

JUDGMENT OF THE COURT (Third Chamber)

27 June 1989 *

In Case 200/87

Bruno Giordani, an official of the Commission of the European Communities at the Joint Research Centre at Ispra, represented by Giuseppe Marchesini, avvocato with a right of audience before the Corte di Cassazione (Court of Cassation) of the Italian Republic, residing at Milan, having an address for service in Luxembourg at the Chambers of Victor Biel, 18A rue des Glacis,

applicant,

v

Commission of the European Communities, represented by Marie Wolfcarius, a member of its Legal Department, acting as Agent, assisted by Aloyse May, of the Luxembourg Bar, 31 Grand-Rue, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre,

defendant,

APPLICATION for the annulment of the decision to reinstate the applicant in so far as it classifies him in Grade A 5, Step 5, and for an award of damages,

THE COURT (Third Chamber)

composed of: F. Grévisse, President of Chamber, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: W. Van Gerven

Registrar: D. Loutermann, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 1 December 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 1 March 1989,

gives the following

Judgment

- 1 By an application lodged at the Court Registry on 30 June 1987, Mr Giordani, an official in the scientific and technical services at the Joint Research Centre at Ispra, brought an action in which he claims that the Court should:
 - (1) annul the decision to reinstate him, as evidenced in his salary statement of 14 October 1986, in so far as it accords him a salary corresponding to Grade A 5, Step 5;
 - (2) order his reinstatement, with regard both to seniority in grade and step and to social security cover, with effect from the date on which the first post to which he could have been appointed in accordance with Article 40(4)(d) of the Staff Regulations fell vacant;
 - (3) order the Commission to pay him compensation equal to the difference between the net remuneration to which he would have been entitled as a Community official throughout the period of the delay in reinstating him and the net income from employment received by him during that period, together with a sum equal to the difference between the salaries paid to him since 1 September 1986 and those corresponding to classification in Grade A 5, Step 8;

- (4) order interest to be paid on all sums claimed at the rate of 8% from the relevant dates and that the costs of the action be reimbursed;
 - (5) by way of preparatory inquiry, order the Commission to make known the vacant posts in the administrative or scientific services capable of being considered for the reinstatement of the applicant to which other candidates were appointed during the period from 1974 to 1986.
- 2 It appears from the documents before the Court that in 1971 Mr Giordani, who was at that time classified in Grade A 5, Step 4, took leave on personal grounds and that his leave was extended until 1974. Before that period of leave finally expired, Mr Giordani informed the Commission that he wished to resume his duties. The Commission replied that his request could not be satisfied because there was no vacant post corresponding to his grade in his category or service.
- 3 Mr Giordani then submitted a number of requests for reinstatement which were either unanswered or answered in the negative on the ground that there were no available posts. On 9 April 1986, Mr Giordani submitted to the Commission a further request for reinstatement pursuant to Article 90(1) of the Staff Regulations.
- 4 By a decision of 26 May 1986, Mr Giordani was reinstated as an official in the scientific and technical services in Grade A 5 at the Joint Research Centre at Ispra with effect from 1 September 1986. That decision did not contain any information on other details of the reinstatement such as step or seniority in grade and step.
- 5 On receiving his salary statement of 14 October 1986, Mr Giordani discovered that the salary paid to him was that for an official in Grade A 5, Step 5.

- 6 On 26 November 1986, Mr Giordani submitted a complaint under Article 90(2) of the Staff Regulations, to which the appointing authority did not reply.
- 7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, 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

Claim for annulment

Admissibility

- 8 In the defence, the Commission first claimed that the application was out of time and therefore inadmissible. In the rejoinder, it stated that it was withdrawing its claim of inadmissibility but still maintained that the application had been registered after the expiry of the period prescribed in the Staff Regulations. At the hearing, the Commission's representative claimed that, as far as the first conclusion in the application — for the annulment of the decision appointing the applicant to Grade A 5, Step 5 — was concerned, the first salary statement of 14 October 1986 did not constitute the decision adversely affecting the official; that was contained in the decision of 26 May 1986 to reinstate him. The Commission's representative added that, while the decision reinstating Mr Giordani did not state explicitly the step in the grade in which he was to be reinstated, he should have sought clarification in good time. In any event, the period which elapsed between 26 May 1986 and the applicant's first reaction in the form of his complaint of 26 November 1986 was unduly long.
- 9 The applicant claims that he became aware of the precise terms of his reinstatement when he received his salary statement of 14 October 1986. His complaint of 26 November was therefore directed against the first act which showed that the administration had failed or refused to take account of the period during which he had been involuntarily absent. He refers, in that regard, to the Court's previous decisions concerning delayed reinstatement after officials have taken leave on personal grounds (judgment of 1 July 1976 in Case 58/75 *Sergy v Commission* [1976] ECR 1139, and judgment of 5 May 1983 in Case 785/79 *Pizziolo v Commission* [1983] ECR 1343).

