



Reports of Cases

JUDGMENT OF THE CIVIL SERVICE TRIBUNAL (Second Chamber)
30 September 2010

Case F-20/06

Patrizia De Luca
v
European Commission

(Civil service — Officials — Appointment — Officials advancing to a higher function group by open competition — Candidate placed on a reserve list prior to the entry into force of the new Staff Regulations — Transitional rules governing classification in grade at the time of recruitment — Classification in grade pursuant to the new, less favourable rules — Article 5(2) and Article 12(3) of Annex XIII to the Staff Regulations)

Application: brought under Articles 236 EC and 152 EA, in which Ms De Luca, a successful candidate in a competition before 1 May 2004, seeks annulment of the Commission's decision of 23 February 2005 appointing her as an administrator, in so far as it classifies her in Grade A*9, step 2.

Held: The application is dismissed. Each party is ordered to bear its own costs.

Summary

- 1. Officials — Actions — Prior administrative complaint — Time-limits — Point from which time starts to run
(Staff Regulations, Arts 25, 26, 90 and 91)*
- 2. Actions for annulment — Jurisdiction of the Community judicature — Application for annulment of an individual act adversely affecting an official — Community judicature's lack of competence to declare a provision of general application unlawful in the operative part of its judgments
(Art. 230 EC)*
- 3. Officials — Recruitment — Appointment in grade — Introduction of a new career structure by Regulation No 723/2004 — Transitional provisions on classification in grade
(Staff Regulations, Annex XIII, Arts 1(2) and 12(3); Council Regulation No 723/2004)*
- 4. Officials — Recruitment — Appointment in grade — Introduction of a new career structure by Regulation No 723/2004 — Transitional provisions on classification in grade
(Staff Regulations, Art. 3; Annex XIII, Art. 12(3); Council Regulation No 723/2004)*

5. *Officials — Recruitment — Appointment in grade — Appointment in the grade of the function group stated in the competition notice — Introduction of a new career structure by Regulation No 723/2004 — Transitional provisions on classification in grade*
(Staff Regulations, Arts 29(1) and 31(1); Annex XIII, Arts 2(1) and 12(3); Council Regulation No 723/2004)

6. *Official — Recruitment — Appointment in grade — Introduction of a new career structure by Regulation No 723/2004 — Transitional provisions on classification in grade*
(Staff Regulations, Annex XIII, Art. 12(3); Council Regulation No 723/2004)

7. *Officials — Recruitment — Appointment in grade — Appointment in the grade of the function group stated in the competition notice — Introduction of a new career structure by Regulation No 723/2004 — Transitional provisions on classification in grade*
(Staff Regulations, Annex XIII, Art. 12(3); Council Regulation No 723/2004)

1. The time-limit for complaints laid down in Article 90 of the Staff Regulations may start to run from the day on which the person concerned receives notification of the act adversely affecting him. That procedural provision, which is intended to cover a large number of situations, must be interpreted in the light of the fundamental rules of the Staff Regulations governing how officials are to be informed concerning the essential features of their employment and, in particular, the form that that information is to take. It is clear from the general scheme of the Staff Regulations and, in particular from Articles 25 and 26, that grading decisions, just like appointment decisions, must be duly notified to the person concerned and that the administration may not confine itself to informing him by means of a document which merely expresses the consequences of those decisions, nor may it neglect to ensure that those decisions actually reach their addressee. To impose the requirement that the official concerned lodge a complaint at the latest within three months of receipt of an offer of employment, rather than within three months of notification of the appointment decision, would have the effect of rendering meaningless the second paragraph of Article 25 and the second and third paragraphs of Article 26 of the Staff Regulations, the aim of which is precisely to allow officials to take effective cognizance of decisions regarding, in particular, their administrative situation and to claim the rights guaranteed them by the Staff Regulations.

(see paras 38-40)

See:

F-101/05 *Grünheid v Commission* [2006] ECR-SC I-A-1-55 and II-A-1-199, paras 49, 52 and 56

2. Although, in an application for annulment of an individual measure having adverse effect, the Community judicature does in fact have jurisdiction to declare, incidentally, the illegality of a provision of general application upon which the contested measure is based, it does not, however, have jurisdiction to make such declarations in the operative part of its judgments.

