



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Appeal Chamber)

21 May 2014 *

(Appeal — Civil service — Members of the temporary staff — Fixed-term contract — Decision of non-renewal — Rejection of the complaint — Obligation to state reasons — Reason stated in the decision rejecting the complaint)

In Case T-347/12 P,

APPEAL against the judgment of the European Union Civil Service Tribunal (Third Chamber) of 13 June 2012 in Case F-41/11 *Mocová v Commission*, seeking the annulment of that judgment,

Dana Mocová, residing in Prague (Czech Republic), represented by D. de Abreu Caldas, S. Orlandi, A. Coolen, J.-N. Louis and É. Marchal, lawyers,

applicant,

the other party to the proceedings being

European Commission, represented by J. Currall and D. Martin, acting as Agents,
defendant at first instance,

THE GENERAL COURT (Appeal Chamber),

composed of M. Jaeger (Rapporteur), President, O. Czúcz and S. Papasavvas, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 8 October 2013,

gives the following

Judgment¹

...

* Language of the case: French.

1 — Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

Appeal

Procedure

- 10 By letter lodged at the Registry of the General Court on 3 August 2012, the applicant applied for legal aid under Article 95 of the Rules of Procedure of the General Court with a view to bringing the present action. By order of 20 December 2012 in Case T-347/12 P-AJ *Mocová v Commission*, not published in the ECR, the President of the General Court dismissed the application for legal aid.
- 11 By application lodged at the Registry of the General Court on 8 January 2013, the applicant brought the present action. By letter of 25 April 2013, the applicant made a reasoned application, under Article 146 of the Rules of Procedure, to be heard during the oral stage of the procedure.
- 12 At the hearing on 8 October 2013, the parties presented oral argument and replied to oral questions put by the Court.

Forms of order sought

- 13 The applicant claims that the General Court should:
- set aside the judgment under appeal;
 - accordingly, annul the decision rejecting the application for renewal of her contract;
 - order the Commission to pay the costs of the proceedings at first instance and of the proceedings on appeal.
- 14 In its defence, lodged on 10 April 2013, the Commission contends that the General Court should:
- dismiss the action as in part inadmissible and in part unfounded;
 - order the applicant to pay her costs in the present proceedings.

Law

...

The first plea, based on 'lack of a relevant statement of reasons'

...

– The alleged error in law based on the modification of the statement of reasons for refusing to renew the applicant's contract at the pre-litigation stage

- 26 The applicant considers that the Civil Service Tribunal made an error in law in basing its argument on a reason — namely the existence of budgetary constraints — that does not appear in the decision of 15 October 2010 and that was put forward by the AECE only at the time of the response to the complaint.

- 27 Thus, the Civil Service Tribunal disregarded, in the first place, the case-law according to which the statement of reasons for the decision rejecting a complaint is deemed to supplement the statement of reasons for the decision against which the complaint was directed (see, to that effect, Case T-562/93 *Obst v Commission* [1995] ECR-SC I-A-247 and II-737, paragraph 79, and Case T-71/96 *Berlingieri Vinzek v Commission* [1997] ECR-SC I-A-339 and II-921, paragraph 79), in the second place, the principle of legality, according to which the reasons for a decision may be based only on factors which predate or are contemporaneous with it, and, in the third place, the purpose of the pre-litigation procedure consisting in giving the parties the possibility of finding an amicable solution to the dispute (Case T-86/98 *Gouloussis v Commission* [2000] ECR-SC I-A-5 and II-23, paragraph 61).
- 28 The Commission considers those arguments unfounded.
- 29 It is clear from the judgment under appeal that, by letter of 15 October 2010, the acting Director-General of OLAF informed the applicant, in response to her application for the extension of her temporary contract, that that contract would end on 31 December 2010, bearing in mind that there was no possibility of extension beyond the maximum period of eight years for temporary staff employed within OLAF.
- 30 However, in its reply of 11 February 2011, the AECE rejected the applicant's complaint of 10 November 2010 without referring to the eight-year overlap rule but basing its decision on the budgetary possibilities, the interests of the service and the applicant's merits and abilities.
- 31 In those circumstances, which were disputed by the applicant at first instance as being contradictory reasons, the Civil Service Tribunal considered, as a preliminary point, taking as a basis *Commission v Birkhoff*, cited above, paragraphs 58 and 59, that, in view of the evolving nature of the pre-litigation procedure, it is the statement of reasons contained in the decision rejecting the complaint which must be taken into account in the review of legality of the original act adversely affecting an official, since that statement of reasons is deemed to supplement that act. The Civil Service Tribunal none the less specified that it was still in fact the legality of the original act adversely affecting the official that was examined, in the light of the reasons contained in the decision rejecting the complaint.
- 32 The Civil Service Tribunal moreover considered — in paragraph 38 of the judgment under appeal — that the fact that, in rejecting the complaint, the AECE, while upholding the decision not to renew the applicant's contract, thus departed from the statement of reasons contained in the decision of 15 October 2010 and instead adopted other reasons, cannot, of itself, render the non-renewal decision illegal, since the whole point of the complaint procedure is to allow review by the AECE of the contested decision in the light of the grievances put forward by the complainant, where appropriate modifying the reasons serving to support its operative part.
- 33 It should be noted that, in taking as a basis the evolving nature of the pre-litigation stage with a view to finding that it was appropriate to take account of the reasons appearing in the rejection of the complaint, the Civil Service Tribunal merely drew the consequences of settled case-law on determining whether the response to the complaint is amenable to review, from which it follows that the AECE may, in the decision rejecting the complaint, find it necessary to supplement or to modify its decision.
- 34 Thus it was held that the administrative complaint and its rejection, whether express or implied, constituted an integral part of a complex procedure and were no more than a precondition for bringing the matter before the judiciary. That being so, the action, even if formally directed against the rejection of the complaint, has the effect of bringing before the court the act adversely affecting the applicant against which the complaint was lodged, except where the rejection of the complaint has a different scope from that of the measure against which the complaint was lodged. An express decision rejecting a complaint may, in the light of its content, not be confirmatory of the measure contested by the applicant. That is the case where the decision rejecting the complaint contains a

