JUDGMENT OF THE COURT (Fifth Chamber)

30 November 2000 *

In Case C-195/98,

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

Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst

and

Republik Österreich

on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 177 of the EC Treaty (now Article 234 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),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), acting for the President of the Fifth Chamber, P. Jann and L. Sevón, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst, by A. Alvarado-Dupuy, Zentralsekretär of the Gewerkschaft öffentlicher Dienst,

— Republik Österreich, by M. Sawerthal, Hofrat at the Finanzprokuratur Wien, acting as Agent,

— the Austrian Government, by C. Stix-Hackl, Gesandte in the Federal Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, acting as Agent, assisted by T. Eilmansberger, of the Brussels Bar,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2000,

gives the following

Judgment

1 By order of 30 April 1998, received by the Court on 20 May 1998, the Oberster Gerichtshof (Supreme Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 177 of that Treaty 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, hereinafter 'the Regulation').

2 Those questions were raised in proceedings between the Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst (hereinafter 'the Gewerkschaftsbund') and Republik Österreich (hereinafter 'the Republic of Austria') concerning the compatibility with Article 48 of the Treaty and Article 7 of the Regulation of the rules contained in the Vertragsbedienstetengesetz 1948 (Federal Law on Contractual Public Servants of 1948, hereinafter 'the VBG') for the determination of certain teachers' pay. The effect of those rules is that previous periods of employment spent in Austria are treated differently from those spent in other Member States for the purpose of determining the pay of contractual teachers and teaching assistants.

The Community legislation

3 Article 7(1) and (4) of the Regulation provides:

'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;

...

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.'

The national legislation

4 In Austria there are two categories of personnel working for federal public authorities. The first consists of civil servants (*Beamte*), appointed by administrative act, not under contract, whose employment is in principle guaranteed for life. Their status is determined by specific laws. The second category, with which the present case is concerned, consists of contractual employees of the public administration, engaged on the basis of a private law employment contract. Their status is governed by the VBG.

5 Under Paragraph 1(1) the VBG applies to all staff engaged by the Federal State under a private law employment contract. The first part of the VBG contains, in Paragraphs 8a to 26, general rules on the remuneration of such staff.

6 Under Paragraph 37(1) of the VBG, contractual teachers, that is to say contractual staff engaged for educational purposes in teaching or educational establishments, boarding schools, institutions for the blind or for deaf mutes or other comparable establishments also fall within the scope *ratione personae* of that law. According to Paragraph 51(1) of the VBG the same is true of contractual teaching assistants.

7 Section I of the VBG sets out in Paragraph 11 the monthly remuneration of a full-time contractual employee on salary scale I which has a total of 21 steps. Under Paragraph 19(1) of the VBG, a contractual employee is promoted every two years to the step immediately above the one he holds.

8 The reference date, which is the relevant date for advancement, must be determined in accordance with Paragraph 26 of the VBG; the version in force at the material time provides:

'1. The advancement date is to be ascertained by adding in before the date of engagement — excluding periods before the eighteenth birthday and having regard to the limiting provisions in subparagraphs 4 to 8:

1. the periods specified in subparagraph 2, in full,

2. the periods specified in subparagraph 2(1)(a) and (b) and 2(4)(e) and (f), if they have been completed to less than half the extent prescribed for full-time employees, to the extent of one half,

3. other periods,

(a) which fulfil the requirements of subparagraph 3, in full,

(b) which do not fulfil the requirements of subparagraph 3, if they do not exceed three years in total, to the extent of one half.

2. The periods to be credited under subparagraph 1(1) are:

1. the time spent in employment of at least half the extent prescribed for full-time employees

(a) in the service of a regional or local authority in Austria or

(b) as a teacher

(aa) in a public school, university or college in Austria or

(bb) in the Academy of Visual Arts or

(cc) in a publicly recognised private school in Austria;

...

4. the time...

