

JUDGMENT OF THE COURT (Fourth Chamber)
22 September 1988 *

In Case 292/87

Adriano Pizziolo, a scientific officer with the Commission of the European Communities, residing at 31 Diepenbrocklaan, NL 1817 KN Alkmaar, Netherlands, represented and assisted by Marcel Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, of the Luxembourg Bar, 34IV, rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Joseph Griesmar, acting as Agent, with an address for service at the office of Georgios Kremlis, a member of its Legal Service, Jean Monnet Building, Luxembourg,

defendant,

APPLICATION for the annulment of the Commission's decision of 2 December 1986 notionally treating the applicant as having continued to work for AGIP during the period from 1 October 1983 to 7 March 1984 and for an order that the Commission pay the applicant an amount equal to the net remuneration which he would have received during the abovementioned period without deducting any notional income, that amount to be calculated in German marks and to take account of the weighting for the Federal Republic of Germany,

THE COURT (Fourth Chamber)

composed of: G. C. Rodríguez Iglesias, President of Chamber, T. Koopmans and C. N. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 2 June 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 2 June 1988,

gives the following

Judgment

- 1 By an application lodged at the Court Registry on 30 September 1987, A. Pizziolo, an official of the Commission of the European Communities, brought an action seeking, essentially, the annulment of the Commission's decisions refusing, first, to pay the applicant an amount equal to the net remuneration which he would have received if he had been effectively reinstated between 1 October 1983 and 7 March 1984 and, secondly, to pay him that amount in German marks, taking account of the weighting for the Federal Republic of Germany.
- 2 The applicant was granted leave on personal grounds from 1 March 1970 to 28 February 1971. He had previously been assigned to the Ceramics and Metallurgy Department of the Joint Research Centre in Karlsruhe as an official in Grade A 6 on the scientific staff. The applicant did not request any extension of his leave and, when the Commission did not reinstate him on its expiry, he brought an action seeking reinstatement with effect from 1 March 1971.
- 3 By an interlocutory judgment of 2 April 1981 (Case 785/79 *Pizziolo v Commission* [1981] ECR 969), the Court dismissed the applicant's claim to be reinstated with effect from the abovementioned date. It did, however, direct that an expert's report should be obtained on the question whether the applicant had the qualifications for reinstatement in various posts declared vacant in the mean time.

- 4 Following that report, the Court, in a judgment of 5 May 1983 (Case 785/79 *Pizzuolo v Commission* [1983] ECR 1343), ordered the Commission to reinstate the applicant with effect from 1 January 1977 and to pay him 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.
- 5 The applicant was in fact employed by the undertaking AGIP Nucleare in Italy. On 30 September 1983 he left that employment and transferred his residence to Bad Herrenalb, near Karlsruhe, in the expectation that he would shortly be reinstated. In fact, the Commission asked him, by a telegram of 24 February 1984, to resume his duties in a post at Petten which had been declared vacant in Vacancy Notice No COM/R/564/83 of 16 June 1983, and his reinstatement took effect on 7 March 1984.
- 6 When calculating the sum of money due, the Commission notionally treated the applicant as having continued to work for AGIP up to that date and deducted from the sums paid the income which the applicant would have received from that undertaking from 30 September 1983 to 7 March 1984 had he continued to work there. That decision of the Commission constitutes the essential subject-matter of this application.
- 7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The decision to refuse full payment of the sum of money equivalent to the applicant's net remuneration

- 8 In support of his claim, the applicant submits that, since the Court's judgment of 5 May 1983, cited above, made no provision for any delay in his reinstatement, the Commission was bound to reinstate him immediately. He was therefore entitled to

leave his employment. The fact that he was not reinstated immediately constitutes a failure on the Commission's part to act diligently, which it should remedy by paying his salary in its entirety for the duration of the delay.

