



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF NIEGEL v. FRANCE

(Application no. 18725/91)

JUDGMENT

STRASBOURG

17 March 1997

In the case of Neigel v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. GÖLCÜKLÜ,

Mr L.-E. PETTITI,

Mr A. SPIELMANN,

Mrs E. PALM,

Sir John FREELAND,

Mr A.B. BAKA,

Mr J. MAKARCZYK,

Mr D. GOTCHEV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 September 1996 and on 21 January and 18 February 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 December 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 18725/91) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Miss Florence Neigel, on 29 January 1991.

The Commission's request referred to Article 48 (art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the

¹ The case is numbered 103/1995/609/697. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30). Having originally been designated by the initials F.N., the applicant subsequently agreed to the disclosure of her identity.

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 21 February 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr A. Spielmann, Mrs E. Palm, Mr F. Bigi, Mr A.B. Baka, Mr J. Makarczyk and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently, Sir John Freeland, substitute judge, replaced Mr Bigi, who had died (Rule 22 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the registry received the applicant's memorial on 21 May and the Government's memorial on 3 June 1996. The Delegate of the Commission did not reply in writing.

5. On 12 July 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions. The applicant's counsel lodged documents on 29 August and 9 September 1996.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 September 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J.-F. DOBELLE, Deputy Director of Legal Affairs,

Ministry of Foreign Affairs,

Agent,

Mr J. LAPOUZADE, administrative court judge on

secondment to the Legal Affairs Department,

Ministry of Foreign Affairs,

Adviser;

(b) for the Commission

Mr F. MARTÍNEZ,

Delegate;

(c) for the applicant

Ms G. ANGLA-GRÉ, of the Bayonne Bar,

Counsel.

The Court heard addresses by Mr Martínez, Ms Angla-Gré and Mr Dobelle, and also their replies to its questions.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. On 4 July 1978 Miss Florence Neigel started working as an auxiliary shorthand typist for Biarritz Town Council (département of Pyrénées-Atlantiques). She was appointed as a trainee on 1 March 1979 and given a permanent post on 1 March 1980.

A. Leave of absence

8. In a decision of 21 February 1983 the mayor of Biarritz ("the mayor") granted a request by the applicant for one year's leave of absence for personal reasons from 14 March 1983.

9. Miss Neigel applied for reinstatement with effect from 14 March 1984. On 25 November 1983 she was informed that her application had been refused by the mayor.

On 17 December 1983 she sought renewal of her leave of absence for one year. The mayor granted her application in a decision of 21 December 1983.

B. Refusal of reinstatement

10. On 7 December 1984 Miss Neigel applied for reinstatement on 14 March 1985. The mayor replied on 11 December 1984 as follows:

"...

As you are aware, reinstatement as of right is by way of appointment to one of the first three posts falling vacant where the leave of absence has not exceeded three years. The essential requirement, however, is that there should be a vacancy. As the posts of shorthand typist provided for in our establishment table are filled by permanent staff, it is not possible to reinstate you at present.

If the situation remains unchanged on 14 March 1985, you will be technically reinstated and will be on leave of absence without pay until another solution is found.

..."

11. On 4 March 1985 Miss Neigel reapplied to the mayor for reinstatement. She argued that the regulations did not authorise him to "technically reinstate" her or to grant her a further year's leave of absence.

12. On 14 March 1985 the mayor ordered that Miss Neigel be "technically" reinstated and continue to be "on leave of absence without pay".

13. On 14 June 1985 the applicant wrote to the mayor challenging the lawfulness of the measure taken and requesting her reinstatement and payment in full of her salary from 14 March 1985.

The mayor replied on 20 June 1985 that reinstatement as of right was by way of appointment to one of the first three posts falling vacant and that in this instance only two appointments had been made to the same grade as the applicant.

In a letter of 27 June 1985 Miss Neigel disputed the information given by the mayor. On 28 November 1985 she made a further application for reinstatement.

On 3 December 1985 the mayor told the applicant that if she considered her situation (which, he said, was still the same) unlawful, it was open to her to apply to the administrative court.