(e) of activity or training with a regional or local authority in Austria, in so far as the promotional measures of employment policy of the Arbeitsmarktförderungsgesetz (Employment Market Promotion Law) BGBl. No 31/1969 were applicable thereto and the period was spent in employment of at least half the extent prescribed for full-time employees,

(f) in employment of at least half the extent prescribed for full-time employees in an employment relationship entered into within the scope of the legal capacity of an Austrian university or college, the Academy of Visual Arts, the Academy of Science, the Austrian National Library

or another scientific institution in accordance with the Forschungsorganisationsgesetz (Law on Organisation of Research BGBl. No 341/1981), or a Federal museum;

3. Periods in accordance with subparagraph 1(3) in which a contractual public servant has exercised an activity or carried on a course of study may in the public interest, with the consent of the Federal Chancellor, be taken into account in full if the activity or course of study is of special importance for the successful deployment of the contractual public servant. Such periods are, however, to be taken into account in full without the consent of the Federal Chancellor,

   1. if they have already been taken into account in full in the immediately preceding Federal service relationship in accordance with the first sentence or with a similar provision of other legislation, and

   2. the contractual public servant is still exercising the relevant deployment at the start of the new service relationship.

...'

9 Paragraph 26 of the VBG had been subject to an amendment published in the BGBl. No 297/1995 with effect from 1 May 1995. Before then, under Paragraph 26(1)(a) the periods specified in subparagraph 2 (which remained unamended) were credited in full and under Paragraph 26(1)(b) the other periods were

credited to the extent of one half, and subparagraph 3, which otherwise also had the same wording, referred to subparagraph 1(b).

10 Paragraph 54(2) to (4) of the Arbeits- und Sozialgerichtsgesetz (Law on Labour and Social Courts, hereinafter 'the ASGG') provides:

'(2) Employers' and employees' bodies which are capable of entering into collective agreements (Paragraphs 4-7 ArbVG) may, within their scope of activity, bring an application before the Oberster Gerichtshof against an employees' or employers' body which is capable of entering into collective agreements for a declaration that rights or legal relationships which concern a factual situation independent of any particular named person exist or do not exist. The application must concern a point of substantive law in the field of employment law disputes within the meaning of Paragraph 50 of the ASGG, which is of importance for at least three employers or employees.

(3) The application shall be served on the respondent designated by the applicant; the respondent shall submit its observations within four weeks. During that time other employers' and employees' bodies which are capable of entering into collective agreements may, within their scope of activity, submit their observations on the application.

(4) The Oberster Gerichtshof shall decide on the application, sitting as an ordinary chamber, (Paragraph 11(1)) on the basis of the facts stated therein. The decision shall be served on all the bodies which are capable of entering into collective agreements involved in the proceedings.'

The main proceedings and the questions referred for a preliminary ruling

11 The applicant in the main proceedings, the Gewerkschaftsbund, is a union representing *inter alia* public sector employees.

12 The respondent in the main proceedings is the Republic of Austria, as the employer of contractual teachers and teaching assistants.

13 By letter of 13 December 1996, the State Secretary for the Public Service rejected an application by the Gewerkschaftsbund asking for account to be taken, pursuant to Paragraph 26 of the VBG, of periods of previous employment spent by contractual teachers or teaching assistants in other Member States.

14 To establish the reference date for the purposes of determining advancement and hence the pay scale of a contractual employee of the public administration, Paragraph 26(1) and (2) of the VBG provides that previous periods of employment spent in the service of an Austrian public authority or in public or State-recognised private teaching establishments in Austria are automatically deemed to precede in full the date of engagement of the person concerned as a contractual employee.

15 On the other hand, other periods of employment, that is to say those spent in another Member State or in an institution in Austria which is not covered by Paragraph 26(2) of the VBG are taken into account in full only with the approval of the competent authorities. That approval is only given if the periods in question are 'of special importance for the successful deployment' of the contractual employee. When they do not meet those conditions they are taken into account as regards only half of their duration if the employment relationship commenced on or before 30 April 1995 (according to the version of Article 26(3)

of the VBG in force before 1 May 1995). If it commenced at a later date, they are taken into account as regards half of their duration provided that they do not exceed a total of three years (according to the version of Paragraph 26(3) of the VBG in force at the material time).

