JUDGMENT OF THE COURT (Fifth Chamber)
9 November 2000 *

In Case C-126/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Pretore di Torino (Italy) for a preliminary ruling in the proceedings pending before that court between

Roberto Vitari

and

European Training Foundation,

on the interpretation of Article 79 of the Conditions of Employment of other Servants of the European Communities,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

* Language of the case: Italian.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr Vitari, by C. Cotto, of the Turin Bar,

— the European Training Foundation, by E. and M. de la Forest de Divonne, of the Turin Bar,

— the Commission of the European Communities, by G. Valsesia, Principal Legal Adviser, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 6 July 2000,

gives the following

Judgment

1 By order of 30 March 1999, received at the Court on 14 April 1999, the Pretore di Torino (Labour Court, Turin) 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 79 of the Conditions of Employment of other Servants of the European Communities ('the Conditions').

2 That question was raised in proceedings between Mr Vitari and the European Training Foundation ('the Foundation') concerning the ending of their employment relationship.

Legal background

The Community provisions

3 The Foundation, which has its principal office in Turin (Italy), was established by Council Regulation (EEC) No 1360/90 of 7 May 1990 (OJ 1990 L 131, p. 1).

Article 14 thereof, as amended by Council Regulation (EC) No 2063/94 of 27 July 1994 (OJ 1994 L 216, p. 9), provides:

'Staff rules

The staff of the Foundation shall be governed by the rules and regulations applicable to the officials and other servants of the European Communities.

The Foundation shall exercise over its staff the powers devolved to the appointing authority.

The governing board shall, in agreement with the Commission, adopt the appropriate implementing rules.'

4 According to the first paragraph of Article 4 of the Conditions:

'... "[L]ocal staff" means staff engaged according to local practice for manual or service duties, assigned to a post not included in the list of posts...'

5 Article 79 of the Conditions provides:

'... [T]he conditions of employment of local staff, in particular:

(a) the manner of their engagement and termination of their contract;

(b) their leave, and

(c) their remuneration,

shall be determined by each institution in accordance with current rules and practice in the place where they are to perform their duties'.

6 The Foundation has not adopted any specific rules for its local staff but has applied the rules governing the conditions of employment of local staff serving in Italy adopted by the Commission ('the Commission rules'). Article 3 thereof provides that the contract of employment of members of local staff may be concluded either for an indefinite period or for a fixed term, but states that a fixed-term contract may be concluded only on condition 'that the circumstances or the nature of the work require that a fixed term be specified'.

7 Lastly, Article 81(1) of the Conditions provides:

'Any dispute between the institution and a member of the local staff serving in a Member State shall be submitted to the competent court in accordance with the laws in force in the place where the servant performs his duties'.

The national legislation

8 Article 1 of Italian Law No 230 of 18 April 1962 on the rules governing fixed-term employment relationships (GURI No 125 of 17 May 1962), as amended, ('Law No 230/62'), provides that contracts of employment are, in principle, concluded for an indefinite period and authorises a term to be set for the duration of the contract only in the circumstances which it sets out, that is to say, where the worker is engaged:

— to carry out work of a seasonal nature;

— to replace workers who are absent on grounds of sickness, pregnancy, post-partum maternity leave or military service;

— to carry out extraordinary or occasional missions and services;

— for phased work which requires specialist workers;

— for the production of specific entertainments or radio or television programmes, or

— to perform specific airport duties.

9 Article 2 of the same law permits, by way of exception and subject to the worker's prior consent, the fixed-term contract to be extended once only for a period not exceeding the length of the original contract, provided that that extension is made necessary by unforeseeable and contingent circumstances and that it relates to the pursuit of the same activity. If the employment relationship continues beyond the period prescribed, the contract is deemed to have been entered into for an indefinite period starting from the date on which the first fixed-term contract was signed.

10 Specific laws have provided for other situations in which fixed-term contracts may be concluded.

The dispute in the main proceedings

11 After being recruited by the Foundation as a member of the auxiliary staff on a fixed-term contract which was extended once from 16 October 1995 to 29 February 1996, Mr Vitari entered into a fixed-term contract with it as a member of the local staff from 1 March 1996 to 31 December 1996. That

contract was extended until 30 June 1997, the date on which the Foundation considered that its employment relationship with Mr Vitari came to an end.