14. On 4 March 1986 Miss Neigel applied for reinstatement on 14 March 1986. On 5 March 1986 the mayor notified her of his refusal.

15. On 16 June 1986 the applicant sent the mayor the following letter:

"...

Pursuant to your decision of 14 March 1985, you 'technically' reinstated me and you are aware that this situation is unlawful.

I therefore request

1. my actual reinstatement; and

2. compensation in an amount corresponding to the salary I should have received since 14 March 1985. If you refuse my request, I shall bring proceedings in the administrative court to have the loss assessed in damages. ..."

On 23 June 1986 the mayor made the following reply:

"...

As there has been no change in the staff of your grade working for the Council, I can only confirm what I said in my previous letters.

I have no objection to your bringing this case before the administrative court.

..."

C. The proceedings in the administrative courts

1. In the Pau Administrative Court

16. On 22 July 1986 Miss Neigel applied to the Pau Administrative Court to have the mayor's decision confirming her "technical reinstatement" and her "leave of absence without pay" quashed and to obtain an order that

he should pay her the salary she should have received from 14 March 1985 onwards.

17. The mayor filed pleadings on 25 September and 18 November 1986 and on 13 January and 27 February 1987. The applicant did likewise on 3 November and 12 December 1986 and on 5 February 1987.

18. Following a hearing on 31 March, the court delivered the following judgment on 7 April 1987:

"...

With regard to Miss Neigel's technical reinstatement:

On the conditions laid down by the mayor of Biarritz Miss Neigel's reinstatement is a purely technical decision; that being so, it is null and void. It is therefore necessary to set aside the decision of 5 March 1986 in so far as it upholds the applicant's technical reinstatement.

With regard to Miss Neigel's right to reinstatement:

Under Article L. 415-59 of the Municipalities Code as in force when the impugned decision was taken, 'A member of staff granted leave of absence at his own request shall be entitled to reinstatement by appointment to one of the first three posts falling vacant where the leave has not exceeded three years'...

...

The applicant claimed that three posts she was suitably qualified for had fallen vacant and been filled during the period when she was requesting reinstatement and that two posts had been created. The mayor of Biarritz asserted that, on the contrary, the posts provided for in the establishment table were filled and that no permanent staff had been recruited since 1 March 1985. That being so, the parties disagreed as to the facts. It is therefore necessary to order that further inquiries into the facts should be made, firstly to enable the mayor of Biarritz to produce all the documents necessary to determine the position since 14 March 1985 regarding vacant posts and staff recruited in Miss Neigel's grade, and secondly so that the total salary the applicant would have received from 14 March 1985 onwards can be calculated.

..."

19. The applicant filed pleadings on 30 June, 20 August and 5 October 1987. The mayor did likewise on 17 July and 23 September.

20. Through a member of parliament Miss Neigel asked the ombudsman to intervene and expedite the proceedings. The ombudsman replied on 22 October 1987 that judgment had been given on 20 October.

21. This judgment was served on the applicant on 10 November 1987. The court rejected her remaining submissions on the following ground:

"...

It is clear from an examination of the case file, and in particular of the table of posts of shorthand typist produced by the mayor of Biarritz, that eight posts are provided for

in the budget, while seven posts are occupied by permanent staff, a number that has not changed since 14 March 1985. All the staff in question were taken on before 7 December 1984, when Miss Neigel applied to be reinstated. The fact that the post Miss Neigel occupied before she was granted leave of absence is vacant has no bearing on the lawfulness of the contested decision. Under these circumstances the applicant is not justified in maintaining that the rights she derived from her priority entitlement to be taken on again following her leave of absence have been infringed. Miss Neigel therefore cannot claim compensation corresponding to her total salary since 14 March 1985.

..."

2. In the Conseil d'Etat

22. On 18 May 1988 Miss Neigel appealed against the Pau Administrative Court's two judgments to the Conseil d'Etat. She filed a supplementary pleading on 19 September 1988.

