

JUDGMENT OF THE CIVIL SERVICE TRIBUNAL
(Third Chamber)
22 October 2008

Case F-46/07

Marie Tzirani
v
Commission of the European Communities

(Civil service — Officials — Recruitment — Appointment in grade — Promotion — Post of director — Rejection of candidature — Implementation of a judgment annulling an appointment decision — Admissibility)

Full text in the language of the case (French) II-A-1 - 1773

Application: brought under Articles 236 EC and 152 EA, in which Ms Tzirani seeks, first, annulment of the Commission's decision of 30 August 2006 to appoint Mr D.J. to the post of Director of Directorate B 'Staff Regulations: Policy, Management and Advisory Services' of the Directorate-General 'Personnel and Administration' and consequently to reject the applicant's candidature for that post; and, secondly, an order that the Commission is to pay compensation for the material and non-material damage allegedly suffered.

Held: The Commission's decision rejecting the applicant's candidature for the post of Director of Directorate B 'Staff Regulations: Policy, Management and Advisory Services' of the Directorate-General 'Personnel and Administration' is annulled. The Commission's decision of 30 August 2006 appointing Mr D.J. to the post of Director of Directorate B 'Staff Regulations: Policy, Management and Advisory Services' of the Directorate-General 'Personnel and Administration' is annulled. The Commission is ordered to pay the applicant EUR 10 000 damages. For the rest, the action is dismissed. The Commission is to bear its own costs and pay the applicant's costs.

Summary

1. Officials — Actions — Interest in bringing proceedings — Action against the failure to implement a judgment annulling the rejection of a candidature for a vacant post — Admissibility
(Art. 233 EC; Staff Regulations, Arts 90 and 91)

2. Action for annulment — Judgment annulling a measure — Effects — Obligation to implement — Scope
(Art. 233 EC)

3. Officials — Vacancy — Filled by promotion or transfer — Consideration of candidates' comparative merits — Posts at Grade A 1 or A 2 — Administration's discretion
(Staff Regulations, Arts 29(1) and 45(1))

4. *Officials — Actions — Pleas in law — Misuse of powers — Definition*

5. *Officials — Equal treatment — Equality between male and female officials — Exceptions (Art. 141(3) and (4) EC)*

6. *Officials — Promotion — Consideration of comparative merits — Principle of entitlement to reasonable career prospects (Staff Regulations, Arts 29(1), 43 and 45)*

7. *Officials — Actions — Judgment annulling a measure — Effects — Annulment of a rejection of candidature — Restoration of the official concerned to his previous legal position — Consequent annulment of subsequent measures relating to third parties — Conditions (Staff Regulations, Art. 91(1))*

8. *Officials — Actions — Unlimited jurisdiction — Possibility for the Tribunal, on its own initiative, to order the defendant institution to pay compensation (Staff Regulations, Art. 91(1))*

9. *Officials — Non-contractual liability of the institutions — Conditions — Unlawfulness*

1. The person to whom a judgment annulling an act of an institution is addressed is directly concerned with the way the institution implements the judgment. He is therefore entitled to request the Community judicature to rule on any failure by the institution to perform its obligations under the provisions applicable. It follows that an applicant has an interest in bringing proceedings against a decision by the Commission to appoint a candidate to a post to be filled where that decision relates to the way the Commission has implemented a judgment of the Tribunal annulling an earlier decision by the Commission to appoint the same candidate to the same post. That finding is not called into question by the fact that the applicant could not seek republication of that post because it has in

the meantime been filled by the appointment of a third candidate. The interests of third parties and the interests of the service may be taken into account when assessing the consequences that the annulment of the contested decision would have, such an assessment being made, if appropriate, after consideration of the lawfulness of that decision.

(see paras 37-38)

See:

341/85, 251/86, 258/86, 259/86, 262/86, 266/86, 222/87 and 232/87 *van der Stijl and Cullington v Commission* [1989] ECR 511, para. 18

T-166/04 *C v Commission* [2007] ECR-SC I-A-2-9 and II-A-2-49, para. 25 and the case-law cited therein

2. It is for the institution from which the annulled measure emanates to determine the measures required to implement a judgment annulling that measure. In exercising that discretion, the administrative authority must comply with both the provisions of Community law and the operative part and grounds of the judgment it is required to give effect to. The authority *erga omnes* of a judgment of the Community judicature annulling a decision attaches to both the operative part and the grounds which constitute its essential basis. It is those grounds which identify the precise measure deemed to be unlawful, and which reveal the exact reasons for the finding of unlawfulness contained in the operative part and which the institution concerned must take into consideration when replacing the annulled measure. The procedure for replacing such a measure may thus be resumed at the very point at which the illegality occurred.

