



Schola Europaea

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Question from the UK delegation about the nine-year rule

Meeting of the Board of Governors

14, 15 and 16 April 2010 – Brussels

I. Issue

In its letter of 8 March 2100 appended hereto, the UK delegation again approaches the members of the Board of Governors with a question about the application of Article 29(a)(ii) of the Regulations for Members of the Seconded Staff, i.e. the nine-year rule, with a view to securing suspension of the application of this rule for the benefit of its members of staff who have reached the end of their period of secondment.

As a reminder, this request was put to the Board of Governors on two previous occasions, in January 2008 and in January 2009. On both occasions the request was rejected by the Board of Governors, which argued that there was no need to call the nine-year rule into question.

Now, the Court of Appeal has found against the Department for Children, Schools and Families (DCSF), as the Ministry of Education is known, for unfair use of fixed-term contracts of employment, which is what has led the UK delegation to reiterate its request.

II. Background

Article 29 of the Regulations for Members of the Seconded Staff of the European Schools states that the total period of secondment may not be more than nine years. In special cases, duly justified in the School's interest, a one-year extension may, however, be granted, thus increasing the maximum period of secondment to ten years.

In the case of the UK, the difficulty stems from the fact that the teachers seconded by this State are specifically recruited with a view to their secondment to the European Schools, being employed on a succession of fixed-term contracts, which so far had been renewed in stages, to coincide with renewal of their secondment (2+3+4).

In a first case in the UK courts, it was ruled that the practice of the Department for Children, Schools and Families (DCSF), which involved employing seconded teachers on a succession of fixed-term contracts that ended to coincide with the end of their period of secondment, contravened both European Directive No 1999/70/EC of 28 June 1999 on fixed-term work and the UK legislation which transposed that Directive (Fixed-Term Employees Regulations 2002).

In its judgment of 14 December 2009 in the cases of *Fletcher v DCSF* and *Duncombe and Others v DCSF*, the Court of Appeal of England and Wales upheld that ruling, finding that the teachers concerned should be regarded as DCSF employees with an open-ended contract for an indefinite period and that their dismissal, after their secondment ended, was unfair.

Following this ruling of the Court of Appeal, the UK took its case to the Supreme Court. If the ruling of the Court of Appeal were to be upheld by the Supreme Court, it should be borne in mind that around 20 teachers have already made claims for unfair dismissal in the UK courts and that other claims are likely

to be made by teachers who will reach the end of their period of secondment at the end of the current school year, which will come on top of the existing litigation.

So far, the Department for Children, Schools and Families (DCSF) has tended to treat seconded teachers whose successive contracts have been renewed as permanent employees and has attempted to redeploy them as officials, as far as possible, within the DCSF. However, there are no teaching vacancies as such within the DCSF, the only teaching posts available being those of teachers seconded to the European Schools, with the result that teachers whose secondment has ended generally have to be dismissed after a few months.

In this humanly and legally difficult context, the UK delegation has raised the following questions:

- whether the Board of Governors would consider suspending the application of the nine-year rule until the legal process is completed, allowing teachers due to leave under the provisions of Article 29 to remain in post beyond 31 August 2010;

- if they do remain in post from September 2010, whether the Board of Governors would continue to pay their European salaries and allowances, thus maintaining the same terms and conditions of employment that they currently enjoy.

In addition, the UK delegation asks whether the employment practice of the European Schools, involving an initial period of secondment of two years, renewable twice for successive periods of three and four years, is consistent with provisions and practice of current employment law across the EU, in view in particular of Directive No 1999/70/CE of 28 June 1999, which seeks to prevent unfair use of a succession of fixed-term contracts.

The latter question is answered in point III below. Also examined is the question of whether the nine-year rule could be suspended for the UK alone, bearing in mind that a similar derogation has already been granted to the UK (see Article 83.1 of the Regulations for Members of the Seconded Staff, the second indent of which only entered into force for the UK from 1 September 1993).