23. In a letter of 23 February 1989 Miss Neigel enquired of the secretary of the Third Section of the Judicial Division of the Conseil d'Etat about the proceedings. The secretary replied on 15 March 1989:

"... the case file ... is currently in the hands of the lawyer for Biarritz Town Council for inspection and has been since the beginning of February, for two months.

As soon as he returns it, it will be sent to your lawyer for your reply, for the same length of time.

As soon as the written proceedings in preparation of the case for trial have been completed, I will submit your case file to the presiding judge. It is nevertheless likely that this case will not be heard until the end of the year at the earliest.

..."

24. Biarritz Town Council filed a pleading on 31 March 1989, to which Miss Neigel replied on 25 October 1989.

25. In a letter of 27 November 1989 the applicant made further enquiries of the secretary about the proceedings. The secretary replied on 4 December 1989 that, as soon as the preparation of the case for trial had been completed, he had submitted the case file to the presiding judge of the Third Section, who had allocated it to a reporting judge in September.

26. Biarritz Town Council filed a pleading on 12 February 1990.

27. On 20 February 1990 Miss Neigel sent the secretary a letter - to which she received no reply - expressing her concern at the time it was taking to deal with her case and asking if she should write to the presiding judge to make him aware that her situation called for an early judgment.

28. The applicant's mother wrote to the secretary on 10 April 1990. She told him of the conflicting information her daughter had been given on the telephone by the registry

- the case file had apparently not yet been transferred to the Government Commissioner (commissaire du gouvernement)
- and requested details of the proceedings and of what further could be done to speed them up.

The applicant's mother wrote again as follows on 13 April 1990 after her daughter had received a copy of the latest pleading filed by Biarritz Town Council:

"...

Given that preparation of the case for trial ended in September 1989, [my daughter] cannot understand why the opposing side should produce a further pleading and why this should be admitted to the case file when it had been stated that once the preparation of the case was terminated, no new document could be added.

...

I suppose that if the rules are to be applied, it would be simpler to withdraw this second pleading, which arrived undated more than six months after termination of the preparation of the case, and for only the evidence already in the file to be submitted to the Government Commissioner appointed to study it.

..."

29. The Conseil d'Etat held a hearing on 4 January 1991 and gave judgment on 21 January. It dismissed the appeal as follows:

"...

Firstly, under the ... provisions of Article L. 415-59 of the Municipalities Code, the mayor was not bound to reinstate Miss Neigel until the third vacancy arising after the end of her leave of absence. It appears from the evidence that between 14 March 1985 and 5 March 1986 only two vacancies arose that Miss Neigel was suitably qualified to fill. ... the mayor of Biarritz's decision of 5 March 1986 whereby he refused Miss Neigel's application for reinstatement was therefore not in breach of the provisions of Article L. 415-59 of the Municipalities Code.

...

It is clear from all the foregoing that Miss Neigel is not justified in maintaining that the Pau Administrative Court, having ordered in a judgment of 7 April 1987 that further inquiries into the facts should be made (a measure which, contrary to what the applicant maintained, was not obstructive), was wrong in its judgment of 20 October 1987 to refuse her application to quash the decision of 5 March 1986.

..."

II. RELEVANT DOMESTIC LAW

30. The provisions of the Municipalities Code that were applicable in the instant case

- they were repealed by Law no. 84-53 of 26 January 1984
- were the following:

Article L. 415-49

"Leave of absence means that a member of staff is released from performing his normal duties and that, for the duration of such leave, his rights relating to promotion and retirement cease to accrue.

..."

Article L. 415-50

"Leave of absence shall be ordered in a decision by the mayor, either of his own motion or at the request of the person concerned."

Article L. 415-54

"Leave of absence may be granted at the request of a member of staff in the following circumstances only:

...

3. For personal reasons; in this case the leave may not exceed one year but shall be renewable for a further year.

..."

Article L. 415-58

"A member of staff granted leave of absence at his own request shall not be entitled to any remuneration.

..."

Article L. 415-59

"A member of staff granted leave of absence at his own request shall be entitled to reinstatement by way of appointment to one of the first three posts falling vacant where the leave has not exceeded three years."

