JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
12 May 1998

Case T-184/94

Martin O'Casey
v
Commission of the European Communities

(Officials – Annulment of the decision rejecting the applicant's candidature for the post of assistant to the Deputy Director of the ITER joint work site at Naka, Japan – Offer of the post – Breach of the agreement – Claim for damages)

Application for: annulment of the letter from the Deputy Director of the International Thermonuclear Experimental Reactor and head of the joint work site at Naka, Japan, of 16 July 1993 informing the applicant that his candidature for the post of administrative assistant to the said Deputy Director was rejected and of the decision contained in that letter to reject his candidature, and for damages to compensate for the material and non-material harm thus suffered by the applicant.

Decision: Inadmissible.

Abstract of the Judgment

By Decision 92/439/Euratom of 22 April 1992, the Commission of the European Communities concluded for and on behalf of the European Atomic Energy Community ('the Community'), on the basis of Article 101 of the Treaty establishing the European Atomic Energy Community ('the EAEC Treaty'), an agreement with the Government of Japan, the Government of the Russian Federation and the Government of the United States of America on cooperation in the engineering design activities for the International Thermonuclear Experimental Reactor ('ITER') (OJ 1992 L 244, p. 13).

In order to achieve the purpose of the agreement, which is to conduct jointly the activities to produce a detailed, complete and fully integrated design for the ITER reactor and all technical data necessary for future decisions on its construction, the agreement provides for a Council to be established with responsibility for the overall direction of the project. The Council is to appoint a Director, who is to direct and coordinate, *inter alia*, the performance of the research activities and who, in carrying out his duties and responsibilities, is to act independently and neither seek nor take instructions from any party.

To assist the Director in the performance of his duties, the agreement further provides for the establishment of a Joint Central Team. Its members, other than the Deputy Directors and the administrative officer and head for each joint work site, are to be chosen by the Director from among qualified persons nominated by the parties.

The parties agree to make qualified persons available to the Joint Central Team in approximately equal numbers, by secondment agreements or by other means specified in the protocols to the cooperation agreement. The Joint Central Team is located at the joint work sites, which are Garching (Germany), Naka (Japan) and San Diego (United States of America).

The negotiators agreed on the names of the parties' likely nominees for the most important positions. Nominees from the Community were to occupy *inter alia* the post of Director (Dr Rebut) and one of the four posts of Deputy Director, the holder of which would also be head of the joint work centre at Naka (Dr Huguet). The Community would additionally be represented on the Council by Mr Maisonnier, the Director of the Fusion Programme in the Directorate-General of the Commission for Science, Research and Development (DG XII).

The applicant, Martin O'Casey, is a member of the temporary staff in Grade A 4 at the Joint European Torus Joint Undertaking ('JET'), in the United Kingdom, where he has worked since 1 May 1980 as an administrator in the contracts service.

According to the applicant, in early April 1992 Dr Huguet, Associate Director of JET, who had been nominated as Deputy Director of ITER and head of the joint work site at Naka, Japan, asked him if he would agree to become his administrative assistant in the new duties he was to take up in Japan from September or October 1992. He agreed to consider the offer.

In the afternoon of 30 April 1992 the applicant had a further discussion with Dr Huguet about the offer and, in view of assurances provided by Dr Huguet, stated that he would be pleased to accept the post offered.

It was understood that the post would have to be allocated by DG XII and that the applicant would have to attend for interview in due course.

The applicant also states that towards the middle of June 1992 he again met Dr Huguet to ask what progress had been made in DG XII regarding the decision to allocate the post and its advertisement. Dr Huguet confirmed that he was empowered to offer him the post and that his choice could not be overruled. In view of those assurances, the applicant, as requested by Dr Huguet, confirmed his acceptance of the offer.

On a visit to JET in January 1993, Dr Huguet met the applicant again and assured him that he needed his services in Japan more than ever.