(see para. 44)

See:

F-134/07 and F-8/08 *Adjemian and Others v Commission* [2009] ECR-SC I-A-1-149 and II-A-1-841, para. 38, on appeal before the General Court of the European Union, Case T-325/09 P; F-20/08, F-34/08 and F-75/08 *Aparicio and Others v Commission* [2009] ECR-SC I-A-1-375 and II-A-1-2013, para. 28

3. It is apparent from a reading of Article 1(2) of Annex XIII to the Staff Regulations in conjunction with Article 12(3) of the same annex that the word ‘recruited’ appearing in the latter provision has a precise meaning and that it must be interpreted as covering officials who entered into service between

1 May 2004, the date on which Regulation No 723/2004 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants came into force, and 30 April 2006 in a post that was open to them following their inclusion, before 1 May 2006, in a list of successful candidates resulting from a competition published under the old Staff Regulations, whether or not those officials already had that status when they entered into service.

(see para. 56)

4. A breach of the principle of equal treatment occurs when two categories of person whose factual and legal circumstances disclose no essential difference are treated differently at the time of their recruitment and that difference in treatment is not objectively justified.

Furthermore, if all further development of legislation is not to be prevented, the principle of equality cannot hinder the legislature's freedom to make at any time such amendments to the Staff Regulations as it considers to be consistent with the interests of the service, even if those amendments are less favourable for officials.

Moreover, it is made clear by Article 3 of the Staff Regulations that the appointment of an official necessarily has its origin in a unilateral instrument of the administration, and it is only after being the subject of such a decision that a successful candidate in a competition can claim the status of official and therefore demand the application to him of provisions of the Staff Regulations.

It follows from the above that the classification in grade of officials appointed from 1 May 2004 onwards, the date on which Regulation No 723/2004 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants came into force, could be lawfully carried out only in accordance with the new criteria in force on that date. During the transitional period from 1 May 2004 to 30 April 2006 those criteria were laid down by Article 12(3) of Annex XIII to the Staff Regulations.

That finding is not undermined by considerations relating to the date when the reform of the Staff Regulations came into force. First of all, while it is possible that the date when new regulations come into force may prove discriminatory, the date of 1 May 2004 was, in the present case, objectively justified. The reason for the reform of the Staff Regulations was that changes had occurred in society in general and needed to be reflected in the regulatory framework applicable to the European civil service 'in order to meet the changing needs of the institutions and their staff', in the words of the first recital of Regulation No 723/2004. It is therefore understandable that its entry into force should coincide with the accession of 10 new Member States. Secondly, the date of recruitment decided by the administration constitutes an objective factor independent of the will of the Community legislature.

(see paras 68-71, 73)

See:

C-443/07 P *Centeno Mediavilla and Others v Commission* [2008] ECR I-10945, paras 76 and 81

T-121/97 *Ryan v Court of Auditors* [1998] ECR II-3885, para. 100; T-135/05 *Campoli v Commission* [2006] ECR-SC I-A-2-297 and II-A-2-1527, para. 105; T-58/05 *Centeno Mediavilla and Others v Commission* [2007] ECR II-2523, paras 54, 55, 77, 86 and 113

F-54/06 *Davis and Others v Council* [2007] ECR-SC I-A-1-165 and II-A-1-911, para. 81

5. As regards the appointment in grade of officials following the introduction of the new career structure by Regulation No 723/2004 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants, the determination of the level of the posts to be filled, carried out

by the administration under the provisions of the old Staff Regulations when drawing up a notice of competition, could not extend its effects beyond 1 May 2004, the date on which Regulation No 723/3004 came into force.

Consequently, the right of successful competition candidates, deriving from Article 31(1) of the Staff Regulations, to be given the grade stated in the notice of competition can apply only where the law is unchanging, because the legality of a decision is assessed on the basis of the elements of law in force at the time it is adopted and that provision cannot therefore compel the administration to take a decision which is incompatible with the Staff Regulations as amended by the legislature and therefore unlawful.

In that context, with the abolition as from 1 May 2004, under the new careers system, of the grades set out in the notices of competitions which had been published before that date, it was open to the legislature to adopt Article 12(3) of Annex XIII to the Staff Regulations in order to resolve the difficulties inherent in that situation and determine the classification in grade of successful candidates in competitions placed on reserve lists published before 1 May 2004, but appointed probationary officials on the basis of those competitions after that date.

