

OPINION OF MR ADVOCATE GENERAL
DA CRUZ VILAÇA

delivered on 24 September 1986 *

*Mr President,
Members of the Court,*

1. The applicant, Marcel Luttgens, entered the service of the Commission on 15 June 1964 as a translator and was appointed Head of Special Department IX-D-7 (French Translation) with effect from 1 March 1983.

On 14 December 1983 he applied for unpaid leave from 1 March 1984 to 28 February 1985, stating in his request that during his leave his address would be: 33 Grand-Rue, B-6780 Messancy.

That request was granted by a decision dated 16 January 1984.

On 12 March 1984 a Notice of Vacancy for the post of Head of Division IX-D-7 in Grade L/A 3 was published. Mr Luttgens applied for the post on 19 March 1984, indicating in a letter accompanying his application that his address was 3 rue du Stade, Schouweiler, but that he would be absent from Luxembourg from 24 March to 1 July 1984; he did not, however, say where he would be at that time. In the same letter he requested that he be reinstated in the service at the end of August, earlier than anticipated, 'so that his application for the post in question might be considered'.

In reply, the Director of Personnel and Administration at the Commission sent a

letter dated 23 March 1984 to the address given by the applicant, informing him that it would not be possible to defer either the advertising or the filling of the L/A 3 post of Head of the French Translation Division. In his reply he also informed the applicant that, under the Staff Regulations, an application from an official on unpaid leave was not admissible, so that in any case reinstatement at the end of August would be too late. The applicant maintains that he did not receive that letter until June 1984 because it was not sent to the address given by him in his application for unpaid leave.

Having been reinstated at his request, but as a reviser, in October 1984 the applicant requested on 29 October that he be given a post equivalent to that which he had occupied prior to taking unpaid leave. When the administration refused that request he submitted a complaint to the appointing authority dated 6 December 1984 under Article 90 of the Staff Regulations, in which he requested that the decisions adversely affecting him be annulled. The complaint was received by the Commission on 12 December 1984 and was registered in the General Secretariat on 4 January 1985.

The Commission rejected the complaint on 5 June 1985, by a letter delivered to the applicant on 11 June.

The application giving rise to the present action was lodged at the Court Registry on 3 September 1985. The applicant seeks the

* Translated from the Portuguese.

annulment of the decision of the Commission rejecting his application for the post of Head of the Translation Division, the annulment of the entire procedure relating to the competition for that post, including the appointment of any other official, and the reopening of that procedure. The applicant also seeks the annulment of the decision to reinstate him as a reviser, maintaining that he should at least have been reinstated in his former post of Head of Section.

However, in view of the fact that in the rejoinder the Commission stated for the first time, in a reversal of its previous position, that Mr Lutgens's application for the post of Head of Division had in fact been considered, at the hearing the applicant withdrew his claim that the Commission's decision rejecting his application should be annulled — not only did that claim relate to a measure adopted by an official which was not definitive (the letter of 23 March) but it would also be pointless to pursue it in view of the Commission's revelation. At the hearing the applicant also withdrew his claim that the appointment of Mr Parini to the post of Head of Division should be annulled, stating that he did so for humanitarian reasons.

In place of those claims, set out in the original application, he requested at the hearing that the Commission be ordered to pay him one ECU by way of damages for its improper conduct, on the basis of Article 42 of the Rules of Procedure.

When the Court queried the validity of such a claim at that stage in the proceedings, the applicant suggested that the Court should order the payment of damages of its own motion, in the same way as it did in *Oberthür*. In the alternative, and for the same reason, the applicant suggested that

the Commission should be ordered to pay the costs of the proceedings in terms similar to those adopted by the Court in *List*.

The second claim in the application, regarding the annulment of the decision to reinstate the applicant as a reviser, remains unaltered.

2. I shall now examine the issues of law raised in this action.

A — The objection that the application is inadmissible.

In its rejoinder the Commission raises a preliminary objection of inadmissibility. It submits that the application is inadmissible because the complaint was lodged outside the time-limit prescribed in Article 90 (2) of the Staff Regulations: three months had already elapsed since the publication of Notice COM/736/84, and that notice is a measure of a general nature.