- 9 The Commission, on the other hand, claims that the applicant failed to make the reasonable efforts to mitigate his losses required of him by the abovementioned judgment. He did the very opposite and must therefore suffer the consequences.
- 10 In that regard, it must be pointed out that, as the Commission has rightly stated, the judgment of 5 May 1983 ordered the Commission to reinstate the applicant in accordance with Article 40 (4) (d) of the Staff Regulations, which presupposes not only that a vacancy must exist but also that the official's qualifications must be appraised and compared with those of other officials in the same situation.
- 11 It is undisputed that there were other officials on leave on personal grounds whose qualifications also had to be examined for the post declared vacant in the abovementioned notice of 16 June 1983. There is nothing in the papers before the Court to justify the assertion that the time taken by the administration in carrying out that examination was longer than necessary.
- 12 In view of those circumstances, it cannot be considered that the Commission failed to act diligently by not informing the official until 23 February 1984 that he was to be reinstated at Petten.
- 13 With regard to the applicant's conduct, it must be borne in mind that the Court, in its judgment of 5 May 1983, cited above, stated that the applicant was to make reasonable efforts to mitigate his losses, if necessary by looking for alternative employment. It was all the more reasonable to expect him to remain in employment he already held until he received notice from the appointing authority that he was in fact to be reinstated.

- 14 It must be concluded therefore that the applicant failed to make reasonable efforts when he prematurely left his employment and that he must accept any losses incurred as a result of his decision. The Commission was therefore justified in deducting from the sums of money to be paid to the applicant the sums which he could have earned had he remained in his employment until the date on which he received notice of his reinstatement.
- 15 Consequently, the application for the annulment of that decision must be dismissed.

Mode of payment

- 16 The applicant claims that the sums of money which the Commission was ordered to pay him should have been paid in German marks, taking account of the weighting for the Federal Republic of Germany, because when he left his employment in Italy he moved to Bad Herrenalb, where he owned a house, to await his actual reinstatement. It follows from the provisions of the Staff Regulations and the Court's case-law (judgment of 31 May 1979 in Case 156/78 *Newth v Commission* [1979] ECR 1941) that the applicant was entitled to be paid in the currency of and with the weighting for the country in which he had his residence, namely the Federal Republic of Germany.
- 17 The Commission, however, considers that it was not obliged to comply with those requests because the applicant changed his place of residence for personal reasons unconnected with his relationship with the Commission under the Staff Regulations.
- 18 In the absence of express rules in the Staff Regulations, the applicant refers to the provisions relating to the weighting applicable for officials having non-active status (Article 41) and those having active status (Articles 63 and 64). However, neither of those provisions can be applied in the applicant's case.

- 19 It is undisputed that the applicant did not have active status during the period in issue, and the Court has just found that he was in no way entitled to be treated as having active status during that period because the Commission did not unduly delay his reinstatement.
- 20 Nor can the applicant's position be compared with either non-active status or retirement in the interests of the service, referred to in the judgment in *Newth*, cited above. Those are situations arising out of a decision of the appointing authority justified by the interests of the service, and not a decision of the official taken for personal reasons.
- 21 Finally, it must be borne in mind that the purpose of the sums of money to be paid to the applicant by the Commission was to make up for the difference between the salary which he would have received if he had been reinstated at the Commission and that which he would have received from the undertaking for which he worked in Italy if he had remained in that employment until the date of his actual reinstatement.
- 22 It follows that the Commission was justified in continuing to apply the weighting for Italy to the sums of money to be paid to the applicant for the period at issue and to pay those sums in Italian currency.
- 23 Consequently, the application must be dismissed in its entirety.

Costs

- 24 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, Article 70 of those Rules provides that institutions are to bear their own costs in proceedings brought by servants of the European Communities.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

- (1) Dismisses the application.
- (2) Orders the parties to bear their own costs.

Rodríguez Iglesias

Koopmans

Kakouris

Delivered in open court in Luxembourg on 22 September 1988.

J.-G. Giraud
Registrar

G. C. Rodríguez Iglesias
President of the Fourth Chamber