III. Legal opinion

At its January 2008 and January 2009 meetings, on two occasions in other words, the Board of Governors confirmed its position that the nine-year rules should not be called into question, since that is the maximum period of secondment to which a seconded teacher can claim entitlement, apart from duly justified exceptions in the interest of the Schools, which allow a final one-year extension to be granted in special cases.

It was thus confirmed, in accordance with the recommendations of the Board of Inspectors, as set out in document '3612-D-2000', that Article 29 of the Regulations for Members of the Seconded Staff of the European Schools rules

out the possibility of renewing a secondment beyond the maximum nine-year period.

This interpretation, whose application is mandatory, is now adhered to uniformly by all the seconding authorities.

As regards the secondment rules laid down by the Regulations for Members of the Seconded Staff and their conformity with Directive No 1999/70/EC on fixed-term work, the response already given in the legal advice presented, to the Board of Governors at its meeting of 22 and 23 January 2008 was that the 1999 Directive governed the employment relationship between the teachers and their national authorities and not their relationship with the European Schools.

The fact that the UK's practice towards its seconded teachers contravenes Directive No 1999/70/EC and the 2002 UK legislation has no bearing whatsoever on the validity of the secondment rules in force at the level of the European Schools.

It is in fact up to the UK authorities to adapt their practices, in relation to both their national legislation and the rules of international law applicable to them. In this connection, it should be pointed out that a Member State cannot take refuge in its national legislation to refuse to implement the provisions of an international treaty, in the case in point, the Convention defining the Statute of the European Schools.

Questioned again about this matter in connection with the writing of this document, the Office's lawyers confirmed that the litigation in progress in the UK courts and tribunals relates solely to the contractual relationship between the UK teachers and the Department for Children, Schools and Families, i.e. a third party legal relationship in relation to the European Schools.

Moreover, acceding to the UK proposal would not be without risk for the European Schools, which are very frequently faced with applications for extension of secondment for a tenth year by way of an exception, under Article 29(a)(ii) of the Regulations for Members of the Seconded Staff. It might usefully be argued by teachers whose extension application was rejected that there is discrimination based on nationality, which would seem to grant UK members automatic extension not justified in the interest of the international organisation. There would then be a breach of the principle of equality, justifying, even though it stems from a decision of the Board of Governors, reference to the Court of Justice of the European Communities for a preliminary ruling.

The Board of Appeal [as the Complaints Board used to be known prior to ratification of the 1994 Convention], for its part, drew a clear distinction between the legal link between the teacher and his/her national authorities, on the one hand, and that created by secondment, which establishes a link between the teacher and the European Schools, on the other. Thus, on the occasion of a refusal to grant an extension of secondment, the Board of Appeal pointed out that *"Similarly, the fact, external to the European Schools, that the Dutch government does not guarantee its nationals redeployment in the education system in force in the Netherlands is not sufficient to demonstrate the manifestly mistaken nature of the appraisal made by the directors of the Brussels I and Brussels II European Schools of the particular situation of each of the applicants with respect to the interest presented for the European Schools in question by extension of renewal*

of their secondment." (KUIPERS v European Schools, Brussels I and II, Board of Appeal, 25 April 2000, Appeal No 99/013).

Finally, the fact that transitional provisions, at the time of adoption of the new Regulations for Members of the Seconded Staff in 1996, allowed for deferred implementation of the nine-year rule in the case of UK teachers does not justify the calling into question of the substance of the rule which is now a mandatory requirement applicable to all the States, when periodic renewal of the teaching staff is one of the fundamentals underpinning the organisation of the European Schools.

It therefore appears reasonable for the Board of Governors not to change the fundamental rules of the Regulations for Members of the Seconded Staff to resolve a legal problem which, in reality, is strictly national.