re-examination of the applicant's situation in the light of new elements of law or of fact, or where it changes or adds to the original decision. In such circumstances, the rejection of the complaint constitutes a measure subject to review by the judicature, which will take it into consideration when assessing the legality of the contested measure or will even regard it as an act adversely affecting the applicant replacing the contested measure (see Case T-325/09 P *Adjemian and Others v Commission* [2011] ECR II-6515, paragraph 32 and the case-law cited).

- 35 That view is also supported by the consideration that the supplementary argument, at the time of the decision to reject the complaint, is in accordance with the purpose of Article 90(2) of the Staff Regulations of Officials of the European Union (the 'Staff Regulations'), under the terms of which the decision on the complaint is itself to be reasoned. This provision necessarily implies, in effect, that the authority required to rule on the complaint is not bound solely by the reasons for the decision that is the subject of the complaint, which may be inadequate or non-existent in the case of an implied rejection decision (Case T-283/08 P *Longinidis v Cedefop* [2011] ECR-SC, paragraph 72).
- 36 In that regard, it should be emphasised that the case-law on which the applicant relies, under the terms of which it was held that the institution was not entitled to substitute an entirely new statement of reasons for the initial, erroneous, statement (*Berlingieri Vinzek v Commission*, cited above, paragraph 79), relates to the specific situation in which the institution provides supplementary reasons after the appeal has been brought and is not therefore applicable to the pre-litigation stage.
- 37 Contrary to the applicant's assertions, such an interpretation infringes neither the rule that the application correspond to the complaint, nor the purpose of the pre-litigation procedure, nor the principle of legality.
- 38 First, as regards the rule that the application correspond to the complaint and the purpose of the pre-litigation procedure, it should be stressed that the pre-litigation procedure laid down by Article 90 of the Staff Regulations, which is applicable to temporary officials pursuant to Article 46 of the CEOS, as a whole, is intended to permit and encourage the amicable settlement of differences which have arisen between officials and the administration (Case 142/85 *Schwiering v Court of Auditors* [1986] ECR 3177, paragraph 11; Case 133/88 *Del Amo Martinez v Parliament* [1989] ECR 689, paragraph 9; and Case T-57/89 *Alexandrakis v Commission* [1990] ECR II-143, paragraph 8) and to compel the authority having control over the official to reconsider its decision in the light of any objections which that official may make (Case 101/79 *Vecchioli v Commission* [1980] ECR 3069, paragraph 31, and Case T-53/92 *Piette de Stachelski v Commission* [1993] ECR II-35, paragraph 16).
- 39 According to the case-law, the rule that the application correspond to the complaint is thus intended to avoid the official or agent making certain claims, or all the claims, only during the contentious stage, with the result that any possibility of extra-judicial settlement of the dispute is significantly reduced. In these circumstances, the AECE, not being in a position to know with sufficient certainty the complaints or requests of the person concerned (*Schwiering v Court of Auditors*, cited above, paragraph 11, and Case T-361/94 *Weir v Commission* [1996] ECR-SC I-A-121 and II-381, paragraph 27), will be unable to allow that person's claims, if appropriate, or to propose an amicable solution and so avoid bringing the dispute directly before the judicature for a decision.
- 40 The objective of permitting the person concerned and the AECE to settle the dispute at the pre-litigation stage does not however mean that, in all circumstances, the official has the right to dispute, at the pre-litigation stage, any new reason invoked by the AECE during the administrative stage.
- 41 Thus it should be noted in particular that, according to settled case-law, although the AECE need not state reasons for a decision on promotion either to the person promoted or to the persons not promoted (Case 111/86 *Delauche v Commission* [1987] ECR 5345, paragraph 13; Joined Cases T-112/96 and T-115/96 *Séché v Commission* [1999] ECR-SC I-A-115 and II-623, paragraph 76; and