31. A civil servant whose dismissal has been quashed as being unlawful is entitled to receive compensation for pecuniary damage, calculated on the basis of the salary lost (Conseil d'Etat, 7 April 1933, Deberles, Rec. 439).

PROCEEDINGS BEFORE THE COMMISSION

32. Miss Neigel applied to the Commission on 29 January 1991. She alleged a violation of Article 6 para. 1 of the Convention (art. 6-1) on the ground that she had not had a "hearing within a reasonable time" or a "fair hearing", and of Article 3 of the Convention (art. 3) and Articles 2 para. 1 and 3 of Protocol No. 7 (P7-2-1, P7-3).

33. On 10 October 1994 the Commission declared the application (no. 18725/91) admissible in so far as it related to the length of the proceedings. In its report of 17 October 1995 (Article 31) (art. 31), it expressed the opinion by nineteen votes to ten that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT

34. In her memorial the applicant requested the Court to

"hold that there has been a violation of Article 6 para. 1 of the Convention (art. 6-1) in that judgment on [her] civil rights and obligations was not given within a reasonable time ... as required by that provision (art. 6-1)".

35. The Government asked the Court to

"dismiss Miss Neigel's application because it is incompatible *ratione materiae* with the provisions of Article 6 para. 1 of the Convention (art. 6-1), or, in the alternative, because it is ill-founded".

AS TO THE LAW ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

36. Miss Neigel complained of the length of the proceedings for reinstatement and for payment of salary that she had instituted against Biarritz Town Council. She relied on Article 6 para. 1 of the Convention (art. 6-1), which provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

37. It is above all necessary to decide whether this provision (art. 6-1) applies to the present case.

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-II), but a copy of the Commission's report is obtainable from the registry.

A. Whether there was a dispute (contestation) over a "right"

38. The Court reiterates that according to the principles enunciated in its case-law (see, amongst other authorities and *mutatis mutandis*, the *Zander v. Sweden* judgment of 25 November 1993, Series A no. 279-B, p. 38, para. 22), it has first to ascertain whether there was a dispute (contestation) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question.

39. In the present case Article L. 415-59 of the Municipalities Code entitled members of staff who had been granted leave of absence to reinstatement, subject to certain conditions (see paragraph 30 above). Reinstatement was precisely what Miss Neigel was seeking (see paragraphs 10-15 above). Moreover, the outcome of the proceedings in the administrative courts (see paragraphs 16-29 above)

- the setting aside or the upholding of the mayor of Biarritz's decision confirming the applicant's "leave of absence without pay"

- was directly decisive for her right to reinstatement. There was accordingly a dispute (contestation) over a "right" within the meaning of Article 6 para. 1 (art. 6-1). That point was not in fact contested.

It is therefore necessary to ascertain whether this right was a "civil" one within the meaning of Article 6 para. 1 (art. 6-1).

B. Whether the applicant's right was a "civil" one

40. The applicant stressed that the proceedings complained of had been concerned with the claims of an employee (herself) against her employer (Biarritz Town Council) and had been brought to secure not only reinstatement but also payment of her salary. The subject of the proceedings had therefore been the recognition of a "private right".

41. In the Government's submission, disputes in civil-service matters normally fell outside the scope of Article 6 para. 1 (art. 6-1). The only exception was where the dispute directly concerned a pecuniary right and where "special powers of the public authorities" were not in issue.

The dispute between Miss Neigel and Biarritz Town Council related to the management of her career and had therefore had only indirect pecuniary consequences for her. Besides, a refusal to reinstate a civil servant on return from leave of absence did not necessarily affect the person's financial position. Where such a refusal was unlawful, the civil servant was entitled not to payment of the salary itself but only to compensation for the pecuniary loss caused by the unlawful deprivation of employment. Compensation could be less than the salary and might not even be paid at all

if the applicant had received income from other employment during the relevant period.

Moreover, civil servants' rights and obligations were governed by the rules of the civil service, which could be altered unilaterally by the public authorities. These rules distinguished civil servants from employees governed by private law in being based on the notion of "public service" and on the special rights of the employer as public authority rather than on agreement.