In February 1993 the vacancy notice for the post of administrative assistant to the Deputy Director and head of the Naka joint work site was published (COM/R5043/93). The applicant applied and received an acknowledgment slip.

In May 1993 the applicant learnt from a person working at the Naka joint work site that the post in question had been offered to Mrs Z., who worked in the Directorate-General for Telecommunications, Information Market and Exploitation of Research (DG XIII). He later found out that she had refused the offer. He also learnt that defamatory rumours about him were circulating.

The applicant wrote to Dr Huguet at Naka on 10 May, 9 June and 9 July 1993, asking for information. Dr Huguet replied on 16 July 1993 by a letter printed on official ITER headed paper, informing him in particular that an American candidate was expected to be appointed to the post of administrative assistant at Naka.

The applicant sent letters to DG XII on 9 June, 30 June and 2 August 1993, expressing his comments and concerns about the appointment procedure for the post in question. He received no reply before initiating the pre-litigation procedure.

On 10 September 1993 the applicant lodged a complaint pursuant to Article 90(2) of the Staff Regulations of Officials of the European Communities in which he contested the decision, brought to his attention by Dr Huguet's letter of 16 July 1993, to exclude him from competition COM/R5043/93 and sought compensation for the harm he had thus suffered.

By letter of 13 September 1993 the Commission informed the applicant that competition COM/R5043/93 was still in progress and that he would be informed of its outcome.

On 27 September 1993 Dr Huguet wrote to DG XII to put his point of view on the applicant's complaint. On the same day Dr Huguet informed Mr Maisonnier that an American candidate had been selected for the post of administrator of the ITER joint work site at Naka, so that the post was no longer open to candidates from the Community.

On 18 November 1993 the applicant was given that information orally by a Commission official during an interservices meeting.

On 22 November 1993 the Commission withdrew vacancy notice COM/R5043/93.

On 8 December 1993, further to the meeting of 18 November 1993, the applicant sent the Commission a letter containing additional information in support of his complaint. On 15 December 1993 the Commission informed the applicant that, because of the end-of-year holidays and in order to meet the time-limit for responding to a complaint laid down by the Staff Regulations, a draft reply had already been prepared prior to receipt of his letter of 8 December 1993.

The Commission rejected the applicant's complaint by a decision of 17 December 1993. He was notified of that decision by a letter dated 14 January 1994 for which he signed an acknowledgment of receipt on 7 February 1994.

Admissibility

Admissibility of the claim for annulment

First of all, Article 152 of the EAEC Treaty, which confers jurisdiction on the Community judicature in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment, must be interpreted as applying not only to persons who have the status of officials or of servants other than local staff but also to persons claiming that status (paragraph 56).

An action in which a person claims the status of Community servant with ITER, a structure resulting from an international agreement to which the Community is a party, is covered by Article 152 of the EAEC Treaty where it relates to the first stage of an appointment procedure, in which the parties to ITER nominate candidates qualified for the post to the authority officially empowered to take a decision on those candidatures, namely the Director of ITER. The Community judicature has jurisdiction to hear actions relating to that shortlisting stage if it is vitiated by a defect for which the Community may be held responsible, in particular that of wrongly considering an internal candidature to be unsuitable and therefore wrongly failing to pass it on to the Director of ITER. On the other hand, the Community judicature lacks jurisdiction over the second stage of the appointment procedure, in which the Director of ITER, acting independently, selects the holder of the post from the qualified persons nominated by the parties. The Community takes no part in that decision since ITER is a body under international law distinct from the Community. Judicial review of that selection would require the merits of candidates nominated by parties other than the Community to be assessed, which would clearly exceed the jurisdiction of the Community judicature (paragraphs 57 to 62).