Joined Cases T-338/00 and T-376/00 *Morello v Commission* [2002] ECR-SC I-A-301 and II-1457, paragraph 48), it has, by contrast, an obligation to give reasons for a decision rejecting a complaint lodged under Article 90(2) of the Staff Regulations by a candidate who has not been promoted, since the reasons given for the latter decision are deemed to be the same as those for the decision which was the subject of the complaint (Case 188/73 *Grassi v Council* [1974] ECR 1099, paragraph 13; Case C-343/87 *Culin v Commission* [1990] ECR I-225, paragraph 13; and Case T-52/90 *Volger v Parliament* [1992] ECR II-121, paragraph 36). The statement of reasons must be made no later than the rejection of the complaint (Case T-117/01 *Roman Parra v Commission* [2002] ECR-SC I-A-27 and II-121, paragraph 26, and Case T-132/03 *Casini v Commission* [2005] ECR-SC I-A-253 and II-1169, paragraph 32).

- 42 Conversely, according to the case-law, the AECE is not required to reply expressly to a complaint provided that the initial decision is itself reasoned (see, by analogy, Case C-115/92 P *Parliament v Volger* [1993] ECR I-6549, paragraph 23).
- 43 Similarly, Article 90(1) of the Staff Regulations, which applies to temporary staff pursuant to Article 46 of the CEOS, itself envisages a situation in which, on expiry of the four-month period from the date on which a request is made, the absence of a reply — of its nature without a statement of reasons — is deemed to constitute an implied decision rejecting it, such that the reasons set out by the AECE in that situation can be contested by the temporary staff member only at the contentious stage.
- 44 In the context of respect for the right to effective judicial protection, it is none the less important to specify that, in a situation where the complainant becomes aware of the statement of reasons for the act adversely affecting him by way of the response to his complaint or in a situation where that statement of reasons modifies or supplements substantially the statement of reasons contained in that act, any plea put forward for the first time at the application stage which aims to dispute the merits of the reasons set out in the response to the complaint must be deemed to be admissible. In such situations, the person concerned has not been put in a position to know, precisely and definitively, the reasons underlying the act adversely affecting that person.
- 45 Secondly, as regards the alleged disregard for the principle of legality, it is true that the legality of a decision must be assessed on the basis of the elements of fact and of law available to the institution at the time when it adopted that decision. Bearing in mind the evolving nature of the pre-litigation stage as set out above, it should however be observed that the drawing up of the act laying down the institution's definitive position comes to an end on the adoption of the response from the AECE to the complaint made by the temporary staff member. It follows that the legality of the definitive act adversely affecting the applicant is assessed in the light of the elements of fact and of law available to the institution on the adoption, whether express or implied, of that response, without prejudice to the possibility, for the institution, under the conditions set out by the case-law, to provide supplementary explanations during the contentious stage. It cannot therefore be considered that the Civil Service Tribunal disregarded the principle of legality.
- 46 It follows from all the above considerations that the Civil Service Tribunal did not make an error in law in finding that it was appropriate to examine the legality of the decision not to renew the applicant's temporary contract taking account of the reasons set out in the decision rejecting the complaint, even though those reasons did not appear in the decision of 15 October 2010.

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On those grounds,

THE GENERAL COURT (Appeal Chamber)

hereby:

- 1. Dismisses the appeal;**
- 2. Orders Ms Dana Mocová to pay her own costs and those incurred by the European Commission in the present proceedings.**

Jaeger

Czucz

Papasavvas

Delivered in open court in Luxembourg on 21 May 2014.

[Signatures]