12 Mr Vitari then brought an action before the Labour Court, Turin, claiming that under Italian law, in particular Law No 230/62, the Foundation could not thus terminate the employment relationship which existed between them, because it had to be regarded as being of indefinite duration as from 1 March 1996, the date on which he was first employed as a member of the local staff.

13 The Foundation, on the other hand, contended that the Italian legislation could not be relied upon as against it since, in accordance with Article 14 of Regulation No 1360/90, as amended, its staff were subject 'to the rules and regulations applicable to officials and other servants of the European Communities'.

14 The Labour Court, Turin, being uncertain as to the relations between national law and the Conditions so far as employment relationships were concerned, and in particular as to the interpretation of Article 79 thereof, decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 79 of Regulation (EEC) No 259/68, as subsequently amended, where it provides that:

"... the conditions of employment of local staff, in particular:

(a) the manner of their engagement and termination of their contract,

(b) their leave, and

(c) their remuneration

shall be determined by each institution in accordance with current rules and practice in the place where they are to perform their duties", be construed as meaning that the European institution is permitted to depart from national legislation, with the consequence that the rules of Community origin alone are applicable, or does it impose compliance with national legislation, particularly if that national legislation is, no matter what the circumstances, mandatory and does not permit any derogation?'

The question

Observations of the parties

15 By its question the national court seeks, essentially, to ascertain whether Article 79 of the Conditions must be interpreted as meaning that it does not preclude the possibility for a Community institution to conclude a fixed-term contract of employment with a member of the local staff, where the national legislation applicable in the State in which that person is called upon to perform his duties requires the conclusion of a contract of employment for an indefinite period.

16 Mr Vitari submits that, having regard to the *renvoi* made in Article 79 of the Conditions to the current rules and practice in the place in which the staff are to perform their duties, the provisions contained in Article 3 of the Commission rules and those in Articles 1 and 2 of Law No 230/62 are complementary. Those provisions specifically restrict the circumstances in which fixed-term contracts of employment may be concluded by the Foundation.

17 The Foundation argues that the question referred by the national court is inapposite, since the Commission rules, as applied in the present case, are compatible with the national legislation on fixed-term contracts of employment. It observes that in Italy that matter is regulated by a multitude of provisions, laid down in both legislation and industrial agreements, which have, from the end of the 1980s onward, considerably liberalised recourse to fixed-term contracts.

18 In the alternative, the Foundation contends that it is clear from the wording of Article 79 of the Conditions that the Community legislature has not required of the institutions strict compliance with the legislation of the Member State in which the local staff perform their duties. On the contrary, it has permitted them, in determining the conditions of employment of such staff, to adopt autonomous rules which must, however, be guided by the principles applicable in the State in which the staff perform their duties.

19 Referring to the Opinion of Advocate General Capotorti in Case 105/80 *Desmedt* v *Commission* [1981] ECR 1701, the Commission stresses the hybrid nature of the rules applicable to local staff, inasmuch as they are derived from both Community and national sources. The function of the national legislation is therefore both to set a limit to the rule-making powers conferred on the Community institutions and to settle all questions which are not covered by the Community rules.

20 None the less, on the basis of Case 232/84 *Commission* v *Tordeur and Others* [1985] ECR 3223, the Commission argues that application of the national provisions must not be allowed to encroach upon the autonomy of the Community institutions. Thus, in its submission, to provide as a sanction for non-compliance with a provision of national law for a contract of employment of indefinite duration to come into existence between the worker engaged for a fixed period and the institution employing him would prejudice the exclusive competence of the appointing authority in the field of recruitment of staff.

Findings of the Court

21 According to Article 3 of the Commission rules, the contracts of members of the local staff performing their duties in Italy must, in principle, be concluded for an indefinite period, and derogations from that principle are permitted only where the circumstances or nature of the work require the setting of a term. In this respect, it is not possible to discern any contradiction between that provision and the relevant provisions of national law, which also favour the conclusion of contracts for an indefinite period.