See: 271/83, 15/84, 36/84, 113/84, 158/84, 203/84 and 13/85 *Ainsworth and Others* v *Commission and Council* [1987] ECR 167, paras 11 and 12; T-177/94 *Altmann and Others* v

Commission [1994] ECR II-1245, para. 35; T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, para. 81

Secondly, the existence of an act adversely affecting the official concerned within the meaning of Articles 90(2) and 91(1) of the Staff Regulations is an essential condition for the admissibility of any action brought by officials or other servants against the institution by which they are employed. Only acts producing binding legal consequences which directly and immediately affect the applicant's interests by significantly changing his legal situation may be the subject of an action for annulment. Such acts must issue from the appointing authority and must contain a decision (paragraph 63).

See: T-34/91 *Whitehead* v *Commission* [1992] ECR II-1723, para. 21; T-20/92 *Moat* v *Commission* [1993] ECR II-799, para. 39; T-586/93 *Kotzonis* v *ESC* [1995] ECR II-665, para. 28; T-26/96 *Lopes* v *Court of Justice* [1996] ECR-SC II-1357, para. 19; T-196/95 *H* v *Commission* [1997] ECR-SC II-403, paras 44 and 45

That is not so in the case of a letter to a person who has applied for a vacancy with ITER, informing him of a decision to reject his candidature, where it is not from the authority officially empowered to take a decision on that candidature and its author does not state that he is writing under delegated powers in the name and on behalf of that authority. That letter cannot objectively be considered to constitute a definitive decision of that authority, nor can it affect directly and immediately the applicant's position in law and under the Staff Regulations (paragraphs 64 to 69).

See: 8/56 *ALMA* v *High Authority* [1957] ECR 95, in particular p. 100; C-388/93 *PIA HiFi* v *Commission* [1994] ECR I-387, para. 10

The action is accordingly inadmissible in so far as it is intended to secure the annulment of the letter sent by Dr Huguet to the applicant on 16 July 1993. It is also inadmissible in so far as it is intended to secure the annulment of the decision by the Director of ITER to reject the applicant's candidature, announced in the letter of 16 July 1993 (paragraphs 71 to 83).

Admissibility of the claim for damages

Admissibility of the claim seeking damages for the refusal to appoint the applicant to the post in question

Where there is a close link between a claim for annulment and a claim for damages, the inadmissibility of the claim for annulment entails the inadmissibility of the claim for damages. In this case, the applicant's claim seeking damages for the refusal to appoint him to the post at issue is closely linked to his claim for annulment. Its admissibility therefore depends on that of the claim for annulment. Since the latter is inadmissible, the same is true of the claim for damages (paragraphs 89 and 90).

See: 4/67 *Muller* v *Commission* [1967] ECR 365; 346/87 *Bossi* v *Commission* [1989] ECR 303, para. 31; T-27/90 *Latham* v *Commission* [1991] ECR II-35, paras 38, 39 and 40; *Moat* v *Commission*, cited above, para. 46; T-82/91 *Latham* v *Commission* [1994] ECR-SC II-61, paras 34, 35 and 36; *Lopes* v *Court of Justice*, cited above, para. 46

Admissibility of the claim seeking damages for the alleged defamation of the applicant

It is only where there is a direct link between a claim for annulment and a claim for damages that the claim for damages is admissible as being ancillary to the claim for annulment without necessarily having to be preceded by a request to the appointing authority for compensation for the damage allegedly suffered and by a complaint

challenging the implied or express rejection of the request. By contrast, where the alleged damage does not result from an act whose annulment is sought but from a series of wrongful acts and omissions alleged to have been committed by the administration, the pre-litigation procedure must necessarily commence with a request that the appointing authority make good that damage. The applicant's claim for damages in respect of the harm caused by the defamatory rumours of which he was allegedly the victim is independent from the claim for annulment. Since the applicant did not comply with that two-stage procedure, the claim for damages regarding the alleged defamatory rumours is inadmissible (paragraphs 98 and 99).

See: T-500/93 *Y* v *Court of Justice* [1996] ECR-SC II-977, para. 66

Operative part:

The action is dismissed as inadmissible.