It is true that the gradings determined by Article 12(3) of Annex XIII to the Staff Regulations do not correspond to the grades published in notices of competition prior to 1 May 2004 and that that provision conflicts with the rule laid down in Article 31 of the Staff Regulations and taken from Article 31 of the old Staff Regulations. However, having regard to its purpose, Article 12(3) of Annex XIII to the Staff Regulations constitutes a transitional provision of a special kind which may, as such, derogate, for a given category of officials, from the general rule provided for by Article 31 of the Staff Regulations.

The constraints inherent in changing from one method of management to another, in respect of officials' careers, may require the administration to depart temporarily, and within certain limits, from the strict application of the permanent rules and principles that normally apply to the situations at issue.

Furthermore, as regards compliance with Article 29 of the Staff Regulations, from which it follows that the vacancy notice constitutes a binding legal framework for the administration, that article does not have a binding effect greater than that of Article 12(3) of Annex XIII to the Staff Regulations and may not take precedence over that special transitional provision.

Moreover, the sole purpose of Article 2(1) of Annex XIII to the Staff Regulations, which establishes a more favourable relationship than that laid down in Article 12(3) of the same annex between the old grades and those in force during the transitional period from 1 May 2004 to 30 April 2006, was to convert, on 1 May 2004, the grades held by those with the status of official on 30 April 2004 in order to bring them into line with the new career structure that would come into force in full on 1 May 2006. Interpreted strictly, as every transitional provision must be, Article 2(1) of Annex XIII to the Staff Regulations cannot be ascribed a scope which extends beyond the establishment of that intermediate relationship.

(see paras 84-86, 91-92)

See:

C-443/07 P *Centeno Mediavilla and Others v Commission*, paras 100 and 101

T-30/02 *Leonhardt v Parliament* [2003] ECR-SC I-A-41 and II-265, para. 51; T-311/04 *Buendía Sierra v Commission* [2006] ECR II-4137, para. 213; T-58/05 *Centeno Mediavilla and Others v Commission*, paras 110 and 112 to 115

6. An official may not rely on the principle of protection of legitimate expectations to challenge the legality of a new regulatory provision, particularly in an area where the legislature has a broad discretion. Furthermore, the right to claim protection of legitimate expectations presupposes, in particular, that the assurances given are consistent with the relevant rules. The appointing authority would have taken an unlawful decision, because it was contrary to the Staff Regulations, if it had classified an official appointed after 1 May 2004, the date on which Regulation No 723/2004 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants came into force, according to the provisions on grades and career brackets of the old Staff Regulations, which were no longer in force.

(see paras 99-101)

See:

C-443/07 P *Centeno Mediavilla and Others v Commission*, paras 91 and 100

T-381/00 *Wasmeier v Commission* [2002] ECR-SC I-A-125 and II-677, para. 106; T-398/03 *Castets v Commission* [2005] ECR-SC I-A-109 and II-507, para. 34; T-282/02 *Cementbouw Handel & Industrie v Commission* [2006] ECR II-319, para. 77; T-58/05 *Centeno Mediavilla and Others v Commission*, para. 95; T-145/06 *Omya v Commission* [2009] ECR II-145, para. 117

7. In the context of the reform of the Staff Regulations introduced by Regulation No 723/2004 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants, which led to changes to the grading structure of officials, the principle that every official is entitled to reasonable career prospects within his institution cannot justify, as such, the application of earlier provisions to an official, thereby destroying the aim pursued by the legislature. It is well established that, in the event of amendment of provisions of general application and, in particular, of the provisions of the Staff Regulations, a new rule applies immediately to the future effects of legal situations which arose, but were not fully constituted, under the previous rule. The Staff Regulations do not confer any right to advance to a higher grade through an open competition, even for officials satisfying all the conditions for such appointment, because the inclusion of successful candidates on the lists of suitable candidates drawn up as a result of selection processes merely renders those concerned eligible to be appointed to one of the posts which the competition was intended to fill, and because that eligibility is necessarily to the exclusion of any acquired right.

(see paras 125-126)

See:

T-58/05 *Centeno Mediavilla and Others v Commission*, paras 51 to 53