16 By application of 14 July 1997, the Gewerkschaftsbund submitted an application, on the basis of Paragraph 54(2) of the ASGG, concerning the position of certain categories of contractual teachers and teaching assistants employed by the respondent in the main proceedings. It claimed that the Oberster Gerichtshof should declare that those employees are entitled from the date of their classification in the relevant pay scale, or from 1 January 1994 if later, to have account taken of all periods of employment spent in States which now belong to the European Union or the European Economic Area in teaching posts in public or State-recognised schools, colleges and universities or in the civil service or for other public-law entities which must be regarded as equivalent to Austrian local authorities. Such periods of activity should be taken into account in accordance with the principles laid down in Paragraph 26 of the VBG applicable to previous periods of service for Austrian local authorities or in teaching posts in Austria.

17 The Republic of Austria contended, however, that the rule in Paragraph 26 of the VBG simply took account of the different forms of employment in the public service of the various Member States, that it was, therefore, consistent with the principle of proportionality and, moreover necessary in order to maintain the special regime applied in the public administration as regards promotion and pay.

18 The Oberster Gerichtshof considers that the procedure provided for in Paragraph 54(2) to (4) of the ASGG does not correspond to the conventional view of litigation. It is rather, in its view, a matter of giving an advisory opinion on the law with the appearance of a judicial decision.

19 As regards the principle of freedom of movement the Oberster Gerichtshof considers that the Court has never ruled in a comparable case since, under Paragraph 26 of the VBG, previous periods of employment spent in other Member States are not automatically ignored but can be taken into account in full with the agreement of the competent authorities.

20 Taking the view that the case turns on the interpretation of Community legislation, the Oberster Gerichtshof decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. May a preliminary ruling of the Court of Justice of the European Communities under Article 177 of the EC Treaty (now Article 234 EC) be sought in proceedings in which the Oberster Gerichtshof has to decide, as a court of first and final instance, on the basis of a factual situation independent of particular named persons, alleged by one party and presumed to be true, on an application by that party for a declaration that rights or legal relationships in the field of employment law, which according to the submissions of that party, which are presumed to be true, are of importance for at least three employers or employees, do or do not exist?

If Question 1 is answered in the affirmative,

2. Does Article 48 of the EC Treaty or any other provision of Community law, in particular Article 7 of Council Regulation No 1612/68, preclude the use of different methods for determining the qualifying date for advancement purposes, which affects the classification of contractual teachers and teaching assistants employed by the defendant within the relevant pay scale, in that, on the one hand, periods of employment completed under a contract of employment with an Austrian local authority or in a teaching post with an

Austrian public school, university or establishment of higher education, or with the Academy of Visual Arts or in a State-approved private school in Austria are — provided that the activity in question amounts to at least half of that laid down for full-time employees — taken into account in their entirety as of the date of recruitment whereas, on the other hand, periods of employment completed with comparable establishments of other Member States are taken into account in their entirety only with the approval of the Minister for Finance and when they are of special importance for the successful deployment of the contractual employee, failing which they are taken into account as regards only half of their duration if the employment relationship commenced on or before 30 April 1995 or, if it commenced at a later date, as regards only half of their duration, but only in so far as the periods in question do not exceed a total of three years?

If Questions 1 and 2 are answered in the affirmative,

3. Are periods completed in institutions in Member States comparable to the said institutions to be taken into account without temporal limitation?'

Admissibility

21 By its first question, the national court wishes to know essentially whether, in exercising the functions provided for by Paragraph 54(2) to (5) of the ASGG, it constitutes a court or tribunal within the meaning of Article 177 of the Treaty and whether it is therefore admissible for it to refer a question for a preliminary ruling.

