

The institution concerned cannot be held liable for any financial loss arising out of the official's decision to leave his employment and transfer his residence to his previous place of employment before receiving notice of his reinstatement. In that event, the institution is justified in deducting from the sums of money to be paid to the official the amount which he would have earned had he remained in

his employment until the date on which he received notice of his reinstatement.

Furthermore, in the absence of any express or analogous provisions in the Staff Regulations relating to the mode of payment of such compensation, it is to be paid in the currency of the country in which the official was employed, taking account of the weighting for that country.

REPORT FOR THE HEARING

delivered in Case 292/87 *

I — Facts

The applicant, a scientific officer at the Joint Research Centre at Karlsruhe, was granted leave on personal grounds from 1 March 1970 to 28 February 1971. He had asked to be reinstated on 27 March 1971.

When he was not reinstated, he brought an action before the Court of Justice. By an interlocutory judgment of 2 April 1981 delivered in Case 785/79 [1981] ECR 969, the Court dismissed the applicant's claim to be reinstated with effect from 1 March 1971 and before giving judgment on the claim for reinstatement at a later date directed that an expert's report should be obtained on the question whether the applicant had the required qualifications for the vacancies successively declared vacant.

Following that report, the Second Chamber of the Court, in its judgment of 5 May 1983 [1983] ECR 1343, ordered the Commission to reinstate the applicant pursuant to Article 40 (4) (d) of the Staff Regulations of Officials with effect, for the purposes of seniority in grade and step and of the pension scheme, from 1 January 1977 and to pay to the applicant the sum of money equivalent to the net remuneration which he would have received up to the date of his actual reinstatement if he had been reinstated on 1 January 1977, subject to deduction of net earnings received in respect of that period from any other activity.

The applicant, who had in the mean time worked for AGIP, decided to give up that employment with effect from 30 September 1983, informing the Commission of that decision in a letter of 24 September 1983.

* Language of the Case: French.

He was effectively reinstated on 7 March 1984 in a post at the Petten establishment in the Netherlands.

European Communities in which he claims that the Court should:

The sum of money which the Commission was ordered to pay the applicant was calculated by deducting, for the period 1 January 1977 to 30 September 1983, the sums which he actually received from AGIP. In respect of the period 1 October 1983 to 7 March 1984, the Commission deducted from the sums equivalent to the net remuneration which the applicant would have received the notional income which he would have earned had he continued to work for AGIP until his actual reinstatement, in the belief that it should not have to bear the aggravated loss suffered by the applicant by reason of his leaving his previous employment.

On 2 March 1987, the applicant, objecting to that method of calculation, lodged a complaint, claiming that the compensation should not be subject to the deduction of the abovementioned notional earnings and that it should be paid in German marks with the weighting in force for Karlsruhe, to where he had transferred his residence after terminating his employment with AGIP.

That complaint was rejected by an implied decision of 2 July 1987, followed by an express decision of rejection notified to the applicant on 30 September 1987.

II — Written procedure and conclusions of the parties

By an application lodged at the Court Registry on 30 September 1987, the applicant brought the present action based on Article 91 of the Staff Regulations of Officials and Other Servants of the

- (1) declare that the defendant's decision notionally treating him as having continued to work for AGIP and the implied decision rejecting his complaint against that decision are null and void;
- (2) declare that the Commission's decision not to pay the compensation in German marks and not to apply to it the weighting in force for Karlsruhe and the implied decision rejecting his complaint against that decision are null and void;
- (3) order the defendant to pay an amount equivalent to the net remuneration which he would have received if he had been reinstated on 1 January 1977 without deducting the notional income which he would have received from AGIP after 30 September 1983;
- (4) declare that the compensation must be paid in German marks and that the weighting in force for Karlsruhe should be applied to it;
- (5) confirm the order requiring the defendant to pay interest at the rate of 6% on the sum payable, as stipulated in paragraph 2 of the operative part of the Court's judgment of 5 May 1983;
- (6) order the defendant to pay the costs.

The Commission of the European Communities, in its defence lodged at the Court's Registry on 2 December 1987, contends that the Court should:

- (1) dismiss the application as unfounded;
- (2) make an appropriate order as to costs.

Upon hearing the report of the Judge- Rapporteur and the views of the Advocate General, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. The Court did, however, request the applicant to produce documentary proof of his move to Karlsruhe during the period in question and to explain the reasons for that move and the connection between the move and the prospect of his future reinstatement in a post at Petten (Netherlands).

III — Submissions and arguments of the parties

First submission: the Commission's disregard of the obligations imposed on it by the Court's judgment of 5 May 1983

According to the applicant, the Court's judgment of 5 May 1983 made no provision for any delay in his reinstatement, which should therefore have been immediate. Moreover, it is clear from that judgment and from the interlocutory judgment of 2 April 1981 that an official who is on leave on personal grounds has priority as regards reinstatement.

Since a post had been declared vacant in Vacancy Notice No COM/R/564/83 dated 16 June 1983 and a recruitment procedure

once initiated can only be suspended for legitimate reasons which the defendant has not adduced, the applicant was entitled to expect that he would be allocated the post which had been declared vacant and consequently he decided to terminate his employment with AGIP on 30 September 1983, informing the administration of the Commission of that decision on 24 September. He then went to live in Germany, where he owned property and had last worked for the Commission.

The applicant states that he could not wait until the arrival of the telegram from the Commission informing him of his reinstatement because he would then have had only two weeks to effect his removal and terminate his employment and that would have meant paying compensation in lieu of notice to AGIP. That step would have been very costly for him.