- 10 It should be stated first of all that the Commission's attitude is ambiguous inasmuch as it does not state clearly whether or not it is claiming that the present application is inadmissible. Consequently, Article 92(2) of the Rules of Procedure, under which the Court may at any time consider of its own motion whether there exists any absolute bar to proceeding with a case, must be applied.
- 11 Article 91(2) of the Staff Regulations provides that an appeal to the Court by an official shall only lie if the appointing authority has previously had a complaint submitted to it pursuant to Article 90(2) of the Staff Regulations. That complaint must itself have been submitted against the act adversely affecting the applicant within a period of three months.
- 12 It is first necessary, in that regard, to dismiss the Commission's argument that the applicant should have taken the initiative to inquire about the details of his reinstatement and that, because he did not do so in good time, his complaint was out of time. The Commission should have specified the essential terms of the applicant's reinstatement, such as step and seniority, in its decision of 26 May 1986. In any event, the fact that the decision was incomplete cannot be detrimental to the applicant.
- 13 With regard, next, to the question whether the salary statement of 14 October 1986 may be regarded as an act adversely affecting the applicant which had to be contested within the period prescribed in Article 90(2) of the Staff Regulations, it should be borne in mind that it has been consistently held (see, most recently, the judgment of 22 September 1988 in Case 159/86 *Canteris v Commission* [1988] ECR 4859) that notification of the monthly salary statement has the effect of setting time running for the purpose of the time-limit for an action against an administrative decision where the existence of such a decision is clearly apparent from the statement.
- 14 Although it is regrettable that the Commission informed the applicant of an essential detail of his reinstatement by means of a mere salary statement and not by notification of the decision which must have been taken, it should nevertheless be recognized that the statement clearly shows the existence of a decision of the Commission with regard to the step accorded. The period within which a complaint against that decision could be brought began to run when the applicant was able to acquaint himself with the contents of his salary statement of

14 October 1986. The complaint submitted on 26 November 1986 was therefore not out of time. The claim seeking the annulment of the contested decision should therefore be declared admissible.

Substance

- 15 The applicant claims that by appointing him to Grade A 5, Step 5, the Commission failed or refused to take account of his period of involuntary absence from service. He considers that his reinstatement, delayed 12 years after the end of his leave, was a manifest infringement of Article 40(4)(d) of the Staff Regulations.
- 16 The Commission contends that, from the date of the applicant's first request to be reinstated, the administration systematically considered all the posts falling vacant in the scientific service. The applicant did not possess the qualifications required for any of those posts, and thus could not be reinstated.
- 17 It should be pointed out that Article 40(3) of the Staff Regulations provides that, during leave, an official is not entitled to advancement to a higher step or promotion in grade; his membership of the social security scheme provided for in Articles 72 and 73 and cover for risks under the scheme are suspended. The last sentence of Article 40(4)(d) of the Staff Regulations provides, moreover, that until effectively reinstated he is to remain on unpaid leave on personal grounds.
- 18 It is clear from those provisions that the classification of an official who is reinstated is, in principle, the same as his classification at the time of the commencement of his leave on personal grounds. In the present case, it is not disputed that the applicant's classification apparent from his salary statement is in accordance with those provisions, without prejudice to his right to request to be classified in a different step on the basis of other provisions of the Staff Regulations.
- 19 The claim for the annulment of the decision reinstating the applicant must therefore be dismissed as unfounded.

Claims for the reconstitution of the applicant's career and for compensation

- 20 The Commission contends that these claims are inadmissible because they were not preceded by a request as provided for in Article 90(1) of the Staff Regulations.
- 21 The applicant claims that his requests for reinstatement and compensation as described above were implicitly rejected by the Commission's decision apparent from the salary statement of 14 October 1986 and could thus form the subject-matter of his complaint of 26 November 1986.
- 22 It should be borne in mind that Articles 90 and 91 of the Staff Regulations have the effect of making an appeal admissible only if the administrative procedure prescribed in those provisions has first been duly followed. In cases such as the present one, in which an official seeks a decision by which the administration acknowledges its own infringement of Article 40(4)(d) of the Staff Regulations and consequently compensates him for the damage he has suffered as a result, the administrative procedure must be initiated by a request from the official concerned that the administration take that decision, in accordance with Article 90(1) of the Staff Regulations. The official may submit a complaint to the administration only against a decision rejecting that request, in accordance with Article 90(2).
- 23 In the present case, that administrative procedure, which is compulsory under the provisions of the Staff Regulations, was not followed.
- 24 As far as the second, third and fourth claims set out in the application are concerned, the applicant's complaint of 26 November 1986 was not preceded by a request within the meaning of Article 90(1) of the Staff Regulations. On the contrary, it appears from the documents before the Court that the Commission did not learn that the applicant was claiming that his reinstatement was unduly delayed until he submitted his complaint.

- 25 Finally, the salary statement of 14 October 1986 was established on the basis of Article 40(3) and not on the basis of the first sentence of Article 40(4)(d) of the Staff Regulations, on which the applicant bases his claim for compensation for the damage allegedly suffered.
- 26 In view of the foregoing, the contested decision apparent from the salary statement of 14 October 1986 cannot be regarded as an implied rejection of the applicant's request.
- 27 Consequently, the claims for the reconstitution of the applicant's career and for compensation must be dismissed as inadmissible, and there is no need to rule on the request for the adoption of measures of inquiry.

Costs

- 28 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs; Article 70 of those rules provides that the institutions are to bear their own costs in proceedings brought by servants of the Communities, without prejudice to the provisions of the second subparagraph of Article 69(3), which provides that the Court may order even a successful party to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.
- 29 In the present case, account must be taken of the fact that, by failing to indicate the essential terms of the applicant's reinstatement, such as step and seniority, in its decision of 26 May 1986, the Commission misled the applicant, causing him to formulate his appeal in the terms set out above. The Commission should therefore bear half of the costs incurred by the applicant.

On those grounds,

THE COURT (Third Chamber)

hereby:

- (1) Dismisses the application;
- (2) Orders the Commission to bear its own costs and to pay half of the costs incurred by the applicant.

Grévisse

Moitinho de Almeida

Zuleeg

Delivered in open court in Luxembourg on 27 June 1989.

J.-G. Giraud

Registrar

F. Grévisse

President of the Third Chamber