22 In that regard the Oberster Gerichtshof refers *inter alia* to the judgments in Case 104/79 *Foglia* v *Novello* [1980] ECR 745 and Case 244/80 *Foglia* v *Novello*

[1981] ECR 3045, pointing out that Article 177 of the Treaty does not give the Court the task of delivering opinions on general or hypothetical questions but merely confers jurisdiction on it to answer questions which correspond to an objective requirement for an effective decision in a specific legal dispute.

23 It is to be noted at the outset that no one has claimed that the dispute in the main proceedings is hypothetical or contrived. The reservations about the admissibility of the question referred for a ruling derive from the particular nature of the proceedings before the national court under Paragraph 54(2) to (5) of the ASGG.

24 In that regard, it is settled case-law that in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case 61/65 *Vaassen (née Göbbels)* [1966] ECR 261; Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; and Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33).

25 Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see *inter alia* Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14).

26 As the Advocate General observed at point 37 of his Opinion, it is common ground that, from an institutional point of view, the Oberster Gerichtshof fulfils

all the criteria to be a court or tribunal within the meaning of Article 177 of the Treaty. It is established by law, it is independent and exercises its activities on a permanent basis.

27 As regards the characteristics of the procedure provided for by Paragraph 54 of the ASGG, it is to be noted, first, that most elements of that procedure are typical of judicial proceedings. In particular, the Oberster Gerichtshof's jurisdiction under Paragraph 54(2) to (5) of the ASGG is compulsory in the sense that either party may bring a case before the Oberster Gerichtshof regardless of the objections of the other. The procedure is governed by law and it is *inter partes*, the parties determining the scope of the proceedings.

28 Next, it appears from the court file that the procedure does not entail the referral of purely hypothetical questions to the Oberster Gerichtshof: Paragraph 54(2) of the ASGG requires that, for the purposes of seeking the opinion of the Oberster Gerichtshof under that paragraph, the application submitted by the employers' or employees' organisation must concern a point of substantive law of importance for at least three employers or employees. Moreover, the Oberster Gerichtshof has held that, in that procedure, employers' and employees' bodies should submit to it only truly typical factual situations of general importance and that it has no jurisdiction to answer *in abstracto* legal questions of a general nature unrelated to sufficiently specific factual situations.

29 Finally, although the procedure at issue also has features which are less characteristic of judicial proceedings than those mentioned in the two previous paragraphs, that is to say, the fact that the Oberster Gerichtshof does not rule on disputes in a specific case involving identified persons, that it must base its legal assessment on the facts alleged by the applicant without further examination, that the decision is declaratory in nature and the right to bring proceedings is exercised collectively, the procedure is none the less intended to result in a decision that is judicial in character.

30 In particular, the final decision is binding on the parties who cannot make a second application for a declaration relating to the same factual situation and raising the same legal questions. Moreover, the decision is intended to have persuasive authority for parallel proceedings concerning individual employers and employees. Thus, according to Paragraph 54(5) of the ASGG, the running of time for bringing parallel proceedings is suspended with regard to the rights and legal relationships forming the subject of the proceedings under Paragraph 54(2) of the ASGG.

31 It follows from the foregoing considerations that the question referred for a preliminary ruling is admissible.

32 Accordingly, the answer to the first question must be that, in exercising functions such as those provided for by Paragraph 54(2) to (5) of the ASGG, the Oberster Gerichtshof constitutes a court or tribunal within the meaning of Article 177 of the Treaty.

Question 2

33 By its second question, the national court is essentially asking whether Article 48 of the Treaty or Article 7(1) and (4) of the Regulation preclude a national rule such as Paragraph 26 of the VBG concerning the account to be taken of previous periods of service for the purposes of determining the pay of contractual teachers and teaching assistants, under which the requirements which apply to periods spent in other Member States are stricter than those applicable to periods spent in comparable institutions of the Member State concerned.