Annulment of a Community measure does not therefore necessarily affect the preparatory acts, but implies that the administration must take account of the point at which the illegality became apparent, with a view to adopting a new measure replacing the measure annulled.

(see paras 49-53)

See:

1/54 *France v High Authority* [1954 to 1956] ECR 1, 16; 14/61 *Koninklijke Nederlandsche Hoogovens en Staalfabrieken v High Authority* [1962] ECR 253, 268; 98/63 R and 99/63 R *Erba and Reynier v Commission* [1964] ECR 276, 278; 97/86, 99/86, 193/86 and 215/86 *Asteris and Others v Commission* [1988] ECR 2181, para. 27; C-415/96 *Spain v Commission* [1998] ECR I-6993, paras 31 and 32; C-310/97 P *Commission v AssiDomän Kraft Products and Others* [1999] ECR I-5363, para. 54

T-84/91 *Meskens v Parliament* [1992] ECR II-2335, para. 73

F-44/06 and F-94/06 *C and F v Commission* [2007] ECR-SC I-A-1-95 and II-A-1-537, paras 33 to 35

3. The appointing authority has a broad discretion when comparing the merits of candidates, in particular where the post to be filled is at a very high level, corresponding to Grade A 1 or A 2. However, that broad discretion must be exercised with scrupulous observance of the relevant regulations, in other words not just of the vacancy notice, but also of any procedural rules which the

authority has adopted for the exercise of that discretion. Thus the rules applicable to the appointment procedure also constitute part of the legal framework which the appointing authority must rigorously observe.

Before taking its final decision on appointment, the appointing authority must be placed in a position to know and assess itself the factors which, at each stage of the selection procedure, have led, at the various administrative levels consulted, to the adoption of the advisory opinions submitted to it.

(see paras 66, 67, 108)

See:

T-203/97 *Forvass v Commission* [1999] ECR-SC I-A-129 and II-705, para. 45; T-95/01 *Coget and Others v Court of Auditors* [2001] ECR-SC I-A-191 and II-879, para. 113; T-158/01 *Tilgenkamp v Commission* [2002] ECR-SC I-A-111 and II-595, para. 50; T-73/01 *Pappas v Committee of the Regions* [2003] ECR-SC I-A-207 and II-1011, para. 53; T-88/04 *Tzirani v Commission* [2006] ECR-SC I-A-2-149 and II-A-2-703, paras 78 and 81

4. The concept of misuse of powers means that an administrative authority uses its powers for a purpose other than that for which they were conferred on it. A decision may be vitiated by misuse of powers only if it appears, on the basis of specific, objective and consistent evidence, to have been taken for purposes

other than those stated. It is therefore not sufficient to refer to certain facts in support of allegations; there must also be adduced specific, objective and consistent evidence to support their truth or, at the very least, their probability.

Where, in an appointment decision, the appointing authority is not found to have made a manifest error of appraisal, an allegation concerning the alleged misuse of powers by that authority cannot be based on the premiss that the comparative consideration of merits should have led to the rejection of the candidature of the candidate appointed.

(see paras 159-161)

See:

C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para. 113

T-111/99 *Samper v Parliament* [2000] ECR-SC I-A-135 and II-611, para. 64;
T-103/01 *Cwik v Commission* [2002] ECR-SC I-A-229 and II-1137, para. 28;
T-282/03 *Ceuninck v Commission* [2008] ECR-SC I-A-2-27 and II-A-2-165,
para. 48

5. Assuming that Article 141(4) EC concerning positive discrimination on the basis of gender is valid vis-à-vis the Community institutions, that provision merely makes it possible, not compulsory, to discriminate positively in favour of women. While it is true that the Commission has the aim of achieving parity in the distribution of posts between men and women and has implemented positive measures and strategies to encourage the allocation of posts to female candidates, the legal instruments on which the implementation of that strategy is based are not binding and it is therefore not for the Civil Service Tribunal

to review the institutions' compliance with them. In any event, the principle of equal opportunities is intended to apply only where candidates have equal merits.