22 Admittedly, the national legislation to which the national court refers is more precise, in that it expressly sets out the situations in which fixed-term contracts may, by way of exception, be concluded.

23 It may not, however, be concluded from Article 79 of the Conditions that the national law of the State in which a member of the local staff performs his duties is to be applied, as it stands, to the employment relationship between a Community institution and a member of the local staff. That article clearly states that the conditions of employment of local staff are to 'be determined by each institution in accordance with current rules and practice' in the Member State where the worker is to perform his duties, which merely means that the rules adopted by each institution may not conflict with the fundamental rules of the applicable national law.

24 As is clear from paragraph 21 above, Article 3 of the Commission rules is consistent with the basic policy underlying the Italian legislation.

25 In those circumstances, it falls to the national court, in accordance with Article 81(1) of the Conditions, to establish whether the circumstances or nature of the work entrusted to Mr Vitari were such as to justify the conclusion of a fixed-term contract. As Advocate General Ruiz-Jarabo Colomer points out in

section 32 of his Opinion, the order for reference does not in any event contain anything that would enable the Court to provide any assessment in that regard.

26 If the national court should find that Article 3 of the Commission rules has been infringed in the case in the main proceedings, in that the circumstances or nature of the work did not require a term to be set to the contract, it will be for that court to reestablish legality by converting the contract in question, which was concluded for a fixed term, into an employment contract of indefinite duration.

27 Such a consequence resulting from infringement of Article 3 of the Commission rules cannot be regarded as an encroachment upon the sphere of autonomy of the Community institutions, a finding which contrasts with what the Court held in *Tordeur*, cited above, in which the facts were fundamentally different from those in the case in the main proceedings in this instance.

28 In *Tordeur*, the question was whether Community law precludes the application to the Community institutions, when they have recourse to undertakings providing temporary staff, of national legislation which provides that, in the event of infringement of certain of its provisions relating to temporary work, the temporary worker and the user of his services are to be bound by a contract of employment for an indefinite period.

29 The Court held that while a temporary worker cannot be denied social protection solely on the ground that he has been placed at the disposal of a Community institution, such protection cannot be provided by means which encroach upon the sphere of autonomy of the Community institutions (*Tordeur*, paragraph 27).

30 In the case in the main proceedings, it is specifically the Commission rules, applied by the Foundation, which, in Article 3, provide that fixed-term contracts may be concluded with members of the local staff employed in Italy only on condition that the circumstances or nature of the work make it necessary to set a term to the employment relationship.

31 In the light of the foregoing, the answer to be given to the question referred by the national court must be that, on a proper construction of Article 79 of the Conditions, that provision precludes the possibility for a Community institution to conclude a fixed-term contract of employment with a member of its local staff where that is contrary to its own rules applicable to the conditions of employment of local staff and drawn up in accordance with the rules and practice of the State in which the duties are performed. It is therefore for the national court to determine whether, in accordance with Article 3 of the Commission rules, the circumstances surrounding the work, or the nature of that work, made it necessary for the local- staff contract between the parties to the main proceedings to be concluded for a fixed term. If not, it is for the national court to convert that contract into a contract of employment for an indefinite period.

Costs

32 The costs incurred by the Commission, which has 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 (Fifth Chamber),

in answer to the question referred to it by the Pretore di Torino by order of 30 March 1999, hereby rules:

On a proper construction of Article 79 of the Conditions of Employment of other Servants of the European Communities, that provision precludes the possibility for a Community institution to conclude a fixed-term contract of employment with a member of its local staff where that is contrary to its own rules applicable to the conditions of employment of local staff and drawn up in accordance with the rules and practice of the State in which the duties are performed. It is therefore for the national court to determine whether, in accordance with Article 3 of the rules governing the conditions of employment of local staff serving in Italy adopted by the Commission, the circumstances surrounding the work, or the nature of that work, made it necessary for the local-staff contract between the parties to the main proceedings to be concluded for a fixed term. If not, it is for the national court to convert that contract into a contract of employment for an indefinite period.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 9 November 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber