JUDGMENT OF THE COURT (Fifth Chamber)

17 July 2008 *

In Case C-94/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht Bonn (Germany), made by decision of 4 November 2004, received at the Court on 20 February 2007, in the proceedings

Andrea Raccanelli

v

Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV,

THE COURT (Fifth Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet and E. Levits (Rapporteur), Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 10 April 2008,

after considering the observations submitted on behalf of:

— the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, by A. Schülzchen, Rechtsanwalt,

— the Commission of the European Communities, 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 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).

2 The reference has been made in the course of proceedings between Mr Raccanelli and the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV ('MPG') concerning an employment relationship which Mr Raccanelli claims that he entered into with the Max Planck Institute for Radio Astronomy in Bonn ('MPI'), which forms part of MPG.

Legal context

Community legislation

3 Article 1 of Regulation No 1612/68, which appears in Title I, headed 'Eligibility for employment', provides:

'1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

4 Article 7 of Regulation No 1612/68, which appears in Title II, headed 'Employment and equality of treatment', is worded as follows:

'1. 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.

2. He shall enjoy the same social and tax advantages as national workers.

…

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

National legislation

5 According to national legislation, 'BAT/2 employment contract' or 'BAT IIa half-time contract' means a contract entered into on the basis of the IIa grade of the pay scale, as applicable at the material time, of the federal collective agreement for public-sector workers (BAT), and under which the working hours correspond to 50% of a full-time post.

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

6 MPG is established under German private law in the form of an association operating in the public interest. It manages a number of scientific research institutes in Germany and other European States.

7 These research institutes, named 'Max Planck Institutes', conduct basic research in the general interest in the natural sciences, life sciences, the humanities and social sciences.

8 MPG operates two methods of advancement for junior researchers, enabling them, in particular, to prepare a thesis: a grant contract or an employment contract.

9 The main difference between the two means of support for doctoral students is that:

— the recipient of a grant is under no obligation to work for the institute in question, and instead may devote himself entirely to work relating to his thesis, whereas

— the holder of a BAT IIa half-time contract is under an obligation to work for the institute which employs him and may use its facilities for the purposes of his thesis only outside his working hours.

10 Moreover, the two types of contract may also be distinguished from the point of view of the contracting parties' tax obligations and their affiliation to the social security system.

11 Thus, grant recipients are exempt from income tax and are not affiliated to the social security system. By contrast, researchers holding BAT IIa half-time posts are liable to income tax and must pay social security contributions in respect of their employment.

12 In the period from 7 February 2000 to 31 July 2003, Mr Raccanelli, an Italian national, worked at MPI in connection with the preparation of his doctoral thesis. His activities were based on a letter from MPI of 7 February 2000, which was signed by him.

13 By that letter, MPI awarded him a monthly grant for the period from 7 February 2000 to 6 February 2002 to enable him to prepare his doctorate in Germany and abroad on the subject of the 'development of a bolometer camera for wavelengths below 300 μm'.

14 The letter was worded as follows:

'Acceptance of the grant obliges you to dedicate yourself wholly to the objective of the grant. Other activities require the prior consent of the institute's management.

The grant is paid as a contribution to living costs but not as consideration for your scientific work.

Acceptance of the grant does not oblige you to undertake any work as an employee of the Max-Planck-Gesellschaft. Therefore the grant is exempt from income tax under Paragraph 3(44) of the Einkommensteuergesetz [(Law on income tax)] and exempt from tax on wages under Paragraph 6(22) of the Lohnsteuerdurchführungsverord-

nung [(Implementing regulation on tax on wages)] and consequently also exempt from social security contributions.'

15 By a supplementary contract dated 29 November 2001, Mr Raccanelli's 'doctoral student contract' was extended to 6 August 2002, and, subsequently, to 6 May 2003. In respect of the period from 7 May 2003 to 31 July 2003, the parties concluded an agreement on 19 May 2003 which was worded as follows:

'In the period from 7 May 2003 to 31 July 2003 Mr Raccanelli will be here as a guest of our institute. The institute will make an appropriate work place available to him and its operatives will supervise him.

Other facilities are available to him within the limits of the institute's regulations and the applicable provisions; he undertakes to comply with these provisions.

His stay as a guest does not establish any employment relationship and no allowance shall be paid.

…'

16 Mr Raccanelli brought an action before the Arbeitsgericht Bonn (Labour Court, Bonn), primarily for a declaration that there was an employment relationship between him and MPG during the period from 7 February 2000 to 31 July 2003.

17 Mr Raccanelli claims that, during that period, he was treated in the same way as German doctoral students employed under BAT IIa half-time contracts, for whom such contracts (according to Mr Raccanelli) — involving, in particular, the benefit of social-security affiliation — were reserved.

18 MPG rejects those claims.

19 Without ruling on the factual aspect of the contractual relationship between the two parties during the period in question, the referring court proceeds on the basis that the degree of Mr Raccanelli's personal dependency on MPI is not sufficient for there to have been an employment relationship between them.

20 The referring court queries whether, in view of MPG's status as a private-law association, MPG is bound by the principle of non-discrimination as if it were a public-law body.

21 In those circumstances, the Arbeitsgericht Bonn decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should the applicant be regarded as a worker within the meaning of the Community concept of "worker" if he is not called upon to provide any more work-related services than are doctoral students with an employment contract concluded pursuant to the Bundesangestelltentarifvertrag (federal collective agreement for public-sector workers, "BAT/2")?

(2) In the event that the answer to Question 1 is in the negative: must Article 7 of Regulation … No 1612/68 … be interpreted as meaning that there is no discrimination only if the applicant was at least granted the right to choose between an employment contract and a grant before his period of doctoral study with the defendant began?

(3) In the event that the answer to Question 2 is that the applicant should have been granted the opportunity to conclude an employment contract, the question must be asked:

What are the consequences in law in the event of discrimination against foreign nationals?'

The questions referred for a preliminary ruling

Admissibility of the reference for a preliminary ruling

22 MPG submits in its written observations that the reference for a preliminary ruling must be dismissed as inadmissible.

23 According to MPG, the referring court has not established the facts of the dispute between the parties to the main proceedings, and has failed to give reasons to justify the questions raised. Therefore, it argues, the Court does not have the information necessary in order to enable it to reply usefully to those questions.

24 It must be observed in that regard that, according to settled case-law of the Court, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 22, and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 26).

25 Moreover, the information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the Statute of the Court of Justice (order in Case C-422/98 *Colonia Versicherung and Others* [1999] ECR I-1279, paragraph 5, and Case C-20/05 *Schwibbert* [2007] ECR I-9447, paragraph 21).

26 In order to ascertain whether the information supplied by the Arbeitsgericht Bonn satisfies those requirements, the nature and scope of the questions raised have to be taken into consideration (see, to that effect, *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 29).

27 In that regard, it must be noted that the first question referred for a preliminary ruling is stated in very general terms, in that it seeks to obtain an interpretation of the Community concept of 'worker', as referred to in Article 39 EC and Article 7 of Regulation No 1612/68.

28 The questions raised by the Arbeitsgericht Bonn in the alternative concern the principle of non-discrimination under Article 12 EC.

29 However, while there may be gaps in the reference for a preliminary ruling, both in relation to the presentation of the facts of the main proceedings and the grounds for the reference, the Court none the less has sufficient information to enable it to determine the scope of the questions raised and to interpret the Community provisions at issue so as to reply usefully to those questions.

30 Moreover, both the Commission of the European Communities and, to a certain extent, MPG took the view that it was possible to submit written observations to the Court of Justice on the basis of the information provided by the national court.

31 In those circumstances, the reference for a preliminary ruling must be held to be admissible.

Substance

Question 1

32 By its first question, the referring court asks, in essence, whether a researcher in a similar situation to that of the applicant in the main proceedings, that is a researcher preparing a doctoral thesis on the basis of a grant contract concluded with MPG, must be regarded as a worker within the meaning of Article 39 EC if he is called upon to perform as much work as a researcher preparing a doctoral thesis on the basis of a BAT/2 employment contract with MPG.

33 In that regard, it must be noted that the Court has consistently held that the concept of 'worker' within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26; and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15).

34 The applicant in the main proceedings can therefore be acknowledged to have the status of worker only if the referring court, which alone is competent to assess the facts of the case in the main proceedings, were to establish the existence in that

case of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration.

35 Consequently, since the referring court is required to verify the existence of the criteria set out in paragraph 33 of the present judgment, it follows that its examination should cover, inter alia, the substance of the doctoral student contract and of the supplementary contract, and the arrangements for giving effect to those documents.

36 While it must be concluded from the foregoing that Mr Raccanelli's status as a worker, within the meaning of Article 39 EC, must be determined objectively in accordance with the criteria set out in paragraph 33 of the present judgment, it is, by contrast, not possible to draw any conclusion with regard to that status from a comparison of the work of the applicant in the main proceedings and the work carried out or to be carried out by a researcher preparing a doctoral thesis on the basis of a BAT/2 employment contract concluded with MPG.