(see paras 180-183, 186)

See:

T-137/03 Mancini v Commission [2005] ECR-SC I-A-7 and II-27, paras 120, 122 to 124

6. The principle that every official has the right to reasonable career prospects within his institution is applied in the order of preference laid down in Article 29(1) of the Staff Regulations concerning the method of recruitment, and in the obligation to consider the comparative merits of the candidates. The Staff Regulations do not confer any right to promotion, even on officials who are eligible for promotion. In the absence of specific arguments proving that the administration gave the official concerned justified hopes regarding the post for which he was a candidate, he cannot claim to have had legitimate expectations that he would be appointed to that post.

(see paras 196-197)

See:

T-52/90 *Volger v Parliament* [1992] ECR II-121, para. 24; *C v Commission*, and the case-law cited therein

F-21/06 *Da Silva v Commission* [2007] ECR-SC I-A-1-179 and II-A-1-981, para. 71 and the case-law cited therein

7. Where restoring the legal position which the applicant held prior to the annulment of an act by the Community judicature involves the annulment of subsequent acts but which relate to third parties, that resulting annulment will be ordered only if it does not appear excessive, particularly in the light of the nature of the unlawful act committed and the interests of the service.

The principles of proportionality and the protection of legitimate expectations make it necessary to reconcile the interests of the applicant, who has been the victim of the unlawful act, to have his rightful position restored, and the interests of third parties, whose legal position may have led them to entertain legitimate expectations. Various operations following on from the procedures provided for in Article 29(1) of the Staff Regulations, such as placing a successful candidate in a competition on a reserve list, promoting an official or appointing an official to a vacant post, may be regarded as creating a legal position which the person concerned may legitimately expect to be lawful.

(see para. 201)

See:

C-119/94 P *Coussios v Commission* [1995] ECR I-1439, para. 24

T-159/96 *Wenk v Commission* [1998] ECR-SC I-A-193 and II-593, para. 121;
T-10/02 *Girardot v Commission* [2004] ECR-SC I-A-109 and II-483, paras 85
and 86

8. In order to ensure that the annulling judgment, which does not have the effect of reopening the selection procedure in order to fill the post for which the applicant applied, has a practical effect in the applicant's interests, the Community judicature may use the unlimited jurisdiction conferred on it

in proceedings concerning pecuniary matters and order, even on its own initiative, the defendant institution to pay compensation. It may also request the institution to provide adequate protection for the applicant's rights by seeking a just solution in his case.

(see para. 214)

See:

24/79 *Oberthür v Commission* [1980] ECR 1743, para. 14

Girardot v Commission, para. 89

F-6/07 *Suvikas v Council* [2008] ECR-SC I-A-1-151 and II-A-1-819, para. 127

9. In order for it to be accepted that there is a causal link between the rejection of an official's candidature for a post and the material injury which results for the official concerned from the difference between the salary and benefits to which he would have been entitled had he been appointed and those which he actually received, evidence must be adduced that there is a direct causal nexus between the fault committed by the institution concerned and the injury in question.

In the particular context of filling a post by promotion, the degree of certainty of the causal link is less where the wrongful act committed by a Community institution has definitely deprived a person, not necessarily of the award of the post in question, to which the person concerned could never prove he had a right, but of a genuine chance of being appointed to that post, resulting in material damage for the person concerned in the form of loss of income. Where it seems eminently probable, in the circumstances of the case, that, if it had abided by

the law, the Community institution concerned would have awarded the post to the person in question, the theoretical uncertainty as regards the outcome of a properly conducted recruitment procedure cannot preclude reparation for the material damage he sustained in having his candidature rejected for the post which he would have had every chance of securing.

(see paras 216-218)

See:

T-45/01 *Sanders and Others v Commission* [2004] ECR II-3315, paras 149 and 150; T-250/04 *Combescot v Commission* [2007] ECR-SC I-A-2-191 and II-A-2-1251, paras 95 and 96