34 In order to determine the advancement and hence the pay scale of a contractual employee of the public administration, Paragraph 26 of the VBG provides for previous periods of employment in the service of an Austrian public authority or a teaching establishment in Austria to be taken into account. However, periods of employment spent in a Member State other than the Republic of Austria are taken into account in full only where it is in the public interest to do so and with the consent of the competent authorities.

35 It is first necessary to consider the argument of the Republic of Austria that contractual teachers and teaching assistants fall within the definition of 'employment in the public service' within the meaning of Article 48(4) of the Treaty.

36 The derogation in Article 48(4) of the Treaty, according to which the provisions on freedom of movement for workers are not to apply to 'employment in the public service', concerns only access for nationals of other Member States to certain posts in the civil service (Case C-248/96 *Grahame and Hollanders* [1997] ECR I-6407, paragraph 32, and Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47, paragraph 13). It is settled case-law that it does not apply to the activities of teachers and teaching assistants (Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 28; Case C-4/91 *Bleis* [1991] ECR I-5627, paragraph 7; and Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 33).

37 In any event, the case in the main proceedings does not concern the rules for access to 'employment in the public service', but simply the determination of the seniority of contractual teachers or teaching assistants for the purposes of calculating their pay. Once a Member State has admitted workers who are nationals of other Member States into its public administration, Article 48(4) of the Treaty cannot justify discriminatory measures against them with regard to remuneration or other conditions of employment (see *inter alia* Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 4).

38 It follows that Article 48(4) does not apply to the facts of the case in the main proceedings. It must therefore be considered whether a rule such as Paragraph 26 of the VBG might breach the principle of non-discrimination laid down in Article 48 of the Treaty and Article 7(1) and (4) of the Regulation.

39 According to the settled case-law of the Court, Article 48 of the Treaty prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result (see *inter alia* Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 7, and Case C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 17).

40 A provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and there is a consequent risk that it will place the former at a particular disadvantage and if it is not justified by objective considerations independent of the nationality of the workers concerned, and proportionate to the legitimate aim pursued by that law (see, *O'Flynn*, cited above, paragraphs 19 and 20).

41 The Court has already held that national rules under which previous periods of employment in the public service of another Member State may not be taken into consideration constituted unjustified indirect discrimination and contravened Article 48(2) of the Treaty (see *Scholz*, cited above, paragraph 11, *Schöning-Kougebetopoulou*, cited above, paragraph 23; and Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095, paragraph 21).

42 It is true that, unlike the national rules at issue in the cases cited in the last paragraph, Paragraph 26 of the VBG does not preclude account being taken of previous periods of employment spent in other Member States.

43 However, such periods are taken into account in full only if the public interest requires it and with the consent of the competent authorities. That consent is granted only if those periods are 'of special importance for the successful deployment' of the contractual teacher or teaching assistant. No such condition is imposed in order for periods of employment spent in Austria to be taken into account.

44 It follows that Paragraph 26 of the VBG imposes stricter conditions in respect of periods of employment spent in a Member State other than the Republic of Austria, to the detriment of migrant workers who have spent part of their career in another Member State. That Paragraph is liable, therefore, to breach the principle of non-discrimination enshrined in Article 48 of the Treaty and Article 7(1) and (4) of the Regulation.

45 The Austrian Government, however, contends that the restrictions on freedom of movement are justified by overriding reasons of public interest and are consistent with the principle of proportionality.

46 In that regard, it argues that the principle of homogeneity laid down in the second sentence of Paragraph 21(1) of the Austrian constitution ensures the free movement of public service employees on Austrian territory. That freedom of movement would be impeded if transfer from one service to another were made financially unattractive. Moreover, the pay scheme for the staff concerned was intended to reward their loyalty. However, the same scheme could not be extended to cover periods of employment spent in other Member States since, at the current stage of the integration process, the public services of the Member States are not interconnected to the same extent as Austrian local authorities and have very different characteristics.

47 It must first be observed that the objective of staff mobility within the Austrian public administration does not require a discriminatory restriction on the mobility of migrant workers.