The Government submitted that the complaint was incompatible *ratione materiae* with the provisions of Article 6 para. 1 (art. 6-1).

42. The Commission observed that, besides her application for reinstatement to her post, Miss Neigel had sought payment of the salary she ought to have received since the end of the statutory period of her leave of absence. The applicant's position was therefore no different from that of an employee who was a party to a private-law contract of employment, and the subject matter of the proceedings brought against the town council was at least partly pecuniary in nature.

The Commission acknowledged that there were some posts in the public service with responsibilities affecting matters of general interest or entailing the exercise of public authority to which States were entitled to make appointments at their discretion. In the instant case, however, Miss Neigel was a shorthand typist at Biarritz Town Hall and in that capacity had not exercised public authority. The right in issue was a civil one and Article 6 para. 1 (art. 6-1) therefore applied.

43. The Court observes that in the law of many member States of the Council of Europe there is a basic distinction between civil servants and employees governed by private law. This has led it to hold that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 para. 1 (art. 6-1)" (see, as the most recent authority, the *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B, p. 20, para. 26).

In the *Massa* case (judgment cited above) the applicant applied for a reversionary pension following the death of his wife, who had been a headmistress. In the case of *Francesco Lombardo v. Italy* (judgment of 26 November 1992, Series A no. 249-B) a carabinieri who had been invalided out of the service because of disability and who maintained that the disability was "due to his service" applied for an "enhanced ordinary pension". The applicants' complaints related neither to the "recruitment" nor to the "careers" of civil servants and only indirectly to "termination of service" as they consisted in claims for purely pecuniary rights arising in law after termination of service. In those circumstances and in view of the fact that the Italian State was not using "discretionary powers" in performing its obligation to pay the pensions in issue and could be compared to an employer who was a party to a contract of employment

governed by private law, the Court held that the applicants' claims were civil ones within the meaning of Article 6 para. 1 (art. 6-1).

44. In the instant case Miss Neigel was essentially seeking reinstatement to the permanent post of shorthand typist at Biarritz Town Hall that she had held previously; this is clear not only from the correspondence between her and the mayor of Biarritz (see paragraphs 10-15 above) but also from the administrative court's judgment of 20 October 1987 (see paragraph 21 above) and the Conseil d'Etat's judgment of 21 January 1991 (see paragraph 29 above). The dispute raised by her clearly related to her "recruitment", her "career" and the "termination of [her] service". It therefore did not concern a "civil" right within the meaning of Article 6 para. 1 (art. 6-1).

As to her claim for payment of the salary she would have received if she had been reinstated, the Court notes that an award of such compensation by the administrative court is directly dependent on a prior finding that the refusal to reinstate was unlawful (see paragraph 31 above).

Article 6 para. 1 (art. 6-1) therefore does not apply in the instant case.

FOR THESE REASONS, THE COURT

Holds by eight votes to one that Article 6 para. 1 (art. 6-1) does not apply in the instant case.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 March 1997.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the dissenting opinion of Mrs Palm is annexed to this judgment.

R. R.
H. P.

DISSENTING OPINION OF JUDGE PALM

1. The applicant's case concerns her reinstatement in the permanent post of shorthand typist at Biarritz Town Hall that she had held previously. The majority has found Article 6 para. 1 (art. 6-1) not applicable because the dispute in question related to her "recruitment", her "career" and "the termination of [her] service" and therefore did not concern a "civil" right within the meaning of Article 6 para. 1 (art. 6-1). In so stating, they are merely referring to a principle that the Court laid down earlier, *inter alia* in its judgments in the *Francesco Lombardo v. Italy* and *Massa v. Italy* cases¹, and which the majority now explain by the fact that "in the law of many member States of the Council of Europe there is a basic distinction between civil servants and employees governed by private law" (paragraph 43 of the judgment).

Such sweeping, thin reasoning cannot, in my view, justify this case-law, which has the effect of depriving all public servants governed by public law who are involved in a dispute with their "public" employer of the basic procedural safeguards in Article 6 para. 1 (art. 6-1).

