

JUDGMENT OF THE COURT (Second Chamber)

14 September 2006^{*}

In Case C-417/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on
24 November 2005,

Commission of the European Communities, represented by D. Martin and
L. Lozano Palacios, acting as Agents, with an address for service in Luxembourg,

applicant,

the other party to the proceedings being:

Maria Dolores Fernández Gómez, represented by J.R. Iturriagagoitia, lawyer,

applicant at first instance,

^{*} Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kūris, G. Arestis (Rapporteur) and J. Klučka, Judges,

Advocate General: L.A. Geelhoed,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 May 2006,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- ¹ By its appeal, the Commission of the European Communities asks the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-272/03 *Fernández Gómez v Commission* [2005] ECR-SC I-A-229 and II-1049 (the ‘judgment under appeal’) by which that court annulled the decision of the Authority Authorised to Conclude Contracts of Employment of 12 May 2003

rejecting the application for renewal of Ms Fernández Gómez's contract (the 'contested decision') and ordered the Commission to pay her the sum of EUR 50 000 as compensation for the damage suffered as a result of that decision and to pay the costs.

Legal context, factual background to the dispute and procedure before the Court of First Instance

- 2 Articles 2 and 3 of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition 1968(I), p. 30), as in force up to and including 30 April 2004, determine the Staff Regulations of Officials of the European Communities (the 'Staff Regulations') and the Conditions of Employment of Other Servants of the European Communities (the 'CEOS') respectively.
- 3 As set out in Article 2(a) of the CEOS, temporary staff means 'staff engaged to fill a post which is included in the list of posts appended to the section of the budget relating to each institution and which the budgetary authorities have classified as temporary'.
- 4 Article 8 of the CEOS specifies inter alia that temporary staff to whom that Article 2(a) applies, may be engaged for a fixed or indefinite period and the contracts of such staff who are engaged for a fixed period may be renewed not more than once for a fixed period.
- 5 On 18 October 1994, the Commission adopted a code of conduct as to general rules governing relations between Commission departments and certain categories of staff (the 'Code of Conduct').

- 6 The different categories of staff covered by that code are the ‘non-regular staff’ and ‘specific categories [of staff]’. As set out in paragraph I B of that code, ‘specific categories [of staff]’ means ‘persons covered by the staff regulations, the conditions of employment or contracts governed by public law’. That latter phrase covers auxiliary staff, national experts on detachment, officials and other servants on leave on personal grounds or working part time, former officials and temporary staff and ‘other servants of the Communities’.
- 7 On 13 November 1996, the Commission adopted a decision entitled ‘Policy on temporary staff covered by Article 2(a) of the Conditions of employment of other servants’ (the ‘Commission decision of 13 November 1996’). That decision adopts, in terms of new guidelines, operational provisions on the recruitment and selection of temporary staff covered by Article 2(a) of the CEOS, the length of their contracts, restrictions on cumulative periods of service with other administrative positions or contracts with the Commission, and the internal and external competitions which might be of interest to them.
- 8 Paragraphs 6(b) and (c) of that decision set out the length of contracts and the rules for the application of the rule against cumulative periods of service applicable to temporary staff covered under Article 2(a) of the CEOS to whom an offer of a contract has been made as from 1 December 1996 (the ‘rule against cumulative periods of service’). Point 6(c) states *inter alia* that:

‘The maximum period for which staff other than as official may serve in the Commission must not exceed six years in all. For the calculation of these six years, will be taken into account the period spent as temporary agent 2(a) or 2(b) of the CEOS, auxiliary agent and as non statutory staff. ... Directorates-General will be sent recommendations enabling them to apply this limit on cumulation in their recruitment proposals.’

- 9 On 14 November 1996, the Director General of the Directorate General 'Personnel and Administration' ('DG IX') sent a letter to staff providing information on the 'new policy on temporary staff covered by Article 2(a) of the CEOS'. As regards the rule against cumulative periods of service which limits the total period of employment for non-permanent staff to 6 years' maximum, that letter explains that, in order to calculate that maximum period, it is necessary to take into account inter alia periods spent in the Commission as national experts on secondment or as any other non-regular staff.
- 10 Ms Fernández Gómez worked in the Commission as a national expert on secondment for three years, from 1 December 1997 to 30 November 2000. She was then employed there as a member of the auxiliary staff for a period of two and a half months, from 1 December 2000 to 15 February 2001.
- 11 Subsequently, she applied for a post published in the vacancy notice 13T/TRADE/2000 to fill four temporary posts in the Directorate General 'Trade'. So far as the duration of the contract was concerned, that notice stated:
- 'When a candidate is appointed ..., the Commission must apply the rules contained in its decision of 13 November 1996 which limit the duration of contracts concluded in accordance with Article 2(a) of the [CEOS] to a maximum of three years, coupled with the possibility to renew the contract once for a maximum period of one year.'
- 12 Since her application was successful, Ms Fernández Gómez signed the contract as a member of the temporary staff within the meaning of Article 2(a) of the CEOS. That contract, dated 17 January 2001, took effect on 16 February 2001. Under clause 4 of that contract, its duration was set at two years and nine and a half months, so that it was to expire on 30 November 2003.