37 Accordingly, the answer to the first question must be that a researcher in a similar situation to that of the applicant in the main proceedings, that is, a researcher preparing a doctoral thesis on the basis of a grant contract concluded with MPG, must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration. It is for the referring court to undertake the necessary verification of the facts in order to establish whether such is the case in the dispute before it.

Question 2

38 By its second question, the referring court asks, in essence, whether there is no discrimination only if the applicant in the main proceedings was at least granted the right to choose between an employment contract and a grant before beginning his period of doctoral study with MPG.

39 As a preliminary point, it must be noted that the question whether Mr Raccanelli would have had the right, by virtue of MPG's practice, to choose between a grant contract and a BAT/2 employment contract if he did not have the status of worker within the meaning of Article 39 EC and Article 7 of Regulation No 1612/68 is a question of national law which it is not for the Court to address.

40 However, it follows from Part II of the grounds for the order for reference that, by its second question, the Arbeitsgericht Bonn is asking, in essence, whether MPG is bound — notwithstanding its establishment as a private-law association — by the principle of non-discrimination as if it had the status of a public-law body, and whether MPG is therefore obliged to accord Mr Raccanelli the right to choose between a grant contract and an employment contract.

41 In that regard, it must be borne in mind that, under Article 39 EC, freedom of movement for workers within the European Community 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 (Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 29).

42 Moreover, it must be noted that the principle of non-discrimination laid down by Article 39 EC is worded in general terms and is not addressed specifically to the Member States or to bodies governed by public law.

43 Thus, the Court has held that the prohibition of discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17, and *Angonese*, paragraph 31).

44 The Court has held that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see *Walrave and Koch*, paragraph 18, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 83).

45 The Court has thus held, with regard to Article 39 EC, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 12 EC, that the prohibition of discrimination applies equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals (see Case 43/75 *Defrenne* [1976] ECR 455, paragraph 39, and *Angonese*, paragraphs 34 and 35).

46 It must be held, therefore, that the prohibition of discrimination based on nationality laid down by Article 39 EC applies equally to private-law associations such as MPG.

47 As to the question whether MPG was, in consequence, obliged to accord Mr Raccanelli the right to choose between a grant contract and an employment contract, the answer must be that the Court has consistently held that discrimination consists in the application of different rules to comparable situations or in the application of the same rule to different situations (see, to that effect, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 26). It is for the referring court to establish whether, by reason of the application of different rules to comparable situations in circumstances such as those of the case in the main proceedings, the potential withholding of that choice resulted in inequality in the treatment of domestic and foreign doctoral students.

48 In those circumstances, the answer to the second question must be that a private-law association, such as MPG, must observe the principle of non-discrimination in

relation to workers within the meaning of Article 39 EC. It is for the referring court to establish whether, in circumstances such as those of the case in the main proceedings, there has been inequality in the treatment of domestic and foreign doctoral students.

Question 3

49 By its third question, the referring court asks what the consequences in law are in the event that discrimination against a foreign doctoral student arises from the fact that the latter did not have the opportunity to conclude an employment contract with MPG.

50 In that regard, it must be held that neither Article 39 EC nor Regulation No 1612/68 prescribes a specific measure to be taken by the Member States or associations such as MPG in the event of a breach of the prohibition of discrimination, but leaves them free to choose between the different solutions suitable for achieving the objective of those respective provisions, depending on the different situations which may arise (see, to that effect, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 18, and Case C-460/06 *Paquay* [2007] ECR I-8511, paragraph 44).

51 Consequently, as the Commission indicates in its written observations, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which the applicant in the main proceedings would be entitled to claim.

52 In those circumstances, the answer to the third question must be that, in the event that the applicant in the main proceedings is justified in relying on damage caused

by the discrimination to which he has been subject, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which he would be entitled to claim.

Costs

53 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 (Fifth Chamber) hereby rules:

1. A researcher in a similar situation to that of the applicant in the main proceedings, that is, a researcher preparing a doctoral thesis on the basis of a grant contract concluded with the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration. It is for the referring court to undertake the necessary verification of the facts in order to establish whether such is the case in the dispute before it.

2. **A private-law association, such as the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 EC. It is for the referring court to establish whether, in circumstances such as those of the case in the main proceedings, there has been inequality in the treatment of domestic and foreign doctoral students.**

3. **In the event that the applicant in the main proceedings is justified in relying on damage caused by the discrimination to which he has been subject, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which he would be entitled to claim.**

[Signatures]