administration of another Member State by a Community worker employed in the Italian civil service, the Italian Republic has failed to fulfil its obligations under 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;**

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

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

[Signatures]