- 13 That contract was communicated to the respondent by letter of 19 January 2001, in which the competent Commission department drew Ms Fernández Gómez's attention to the fact that the contract had been signed in respect of a fixed period of two years and nine and a half months and that it could not be renewed following the Commission's decision of 13 November 1996 fixing the maximum duration for various types of contract.
- 14 On 13 February 2003, Ms Fernández Gómez sent an email to Mr Daum, a member of temporary staff at DG IX. That email, entitled 'Questions concerning the secondment of national experts', was worded as follows:

'... I would be grateful if you could provide me with the following information:

- is the 'rule against cumulative periods of service' (Commission decision of 13 November 1996) applicable to secondments of national experts which were started and completed before 5 January 2002? If so,
- from what date is it applicable, and
- why isn't such a limitation included in the Commission decision of 9 February 2001 (which governs the conditions of employment of national experts on secondment) and why aren't the periods spent on secondment by national experts referred to in the decision of 13 November 1996?

...'

- 15 By a note of 3 April 2003 addressed to DG IX, the head of the unit in which Ms Fernández Gómez was working requested, *inter alia*, that her contract as a temporary staff member be renewed to cover a total period of four years, which he regarded as the maximum duration of that contract. The request for renewal set out why it was 'strongly hoped for' that the person at issue should be retained in the unit. In addition, that note pointed out that the Commission's decision of 13 November 1996 did not provide that the period of secondment as a national expert should be taken into consideration for the purpose of calculating the 6-year period laid down in the rule against cumulative periods of service. That same note also indicated that the national experts were not referred to as 'non-regular staff' in the Code of Conduct.
- 16 On 12 May 2003, an agent at DG IX sent an email to an agent in the unit to which Ms Fernández Gómez belonged. That email (the 'contested decision') was worded as follows:

'I have been asked to reply [to the] message concerning the renewals requested in your note of 3 April 2003 in respect of two 2(a) [members of temporary staff], Ms Fernández Gómez and Mr ...

Ms Fernández Gómez has contacted Mr Daum directly as to the issue of the period as a national expert on secondment calculated in the rule against cumulative periods of service; the latter has replied to her that it is consistent practice to take account of that period as a national expert on secondment as a period as 'non-regular staff' ...

As a result, I can confirm that for those two members of temporary staff, as for all others in the same position, there is no intention to discount the period spent as a national expert on secondment or to review the expiry of their contract.

...'

- 17 That letter was forwarded by an email of 18 June 2003 to Ms Fernández Gómez.
- 18 On 11 July 2003, she submitted a complaint on the basis of Article 90(2) of the Staff Regulations, which was dismissed by a decision of the Commission of 29 October 2003.
- 19 By an application lodged in the mean time at the Registry of the Court of First Instance on 4 August 2003, Ms Fernández Gómez brought an action, firstly, for annulment of the contested decision and, secondly, for an order that the Commission pay the sum of EUR 101 328.60, plus interest for late payment, by way of compensation for the damage suffered.
- 20 In a separate document lodged at the Registry of the Court of First Instance on the same day, Ms Fernández Gómez also brought an application for, inter alia, suspension of the operation of the contested decision.
- 21 By the order in Case T-272/03 R *Fernández Gómez v Commission* [2003] ECR-SC I-A-197 and II-979, the President of the Court of First Instance dismissed that application and reserved the costs.
- 22 By a document lodged on 29 January 2004, the Commission raised a plea of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance.

- 23 By order of 30 March 2004, the Court of First Instance ruled to join the plea of inadmissibility to the substance of the case.
- 24 By the judgment under appeal, after having declared the action to be admissible, the Court of First Instance annulled the contested decision and ordered the Commission to pay Ms Fernández Gómez the sum of EUR 50 000 as compensation for the damage suffered.

