

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
2 October 1996

Case T-356/94

Sergio Vecchi
v
Commission of the European Communities

(Officials – Vacancy notice – Manifest error – Misuse of powers – Statement
of reasons – Admissibility)

Full text in French II - 1251

Application for: annulment of the Commission's decision of 8 August 1994 not to consider the applicant's candidature for the post of head of the Commission delegation in Kazakhstan and, consequently, annulment of the decision appointing another candidate to that post, together with a claim for compensation.

Decision: annulment of the Commission's decision of 8 August 1994. Claim for compensation dismissed.

Abstract of the Judgment

The applicant, currently an official of the Commission in Grade A 4, entered the service of that institution in 1967 as an official in the Language Service. In 1990 he was assigned as an administrator to the Directorate-General for Telecommunications, Information Industries and Innovation (DG XIII), where he performed duties principally in connection with relations with Eastern European countries, in particular in the context of the G24 (Group of twenty-four), the Phare programme (Community aid to the countries of Central and Eastern Europe) and the Tacis programme (technical assistance to the newly independent States of the former Soviet Union and to Mongolia). In 1993 he was transferred to the Directorate-General for Industry (DG III) where he deals with questions concerning industrial cooperation with the countries of Eastern Europe.

Following publication of Vacancy Notice COM/026/94 dated 17 March 1994, the applicant and seven other officials applied for the post of head of the Commission delegation in Kazakhstan.

According to the vacancy notice, the minimum qualifications required of applicants were as follows:

- ‘ – They should be serving officials in the same category/bracket/career (transfer);
- They may belong to the career bracket below (promotion under Article 45 of the Staff Regulations);
- They should possess knowledge and experience/skills commensurate with the tasks to be performed;
- For posts requiring special qualifications: they should have extensive knowledge and experience in or in relation to the sector of activity.’

The vacancy notice describes the special conditions applicable to the post in question in the following terms:

'Alma Ata. Head of the Commission delegation in Kazakhstan. Extensive knowledge of the Treaties and of the Community's common policies in the field of external relations. Extensive knowledge of economic, commercial and technical cooperation policies in Kazakhstan and the Central Asian Republics. Knowledge of Russian and/or German and local languages would be an advantage.'

By letter dated 17 June 1994 the Secretary of the Advisory Committee on Appointments informed the applicant that his candidature could not be taken into consideration for the post to be filled.

By decision of 8 August 1994 the Commission appointed another candidate, Mr K., to the post in question. On 12 August 1994 the applicant was informed that his candidature had been unsuccessful.

On the same date the applicant lodged a complaint against that decision, which was examined at two meetings of the inter-service group on 29 September and 13 October 1994.

Those were the circumstances in which the applicant brought this action by application lodged at the Registry of the Court of First Instance on 24 October 1994.

On the same date, by separate document, the applicant requested the suspension of operation of the decision appointing Mr K. By order of 23 November 1994 (T-356/94 R *Vecchi v Commission* [1994] ECR-SC II-805), the President of the Court of First Instance dismissed the application for interim relief and reserved costs.

By letter dated 5 December 1994 the Commission rejected the complaint brought by the applicant, in particular on the following grounds:

‘The Advisory Committee on Appointments examined all the candidatures and came to the conclusion that three of them (including that of the candidate appointed) could be taken into consideration.

(...)

The Commission finds that the appointing authority in no way disregarded the framework of legality set by the vacancy notice in appointing Mr K. to the post in question. The experience acquired by Mr K. in the exercise of his various duties has enabled him to widen an extensive knowledge of the common policies and external relations of the Community.

The Commission notes that the candidate appointed most closely satisfied the conditions required for this post of head of delegation.

Mr Vecchi’s experience, although concerned with the Eastern European countries, is limited to more specific areas.’

Subject-matter of the dispute and admissibility

The arguments concerning the subject-matter of the dispute and the issue of admissibility all turn on the question whether the applicant satisfies the conditions laid down in the vacancy notice. The terms in which the vacancy notice was couched, in particular the requirement that candidates should have extensive knowledge of the economic, commercial and technical cooperation policies in

Kazakhstan and in the Central Asian Republics – knowledge which appeared to be fairly uncommon at the time – must have conveyed the impression to the applicant who performed certain tasks in this area that he had a chance of obtaining the post. Similarly, the applicant had an interest in ascertaining whether the candidate finally selected satisfied that condition of the notice (paragraphs 27 and 28).

What is more, the applicant has shown that he possessed certain knowledge, experience and skills in relation to each of the conditions mentioned in the notice (paragraph 30).