48 Next, the differences between the public services in Austria and those in the other Member States cannot justify a difference in the conditions under which previous periods of service are taken into account. In particular, such differences cannot explain why the periods spent in a Member State other than Austria have to be of special importance for the deployment of the person concerned, a condition which is not imposed in respect of periods of employment spent in Austria.

49 Finally, as regards the argument concerning the objective of rewarding the loyalty of the staff concerned, given the large number of employers covered by Paragraph 26(2) of the VBG, the pay scheme is intended to allow the greatest possible mobility within a group of legally distinct employers and not to reward the loyalty of an employee to a particular employer.

50 It follows from the foregoing that Paragraph 26 of the VBG is not in any event proportionate to the objective the Austrian Government claims it is intended to achieve.

51 The answer to the second question must therefore be that Article 48 of the EC Treaty and Article 7(1) and (4) of the Regulation preclude a national rule such as Paragraph 26 of the VBG concerning the account to be taken of previous periods of service for the purposes of determining the pay of contractual teachers and teaching assistants, where the requirements which apply to periods spent in other Member States are stricter than those applicable to periods spent in comparable institutions of the Member State concerned.

Question 3

52 By its third question, the national court is essentially asking whether, a Member State which is obliged to take into account, in calculating the pay of contractual teachers and teaching assistants, periods of employment in certain institutions in other Member States comparable to the Austrian institutions listed in Paragraph 26(2) of the VBG, must take such periods into account without temporal limitation.

53 The purpose of the question is to determine whether periods of employment spent by such staff before the accession of the Republic of Austria to the European Union must be taken into account.

54 It is important to note that the case in the main proceedings does not concern the recognition of rights under Community law allegedly acquired before the accession of the Republic of Austria, but concerns the current discriminatory treatment of migrant workers.

55 The Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241 p. 21, and OJ 1995 L 1, p. 1) contains no transitional provisions concerning the application of Article 48 of the Treaty and Article 7(1) of the Regulation. Those provisions must be considered to be immediately applicable and binding as regards the Republic of Austria as of the date of its accession to the European Union, that is to say 1 January 1995. Since that date, they can be relied on by migrant workers from the Member States. In the absence of transitional provisions, previous periods of employment must necessarily be taken into account.

56 The answer to the third question must therefore be that where a Member State is obliged to take into account, in calculating the pay of contractual teachers and teaching assistants, periods of employment in certain institutions in other Member States comparable to the Austrian institutions listed in Paragraph 26(2) of the VBG, such periods must be taken into account without any temporal limitation.

Costs

57 The costs incurred by the Austrian Government 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 proceedings 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 questions referred to it by the Oberster Gerichtshof by order of 30 April 1998, hereby rules:

1. In exercising functions such as those provided for by Paragraph 54(2) to (5) of the Arbeits- und Sozialgerichtsgesetz (Law on Labour and Social Courts),

the Oberster Gerichtshof constitutes a court or tribunal within the meaning of Article 177 of the EC Treaty (now Article 234 EC).

2. Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Article 7(1) and (4) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community preclude a national rule such as Paragraph 26 of the Vertragsbedienstetengesetz 1948 (Federal Law on Contractual Public Servants of 1948) concerning the account to be taken of previous periods of service for the purposes of determining the pay of contractual teachers and teaching assistants, where the requirements which apply to periods spent in other Member States are stricter than those applicable to periods spent in comparable institutions of the Member State concerned.

3. Where a Member State is obliged to take into account, in calculating the pay of contractual teachers and teaching assistants, periods of employment in certain institutions in other Member States comparable to the Austrian institutions listed in Paragraph 26(2) of the Vertragsbedienstetengesetz 1948, such periods must be taken into account without any temporal limitation.

Edward Jann Sevón

Delivered in open court in Luxembourg on 30 November 2000.

R. Grass — A. La Pergola

Registrar — President of the Fifth Chamber