2. It is clear from the Convention's drafting history that neither the Convention nor its Protocols provide a right of access to the public service. The reason why the Contracting States were not willing to commit themselves to the recognition of a right of recruitment to the civil service lies mainly in the difficulty that an international court would have in setting a common standard in matters of recruitment, as recruitment conditions differ considerably in the Contracting States according to national traditions.

This does not mean that civil servants generally fall outside the scope of the Convention. Indeed, the Court has stated, in its *Glaserapp v. Germany* judgment of 28 August 1896 (Series A no. 104, p. 26, para. 49), that "as a general rule the guarantees in the Convention extend to civil servants". But it is clear that when access to the civil service lies at the heart of the issue submitted to the Court, it is not covered by the Convention (see the above-mentioned *Glaserapp* judgment, paragraph 53).

3. In its previous judgments the Court seems to have used alternatively the terms "public servants" and "civil servants" without any analysis of the consequences for those different categories of employees. In the present judgment the Court systematically uses "civil servants". It is - to say the least - unclear whether the judgment is to be understood as comprising all public servants or just the limited group of "civil servants".

It is well known that in some States the employment of all public servants employed by the State or by local authorities - from government officials to street-sweepers - is governed by public law. Such persons

¹ *Francesco Lombardo v. Italy* judgment of 26 November 1992, Series A no. 249-B, and *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B.

would, according to the present judgment, be deprived of the safeguards in Article 6 (art. 6) in all disputes with their employer. In other States a more limited group of public servants - mostly high-ranking officials - are subject to public law whilst other employees have private-law contracts. The rights of the latter category will certainly be classified as being "civil" in character.

The fact that an employment is governed by public law does not in itself prevent the right in issue from being classified as a "civil" right. The Court has found in several cases that only the character of the right is relevant (see, *inter alia*, the *König v. Germany* judgment of 28 June 1978, Series A no. 27, p. 30, para. 90 in fine).

4. My view is that a dispute relating to a person's employment is "civil" in nature and therefore, in principle, comes within the scope of Article 6 para. 1 (art. 6-1). It follows from the foregoing that as a general rule this also applies to civil servants.

Taking into consideration the general object and purpose of the Convention and the reasons for excluding a right of access to the civil service from the safeguards of the Convention, I find that this exception must be interpreted in a restrictive manner. However, I accept that where public servants have been appointed by the State in the exercise of its discretionary powers, disputes relating to the recruitment, careers and termination of their posts do not have a "civil" character and therefore fall outside the scope of Article 6 para. 1 (art. 6-1). This will frequently be the case with civil-servant posts in the public service which involve a certain degree of responsibility or entail the exercise of public authority, where - and when - appointment to the job in question depends on an entirely discretionary assessment or evaluation. But there is no reason to take the same approach to public servants whose job content does not possess such a "public administration" profile.

5. In the present case it is not a question of access to a civil-service post in the real sense. Miss Neigel already held a post as a shorthand typist and sought to be reinstated in that post according to rules laid down in the relevant legislation. There was no evaluation of her qualifications. She was by law entitled to a post within a certain period of time and she had a right to take the case to the national courts. I can find no valid reason in such a case why the national courts that tried the case should not fulfil the requirements of Article 6 para. 1 (art. 6-1).

6. Furthermore, to limit the scope of Article 6 para. 1 (art. 6-1) the way the majority does in the judgment will have the consequence that public servants in the member States of the Council of Europe will be unequally protected by the Convention, notwithstanding the similarity of job content.

In my view, such a difference in respect of Article 6 para. 1 (art. 6-1) between public servants in the Contracting States is unfortunate and unnecessary. The Court ought to give an autonomous interpretation of the

meaning of "civil service" for the purpose of Article 6 para. 1 (art. 6-1) so that the same standards can be applied to individuals holding equivalent or similar posts, independently of the employment system in each member State, drawing, for example, on the distinction which has been recognised by the Court of Justice of the European Communities between, on the one hand, posts involving the exercise of public authority and, on the other, posts that do not belong to the category of public administration in the proper sense (see, for example and *mutatis mutandis*, Case 473/93, *Commission v. Luxembourg*, judgment of 2 July 1996).