By neglecting for several months to reinstate the applicant, the Commission failed to fulfil the obligations imposed on it by the Court's judgment of 5 May 1983.

The Commission rejects the applicant's allegations concerning its slowness in complying with the Court's abovementioned judgment. It accuses the applicant of showing a lack of care himself, since paragraph 13 of the judgment had emphasized that he should mitigate his losses, if necessary by looking for alternative employment.

The Commission points out first of all, that the applicant could not have had knowledge of the vacant post in which he was ultimately reinstated at the time when it fell vacant, because a vacancy notice is initially

published only internally. It was not until the applicant received the telegram of 24 February 1984 in which the Commission notified him of the vacancy and invited him to resume his employment that he could have had knowledge of the vacancy.

Even if he did have knowledge of the vacancy before that date, he could not count on being reinstated in that post. The judgment required the Commission to reinstate the applicant in accordance with Article 40 (4) (d) of the Staff Regulations, which implies that a vacant post exists which corresponds to the official's service, category and grade and that he fulfils the requirements as regards qualifications.

In the first place, however, the applicant himself initially denied that he possessed the required qualifications for the post which was notified to him as being vacant. Secondly, he could not have been certain that he would be reinstated because there might have been other officials on leave on personal grounds who were better qualified for the post. Finally, the appointing authority might not have filled the post in question for reasons such as lack of funds in the budget or for other legitimate reasons based, as the Court stated in its judgment of 2 April 1981 in Case 785/79 *Pizzuolo v Commission* [1981] ECR 969, on the current requirements of its departments and the priority of the tasks to be carried out by it.

Consequently, since the Commission had not given the applicant any assurances with regard to his reinstatement before 24 February 1984 and, moreover, being under no obligation to do so, it cannot be held responsible for the financial loss incurred by the applicant when he left his employment with AGIP and moved his residence, as he claims, to Karlsruhe.

On the contrary, it was the applicant who had failed to act reasonably, as required by the Court's judgment of 5 May 1983, by aggravating his losses rather than minimizing them. In accordance with the Court's judgments of 1 July 1976 in Case 58/75 *Sergy v Commission* [1976] ECR 1139 and of 12 June 1986 in Case 229/84 *Sommerlatte v Commission* [1986] ECR 1805, the applicant should be made to bear the loss, for which he alone was responsible.

Second submission: breach of the obligation to calculate the compensation in German marks and to apply the weighting in force for Karlsruhe

The applicant states that since he believed, following the Court's judgment of 5 May 1983, that his reinstatement was to take place immediately, he had moved back to Karlsruhe, his original place of employment and a place where he owned property, to await his reinstatement. In the circumstances, the compensation payable to the applicant ought to have been calculated in German marks and have had the weighting applicable to Karlsruhe applied to it.

In the absence of an express provision regulating the determination of the currency in which compensation must be paid and the weighting to be applied in the circumstances provided for in Article 40 of the Staff Regulations, the currency of and weighting for the country in which the official has his residence should be taken into account, applying *mutatis mutandis* the rules laid down in the sixth and eighth paragraphs of Article 41 (3) of the Staff Regulations. That rule also corresponds to the ordinary rules of law in force with regard to the sums payable to the applicant under Articles 63

and 64 of the Staff Regulations and to the general principles established by the Court in the absence of specific provisions in its judgment of 31 May 1979 in Case 156/78 *Newth v Commission* [1979] ECR 1951.

In reply to the applicant's claims, the Commission points out, first, that he has not furnished evidence that he ceased to reside in Italy. In fact Mr Pizziolo's children have not ceased to reside in Italy and are studying at the University of Bologna; the removal of the family's furniture was effected not from the Federal Republic of Germany but from Bologna and, finally, he failed to produce any administrative attestation to the effect that from October 1983 he had transferred his place of residence from Bologna to Bad Herrenalb.

The Commission then casts doubt on whether the applicant has any interest in having the amounts due to him paid in German marks, since the exchange value in that currency of the amount paid to him in lira could only have been calculated by the Commission at the market exchange rate and would not have produced for the applicant an amount in German marks substantially different from that which he could have obtained himself by exporting the capital in issue from Italy.

Finally, the Commission denies that it had the duty in this case to apply the weighting in force in respect of the remuneration paid to staff employed in the Federal Republic of Germany, since it was for private reasons,

unrelated to his occupation, that Mr Pizziolo lived, as he maintains, in Germany and therefore the Commission can in no way be held liable for the financial consequences.

In any event, the Commission challenges the assumption that the rules and principles relied on by the applicant may be applied by analogy. It points out that Article 41 of the Staff Regulations concerns officials who have non-active status, which was not Mr Pizziolo's case. As regards Articles 63 and 64, they are concerned only with payment of remuneration to officials posted to a specific place; Mr Pizziolo was not posted to the Federal Republic of Germany during the period in issue and could not therefore claim the application of a weighting intended to take account of living conditions for officials posted to that Member State. Finally, the general principles established by the Court in the *Newth* judgment are not applicable in the present case because it is not possible to take into consideration the principle of equal treatment on which that judgment was based for the purpose of giving the applicant the benefit of the weighting for the Federal Republic of Germany. Mr Pizziolo was not in fact in a situation comparable to that of an official enjoying that weighting under the Staff Regulations.

G. C. Rodríguez Iglesias
Judge-Rapporteur