Moreover, the Advisory Committee on Appointments rejected the applicant's candidature after conducting a comparative examination of the candidates' merits and not because it considered that the applicant did not satisfy the conditions set out in the vacancy notice (paragraph 30).

The memorandum sent by the Secretary of the Advisory Committee on Appointments to the applicant shows that at its meeting on 9 June 1994 the committee examined the level at which the post had to be filled and the qualifications required of the future holder of the post. After stating that all the applications had been examined, the memorandum concludes that the applicant's candidature should not be taken into consideration on this occasion (paragraph 31).

The fact that that memorandum expressly states that the Advisory Committee on Appointments had come to the conclusion that the applicant's candidature was not to be considered following an examination of all the candidatures in fact confirms that the applicant satisfied the conditions of the vacancy notice and that the committee had conducted a comparative examination of the applicant's periodic reports and merits, in accordance with Article 45 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'). It follows that its conclusion that 'the applicant's candidature should not be taken into consideration' cannot be construed as meaning that the Advisory Committee on Appointments took the view that his candidature was not admissible in the light of the qualifications

required, but as an appraisal made following the comparative examination of all the applications (paragraph 32).

See: 44/85, 77/85, 294/85 and 295/85 *Hochbaum and Rawes v Commission* [1987] ECR 3259, paras 16 to 19; T-108/92 *Caló v Commission* [1994] ECR-SC II-213, para. 16

Similarly, in the decision rejecting the applicant's complaint no reference is made to the possibility that he did not satisfy the conditions set out in the vacancy notice, since the Commission merely emphasized the value of the experience acquired by the candidate selected in relation to the applicant's own experience. In those circumstances the Commission cannot be seen to alter its position by maintaining that the applicant did not satisfy the conditions set out in the vacancy notice (paragraph 33).

It follows that the applicant has a legitimate, certain and existing interest in seeking the annulment of Mr K.'s appointment (paragraph 34).

See: T-45/91 *McAvoy v Parliament* [1993] ECR II-83, para. 28

Substance

The pleas alleging infringement of the vacancy notice and manifestly erroneous appraisal of the facts

The purpose of the vacancy notice is to inform those concerned as accurately as possible of the nature of the conditions required for the post in question in order to

enable them to assess whether it is appropriate for them to submit their candidature (paragraph 50).

See: 188/73 *Grassi v Council* [1974] ECR 1099, para. 40

At the time when the contested decision was adopted, the candidate selected did not possess an 'extensive knowledge of the economic, commercial and technical cooperation policies in Kazakhstan and the Central Asian Republics', as required by the vacancy notice (paragraph 51).

Whatever may be the merits of the candidate selected in relation to those of the applicant, the appointing authority is required to conduct the comparison of the merits and periodic reports of the candidates within the framework which it imposed on itself by the terms of the vacancy notice for the post (paragraph 53).

See: C-35/92 P *Parliament v Frederiksen* [1993] ECR I-991, para. 13

In exercising its discretionary power in matters of appointment and promotion, the appointing authority must scrupulously examine the candidates' files and conscientiously observe the requirements laid down in the vacancy notice, in such a way that it must eliminate any candidate who does not satisfy those requirements (paragraph 54).

See: *Parliament v Frederiksen*, cited above, para. 15

At the time when it draws up the vacancy notice, the appointing authority must be apprised of the conditions laid down. The provisions of the Staff Regulations are not satisfied if it takes cognizance of those conditions only after publication of the notice, in the light of the candidates who have come forward, and interprets the terms of the vacancy notice in a way which it considers best meets the needs of the service (paragraph 55).

See: *Grassi v Council*, cited above, para. 39

If, subsequently, the appointing authority discovers that the conditions laid down by the vacancy notice were more severe than was required by the needs of the service, it is open to it to recommence the procedure for filling the post by withdrawing the original vacancy notice and replacing it with a corrected notice (paragraph 56).

See: *Grassi v Council*, cited above, para. 43

Nor can the Commission rely on the fact that the vacancy notice, divided into two parts, attaches less importance to the specific conditions than to the general conditions. The notice states in the general conditions that extensive knowledge and experience of and in relation to the sector of activity concerned are required for posts calling for special qualifications. Accordingly, the second part of the notice merely sets out that condition in more detail. In any event, since the purpose of the vacancy notice is to inform those concerned, as precisely as possible, of the nature of the conditions laid down for the vacant post, both parts of the notice must be considered together. Extensive knowledge of economic, commercial and technical cooperation policies in Kazakhstan and the Central Asian Republics is such a manifest requirement of the notice that it could not have escaped the attention of those concerned (paragraph 57).