Forms of order sought

- 25 In its appeal the Commission claims that the Court should:
- set aside the judgment under appeal;
 - pass final judgment on the dispute, allowing the claims submitted before the Court of First Instance and dismissing the application in Case T-272/03;
 - in the alternative, refer the case back to the Court of First Instance;
 - order Ms Fernández Gómez to pay the costs of the proceedings, including her own costs in the proceedings before the Court of First Instance.

26 The respondent claims that the Court should:

— dismiss the appeal in its entirety;

— order the Commission to pay the costs relating to the action before the Court of First Instance and the appeal before the Court of Justice.

27 By letter lodged at the Registry of the Court on 23 February 2006, the Commission, pursuant to Article 117 of the Rules of Procedure of the Court, requested permission to lodge a response. By decision of 8 March 2006, the President of the Court refused that request.

The appeal

28 In support of its appeal, the Commission puts forward three pleas. The first alleges that the Court of First Instance erred in law in holding the action against the contested decision to be admissible. The second plea relies on an error in law as regards Article 8 of the CEOS and the rule against cumulative periods of service. The third plea relies on an error in law as to the determination and evaluation of the damage allegedly suffered by the respondent.

The first plea

- 29 The Court of First Instance noted first of all, in paragraph 37 of the judgment under appeal, that the contested decision, namely the email of 12 May 2003, contains the answer given by the authorities to the request for renewal of Ms Fernández Gómez's contract submitted by her head of unit on 3 April 2003.
- 30 According to paragraph 38 of the same judgment, the contested decision rejects that request on the ground that the period of three years which the respondent spent in the Commission's service as a national expert on secondment must be taken into account for the application of the rule against cumulative periods of service, that period being added to those of two and a half months she spent there as a member of the auxiliary staff and of two years and nine and a half months which she spent there as a member of the temporary staff, corresponding in total to the maximum period of six years served within the institution laid down by the rule against cumulative periods of service.
- 31 Next, in response to the plea of inadmissibility raised by the Commission, according to which the contested decision merely confirms the content of the respondent's contract as temporary staff, the Court held in paragraph 43 of the judgment under appeal that a comparison of the contested decision with the contract and the letter of 19 January 2001 transmitting that contract shows that that decision contains new information: it rejects the request for renewal of that contract on the ground that the period spent in the service of the Commission as a national expert on secondment must be taken into account for the application of the rule against cumulative periods of service, while the earlier documents comment solely on the issue of the contract's duration without taking a view on that of its possible renewal on expiry, referring back to the applicable rules in that respect.

- 32 After consequently having found, in paragraph 44 of the judgment under appeal, that the contested decision is not an act confirming an earlier decision but an act adversely affecting the respondent, the Court finally held, in paragraphs 45 and 46 of the same judgment, that the statutory time-limits have been complied with, to reach the conclusion, in paragraph 47 of that judgment, that the action is admissible in its entirety.
- 33 The Commission claims that, in reaching that conclusion, the Court made a number of errors in law. In this connection it submits, inter alia, that the respondent did not submit a request within the meaning of the Staff Regulations concerning the renewal of her contract as a member of the temporary staff such that the appeal is inadmissible in that one respect. The Commission adds that, in any event, the contested decision, being merely an informative letter which does not amount to a decision, does not amount to an act adversely affecting the respondent.
- 34 It is appropriate to draw attention to the wording of Article 90(1) and (2) of the Staff Regulations, under which:

‘1. Any person to whom these Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. The authority shall notify the person concerned of its reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.

2. Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said

authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations.

...'

35 It thus follows from Article 90(1) of the Staff Regulations that a request may be addressed to the appointing authority only by a person to whom the Staff Regulations apply.

36 As a member of temporary staff, the respondent is included in the persons covered by Article 90(1) of the Staff Regulations and may therefore, on that basis, submit a request as provided for in that provision. It is therefore necessary to examine whether she has actually submitted such a request.

37 As the file submitted to the Court shows, the respondent contacted DG IX 'Personnel and Administration' by the email of 13 February 2003, quoted at paragraph 14 of this judgment, regarding her contract. Without specifically dwelling on whether that email constitutes a request within the meaning of Article 90(1) of the Staff Regulations, the respondent claims that the request for renewal of her contract was submitted, following steps taken by her, by the head of the unit in which she was working.

38 It is admittedly true that, by a note of 3 April 2003, that head of unit requested the renewal of the respondent's contract. However, it is apparent from the clear language

of Article 90(1) of the Staff Regulations, reproduced in paragraph 34 of this judgment, that only persons covered by those Staff Regulations can submit such a request. A note sent by one Commission department to another does not therefore fall within the framework set out by that provision. In addition, it is apparent that such a note may not be treated in the same way as a request covered under that provision, otherwise the procedure laid down in that provision might be circumvented.