It is clear that the objection cannot be upheld as regards the applicant's claim concerning his reinstatement. The decision regarding reinstatement came to the applicant's notice in October 1984 and the complaint was lodged on 6 December, that is to say within the three-month period prescribed in Article 90 (2) of the Staff Regulations.

As regards the claim for annulment of the competition and of the appointment to the post of Head of Division it would at first appear that since the applicant withdrew that claim its admissibility need no longer be considered.

However, the applicant submitted a new claim at the hearing which — assuming that there were no other grounds for rejecting it directly — could only be examined, in my view, in the event of the original claim set out in the application being admissible. After all, would it be logical to order the Commission to pay damages or costs, or both, for unlawful conduct established on the basis of the same facts as those which founded a particular claim, if that claim were not itself admissible?

Accordingly, we are bound to examine the admissibility of the original claim.

The fact is, however, as will be seen shortly, that there is another ground, unrelated to the admissibility of the original application, for dismissing the applicant's new claim as inadmissible, which makes it unnecessary to examine the original claim here.

B — The claim for compensation

At the hearing the applicant asked, as we saw, that the Commission be ordered to pay one ECU as compensation for loss and damage, basing his claim on Article 42 (2) of the Rules of Procedure.

However, that article merely permits fresh issues to be raised in certain circumstances. But it certainly does not allow an entirely new claim to be made at the hearing. The claim for compensation submitted at the hearing is thus inadmissible.

I consider, however, that the Court may of its own motion order the Commission to pay compensation for the damage it caused

to the applicant if its conduct amounts to maladministration or in some other way justifies such a payment. The Court enjoys in such cases unlimited jurisdiction under Article 91 (1) of the Staff Regulations (see Case 44/59 *Fiddelbar v Commission* [1960] ECR 535; Case 24/79 *Oberthür v Commission* [1980] ECR 1743).

In the present case the Commission consistently maintained throughout both its correspondence with the applicant and the written procedure prior to the rejoinder that the applicant was not even considered for the post of Head of Division. Not until the rejoinder did the Commission state — contradicting what it had previously maintained — that he had in fact been considered for the post. That fact inevitably influenced the applicant's strategy, as he pointed out at the hearing: he might never have brought the action, or if he had done so he would certainly have based it on quite different grounds. The proof of that is the fact that the first three grounds relied upon by the applicant cannot be upheld because they challenge the supposed refusal to consider him for the post in question.

Thus, the Commission did not exercise the care required of it in order to avoid such consequences (especially as the Commission had available to it from the start the documentation relating to the competition) and thus failed to observe the rules of sound administration, and did so in a manner prejudicial to the absolute good faith required in legal proceedings. It has thus laid itself open to a charge of maladministration adversely affecting a member of its staff.

For that reason I propose that the Court should, of its own motion, order the Commission to pay compensation which could be fixed at a symbolic amount of one

ECU for the non-material damage suffered by the applicant as a result of the administration's wrongful conduct.

C — The decision to reinstate the applicant as a reviser

The applicant maintains that as he had been head of a special department, his reinstatement as a reviser was prejudicial not only to his personal standing but also to his future prospects, particularly the possibility of being promoted to the post of Head of Division. On that ground he seeks the annulment of his posting on reinstatement.

However, I do not consider that that claim can be upheld.

Article 40 (4) (d) provides that on the expiry of his unpaid leave an official must be reinstated in a post corresponding to his grade in his category or service.

The applicant was in Grade L/A 4 before his leave and was reinstated in the same grade. The fact that the post of reviser corresponds to that grade is established in Annex I to the Staff Regulations, so that, as far as the applicant's present duties are concerned, there is no discrepancy between grade and post.

I have doubtless been influenced by the remarks made by Mr Advocate General Mayras regarding the interpretation of Article 7 of the Staff Regulations in a similar case in his Opinion in *Kubner v Commission* Joined Cases 33 and 75/79 ([1980] ECR 1577, at p. 1706 *et seq.*).