It follows that the appointing authority did not conscientiously observe the conditions set out in the vacancy notice. In so doing it also committed a manifest error in the examination of the candidates' merits (paragraph 58).

See: *McAvoy v Parliament*, cited above, paras 51 and 52

The plea alleging failure to conduct a comparative examination of the merits

The arguments advanced by the applicant under this plea seek to demonstrate that the Commission misdirected itself in the examination of the candidates' merits, as found by the Court at paragraph 58 above. However, the allegation that there was a total failure to conduct a comparative examination of merits is unfounded since it is clear from the Court's appraisal that such an examination did in fact take place (paragraph 65).

The plea alleging misuse of powers and infringement of the principle of non-discrimination

It is not apparent from the documents before the Court that the Commission was guilty of a misuse of powers or that it infringed the principle of non-discrimination (paragraph 72).

None of the evidence adduced by the applicant demonstrates that the decision was taken in order to attain objectives other than those stated. In that regard, non-observance of the vacancy notice in connection with the examination of the merits is not sufficient in itself to establish that the Commission acted against the interests of the service in the sense that it was guilty of a misuse of powers (paragraph 73).

As to the applicant's allegation that Mr K.'s nationality was a decisive criterion in his appointment, suffice it to state that the applicant has adduced no evidence to support the suggestion that there is a predetermined share-out amongst the Member States as regards heads of delegation posts (paragraph 74).

The plea alleging infringement of the duty to provide a statement of reasons

When it decides to reject a candidature, the appointing authority is required to provide a statement of reasons, at least at the stage when it rejects the complaint against such a decision. However, where promotions and transfers are by selection, the reasons for the rejection of a complaint need concern only the fulfilment of the legal conditions on which, under the Staff Regulations, the lawfulness of the procedure depends. Therefore, it is not necessary for the institution concerned to set out in detail in what way it considered that the candidate appointed fulfilled the conditions laid down in the vacancy notice. The statement of reasons must, nevertheless, enable the Community judicature to review the legality of the contested decision and provide the person concerned with sufficient details to allow him to ascertain whether that decision is well founded or whether it is vitiated by an error which will allow its legality to be contested (paragraph 80).

See: T-25/90 *Schönherr v ESC* [1992] ECR II-63, paras 21 and 22; T-25/92 *Vela Palacios v ESC* [1993] ECR II-201, para. 22

The decision rejecting the complaint states, on the one hand, that the experience acquired by Mr K. in the exercise of various functions enabled him to acquire a wide knowledge of the common policies and external relations of the Community, with the result that he was the best candidate in the light of the conditions laid down for the post of head of delegation and, on the other hand, that the applicant's experience, although concerned with the Eastern European countries, was limited to more specific areas (paragraph 81).

Even if the examination of the candidates' merits has been found to be vitiated by a manifest error in the assessment of the facts, the statement of reasons as such is not inadequate. It does in fact set forth individually the relevant grounds which, in the Commission's view, justify the rejection of the applicant's candidature, with the result that he was able to challenge the legality of the contested decision and the Court was able to exercise its power of review in that regard (paragraph 82).

The plea alleging that the procedure was unlawful

Suffice it to state that this plea does not give the applicant a personal interest in the annulment of the contested measure. Since he is an official in Grade A 4 and the post in question was to be filled at Grade A 4/A 5, he cannot claim to have been wronged by an infringement of the procedure in question. The post was set at a level allowing the applicant to be appointed to it in the event that the comparative examination of the merits had been in his favour (paragraph 87).

See: T-16/94 *Benecos v Commission* [1995] ECR-SC II-335, para. 47

Compensation

A claim for compensation to make good damage caused not by an adverse decision whose annulment is sought, but by various errors and omissions alleged to have been committed by the administration, must be preceded by a two-stage procedure. It is mandatory for such a procedure to commence with the submission of a request asking the appointing authority to make good the alleged damage and to continue, if necessary, with the lodging of a complaint against the decision rejecting the request (paragraph 93).

See: T-53/92 *Piette de Stachelski v Commission* [1993] ECR II-35

In the present case, the claim for compensation seeks reparation for damage alleged to have been caused by acts which, owing to the absence of legal effects, cannot be described as acts adversely affecting the official. However, the claim was not preceded by the correct pre-litigation procedure (paragraph 94).

Operative part:

The Commission's decision of 8 August 1994 not to consider the applicant's candidature for the post of head of the Commission delegation in Kazakhstan and the decision of 8 August 1994 appointing Mr K. to that post are annulled.

The remainder of the application is dismissed.