- 39 Furthermore, the email of 13 February 2003 referred to above also shows that the respondent did not ask the appointing authority to take any decision in respect of her. In that email, entitled 'Questions about the secondment of national experts', the respondent merely asked for information about the application, in her situation, of the rule against cumulative periods of service.
- 40 It follows that the respondent did not make any request within the meaning of Article 90(1) of the Staff Regulations.
- 41 In those circumstances it must also be ascertained whether, in the absence of such a request, the contested decision constitutes an act adversely affecting the respondent, since she has in any event submitted against that act a complaint within the meaning of Article 90(2) of the Staff Regulations.
- 42 It is appropriate to state in that regard that an applicant is adversely affected only by measures which produce binding legal effects such as to affect his or her interests by bringing about a distinct change in his or her legal position.

- 43 It should be stated from the outset that the email from DG IX of 12 May 2003 clearly does not amount to such an act.
- 44 Even if the email at issue does contain a decision, case-law provides that it is only the contract of employment which produces legal effects in respect of the persons covered by the Staff Regulations (see, to that effect, Case 329/85 *Castagnoli v Commission* [1987] ECR 3281, paragraphs 10 and 11, and order in Case 95/87 *Contini v Commission* [1988] ECR 2537, paragraph 8). As it is, it is common ground that the respondent did not raise any objection to the terms of her contract, which were explained in the accompanying letter of 19 January 2000, within the statutory time-limits.
- 45 In addition, the letter of 12 May 2003 itself does not contain, in relation to those terms, any new information regarding the date of expiry of the respondent's contract and the issue of that contract's renewal.
- 46 A measure which contains no new factor as compared with a previous measure constitutes a purely confirmatory measure and cannot therefore have the effect of setting a fresh time-limit (see Case 23/80 *Grasselli v Commission* [1980] ECR 3709, paragraph 18).
- 47 The Court of First Instance therefore infringed Articles 90 and 91 of the Staff Regulations in holding, at paragraph 37 of the judgment under appeal, that the contested decision sets out the answer given by the administration to the request for

renewal of Ms Fernández Gómez's contract submitted by her head of unit on 3 April 2003, then, in paragraph 44 of that judgment, that the contested decision constitutes an act adversely affecting her, to conclude, in paragraph 47 of the same judgment, that the respondent's action was admissible.

- 48 Therefore, the first plea of the appeal must be accepted and the judgment under appeal must be set aside, without there being any need to rule on the other pleas in law put forward by the Commission. As a result, it is also necessary to set aside the judgment under appeal in so far as it ordered the Commission to pay compensation for the damage allegedly suffered by Ms Fernández Gómez on account of the adoption of the contested decision.

The action before the Court of First Instance

- 49 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes a judgment of the Court of First Instance it may itself give final judgment in the matter where the state of the proceedings so permits. That applies in this case.

- 50 It follows from paragraphs 43 to 47 above that the plea of inadmissibility raised before the Court of First Instance by the Commission must be accepted. Consequently, Ms Fernández Gómez's action should be dismissed as inadmissible in so far as it seeks the annulment of the contested decision.

- 51 It should be stated in this connection that the inadmissibility of an application for annulment of an act results in the inadmissibility of the application for damages where, as is evidently true in the present case, the two requests are closely linked.
- 52 It follows that Ms Fernández Gómez's action should be dismissed as inadmissible in its entirety.

Costs

- 53 Pursuant to the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.
- 54 Under the first subparagraph Article 69(2) of the same rules, which apply to appeals pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 55 Nevertheless, Article 70 of those rules, applicable to appeals brought by the institutions under Articles 188 and 122 thereof, provides that in proceedings between the Communities and their servants the institutions, as a rule, are to bear their own costs. Accordingly, each party is to bear its own costs.

On those grounds, the Court (Second Chamber) hereby

- 1. Sets aside the judgment of the Court of First Instance of 13 September 2005 in Case T-272/03 *Fernández Gómez v Commission*;**
- 2. Dismisses as inadmissible the action brought by Ms Fernández Gómez before the Court of First Instance of the European Communities for the annulment of the decision of the Authority Authorised to Conclude Contracts of Employment of 12 May 2003 rejecting the application for renewal of Ms Fernández Gómez's contract and for compensation in respect of the damage which allegedly resulted from that decision;**
- 3. Orders the parties to bear their own costs as regards both the proceedings at first instance and the appeal.**

[Signatures]