In that case, an official in Grade A 4 at the Commission who was acting head of a special department in Directorate F (External relations, transport and services statistics) was appointed, after a reorganization, as a principal administrator responsible for special assignments. The circumstances surrounding the official's change of post led Mr Advocate General Mayras to conclude that although the letter of Articles 5 and 7 of the Staff Regulations had been observed, the Commission had failed to fulfil its duty to look after the well-being of officials, in so far as the official concerned had suffered a *de facto* demotion.

In the case before us today, however, I consider that the proceedings have not yielded sufficient evidence to found such a conclusion.

Neither in the written nor in the oral proceedings was the precise nature of the applicant's functions prior to his unpaid leave clearly explained. He contrived to use indiscriminately the titles 'head of a group', 'head of a sector' (apparently more or less equivalent to 'head of a special department') and even 'head of a department', without making any clear distinction between terms used in the Staff Regulations and those used solely by the administration.

If the applicant must be reinstated as head of a special department the result, as far as the Commission is concerned, must be the reversal of the conversion of the department into a division (to the post of head of which the applicant was not appointed), thus denying the institution the means of discharging its responsibility to make

arrangements for and improve its internal organization which has been recognized in the judgments of this Court Case 66/75 (*Macevicius v Parliament* [1976] ECR 593, at p. 603 *et seq.*; Case 61/76 *Geist v Commission* [1977] ECR 1419, at p. 1434). The situation is not made any clearer by the fact that the applicant concluded by claiming, in paragraph 5 of the last part of his application, that he should be reinstated 'at least in his former post of head of the French group', indicating that what he really seeks is a post equivalent to that which he occupied before taking unpaid leave.

However, there has not been the slightest explanation as to how the translation division in Luxembourg was organized, and in particular whether or not the list of posts for the division included posts of heads of groups within the meaning of the Staff Regulations, although the letter of 4 December 1984 from the Director-General of Personnel mentioned the intention of the administration to give him a post as head of a group.

Thus, the proceedings have not yielded any sufficiently reliable evidence to conclude that there was a significant demotion or any substantial reduction in the level of the applicant's duties after his reinstatement.

Accordingly, I do not consider that there is sufficient reason to regard the circumstances of this case as departing from the scope of the previous case-law, according to which 'the rule that the post must correspond to the grade, set out in particular in Article 7 of the Staff Regulations, involves, in the event of a change in the duties of an official, a comparison between his present duties and his grade and not between his present and previous duties' Joined Cases 33 and 75/79 (*Kühner v Commission* [1980]

ECR 1677 at p. 1696; Case 66/75 *Macevicius v Parliament* [1976] ECR 593 at p. 604).

In fact, the applicant does not deny that his present duties as a reviser corresponded to his grade, Grade L/A 4.

D — Costs

For the reasons already given in connection with the claim for compensation based on the Commission's wrongful conduct the applicant, faced with the collapse of most of his submissions and arguments, abandoned them. His action in that regard is attributable, as has been shown, to the conduct of the Commission, which failed to indicate that it had considered Mr Luttgens's application until it submitted its rejoinder.

There is no doubt that the applicant was prompted, if not actually induced, to bring this action and to rely on the grounds which he put forward by the concealment from him of a fact which was subsequently revealed in the rejoinder.

In the circumstances I consider that the applicant should not be made to pay the costs of the action, despite the fact that he has failed in his submissions.

I therefore conclude that the Court is bound, in accordance with its judgment of 27 January 1983 (Case 263/81 *List v Commission* [1983] ECR 103 at p. 118), to apply the second paragraph of Article 69 (3) of the Rules of Procedure, according to which the Court may order even a successful party to pay the costs of the other party in proceedings which have arisen as a result of its own misconduct.

On the basis of the foregoing conclusions I propose that the Court should:

- order the Commission to pay the applicant one ECU by way of symbolic compensation for the damage it has caused him to suffer;
- dismiss the application so far as it concerns the applicant's reinstatement;
- order the Commission to pay the costs in their entirety.