IV. Proposal

The Board of Governors is invited to answer the questions put to it in the letter from Mrs Charles of 8 March 2010 (see annex), namely:

- whether the Board of Governors would consider suspending the application of the nine-year rule until the legal process is completed, allowing teachers due to leave under the provisions of Article 29 to remain in post beyond 31 August 2010;

- if they do remain in post from September 2010, whether the Board of Governors would continue to pay their European salaries and allowances, thus maintaining the same terms and conditions of employment that they currently enjoy.

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BELGIUM

Date: 8 March 2010

Dear Renée

Litigation relating to the application of Article 29 of the Seconded Staff Regulations (the Nine Year rule)

I am writing to the Board of Governors once again on the subject of the ongoing litigation about the application of Article 29 of the Seconded Staff Regulations (the Nine Year Rule) to UK seconded teachers. Many of my colleagues on the Board of Governors will be aware, that since I wrote last year, the cases of *Fletcher v DCSF* and *Duncombe and Others v DCSF* have been heard by the UK's Court of Appeal. The Court of Appeal gave judgement in December 2009 and found against the UK on all counts. You should be aware that the Court of Appeal found that domestic employment regulations take precedent over the UK's international treaty obligations made pursuant to the 1994 Convention defining the Statute of the European Schools. We have lodged papers with the UK Supreme Court, asking the highest court in the UK to consider hearing our case. We await the outcome.

If the Court of Appeal judgement stands, there are two immediate effects. First: Mr Fletcher's case for unfair dismissal under the provisions of the Fixed Term Employment (Prevention of Less Favourable Treatment) Regulations 2002 can be heard by the UK's Employment Tribunal. Mr Fletcher was employed at Culham. Second: the UK Employment Tribunal will be able to hear cases for unfair dismissal from teachers who have been wholly employed outside of the United Kingdom while seconded to the European Schools system. There are 9 cases involved in our application to the Supreme Court. A further 9 teachers who left the European Schools system in 2008 and 6 who left in 2009 have made claims for unfair dismissal to the UK Employment Tribunal, but these cases are stayed while we wait for the decision of the Supreme Court. Unless the Supreme Court overturns the judgement of the Court of Appeal, these cases will be allowed to proceed on the basis that the Courts had found that these teachers were permanent DCSF employees as a result



of being employed on a succession of fixed term contracts for more than four years in accordance with the nine year rule.

As a gesture of goodwill, we have been treating the teachers as permanent employees of the Department for Children, Schools and Families (DCSF) and have offered the teachers help to find alternative work in the department as an official. This is because the only teaching vacancies that the Department has available to it are the vacancies in the European School's system. Our efforts to redeploy teachers leaving the European Schools' system within the DCSF have so far been unsuccessful. As a result, three months after the end of their contract with the European Schools' system, we have been forced to dismiss the teachers who have not found alternative employment. This is a distressing situation for all concerned, but the DCSF cannot continue to pay salaries to those not employed in the Department for an indefinite period. If the teachers cannot find an alternative post in the department, we have no alternative but to dismiss them after a period of time.

Once again, I would like to ask the Board of Governors to review its negative answers to the questions put to it by the UK Delegation in January 2008 and again in January 2009, namely:

- *whether the Board of Governors would consider suspending the application of the nine-year rule until the legal process is completed allowing teachers due to leave under the provisions of Article 29 to remain in post beyond 31 August 2010.*
- *if they do remain in post from September 2010, whether the Board would continue to pay their European salaries and allowances, thus maintaining the same terms and conditions of employment that they currently enjoy.*

I would also like the Board of Governors to consider whether its employment practices are consistent with the provisions and practice of current employment law across the EU.

I should also inform you that the UK will continue with the practice it introduced last year to employ teachers on a single contract for a period of five years. This contract will, of course, include a probationary period of two years as required by the regulations. Teachers already seconded to the system will not have the terms of their secondment altered and, subject to satisfactory performance reviews, will remain in the system for up to nine years.

I would be grateful if you could bring this letter to the attention of the Board of Governors at its meeting in April 2010.

Yours sincerely



Pauline Charles
European Schools Team

