JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
14 February 1990 *

In Case T-38/39

Ingfried Hochbaum, an official of the Commission of the European Communities, residing at 53 avenue des Nerviens, 1040 Brussels, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Yvette Hamilius, lawyer, 11 boulevard Royal,

applicant,

v

Commission of the European Communities, represented by Sean van Raepenbusch, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decisions cancelling Vacancy Notice COM/902/84 and adopting in its place Vacancy COM/83/87,

THE COURT OF FIRST INSTANCE (Third Chamber)

composed of: A. Saggio, President of Chamber (Judge-Rapporteur), B. Vesterdorf and K. Lenaerts, Judges,

Registrar: H. Jung

having regard to the written procedure and further to the hearing on 23 January 1990,

gives the following

* Language of the case: French

Judgment

Facts, procedure and conclusions of the parties

1 Following the publication in 1984 of Vacancy Notice COM/902/84, Mr Hochbaum, an official of the Directorate-General for Competition (DG IV) at the Commission, submitted an application, with 15 other officials, for the post of Head of the State Monopolies and Public Enterprises Division. When the Commission appointed another candidate, Mr Waterschoot, to the post in question, Mr Hochbaum brought an action for the annulment of that appointment.

2 By a judgment of 9 July 1987, the Court of Justice annulled the contested appointment and, with it, the Commission's decision rejecting the applicant's application for the post, *inter alia* on the ground that the Advisory Committee on Appointments to Grades A 2 and A 3 (hereinafter referred to as the 'Noël Committee', after the name of its President at the time) had not been consulted on the basis of complete application files (Joined Cases 44, 77, 294 and 295/85 *Hochbaum and Rawes* v *Commission* [1987] ECR 3259).

3 In the light of that judgment, the Commission recommenced the recruitment procedure which had been initiated three years previously and sought anew the opinion of the Noël Committee on all the applications submitted in 1984 under Vacancy Notice COM/902/84. Subsequently, in line with the Noël Committee's opinion which suggested that a fresh vacancy notice should be published 'so as to enable the appointment procedure to be completed with the greatest possible transparency as required by the Court of Justice', the Commission decided to cancel the aforementioned vacancy notice and to initiate a fresh procedure to fill the post in question by the publication, on 7 August 1987, of Vacancy Notice COM/83/87. It is important to point out that the qualifications required by the notices were stated in identical terms. Mr Hochbaum and 10 other officials submitted applications under the new vacancy notice and, on 15 October 1987, after consulting the Noël Committee, the Commission appointed Mr Waterschoot to be Head of Division.

4 In the meantime Mr Hochbaum had on 18 September 1987 lodged a complaint under Article 90(2) of the Staff Regulations of Officials (hereinafter referred to as the 'Staff Regulations') against the Commission's decisions, referred to in the

preceding paragraph, cancelling Vacancy Notice COM/902/84 as a result of the abovementioned judgment of the Court of Justice and opening vacancy COM/83/87 for the post in question. Six months later, by a decision of 17 March 1988, which was notified to the applicant on 15 April, the administration rejected that complaint.

5 In those circumstances Mr Hochbaum brought these proceedings by application lodged with the Court Registry on 6 July 1988, within the time-limits prescribed by the second subparagraph of Article 91(3) of the Staff Regulations. The written procedure was conducted in its entirety before the Court of Justice. At the close of the written procedure, the Court of Justice, by order of 15 November 1989, transferred the present case to the Court of First Instance, in accordance with the Council Decision of 24 October 1988. After hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.

6 The parties submitted the following conclusions.

The applicant contended that the Court of First Instance should:

(i) declare null and void:

(a) the Commission's decision cancelling Vacancy Notice COM/902/84;

(b) as far as might be necessary, the implied decision rejecting the applicant's application for the post of Head of the State Monopolies and Public Enterprises Division declared vacant under No COM/902/84;

(c) the adoption by the Commission and subsequent publication on 31 July 1987 of Vacancy Notice COM/83/87 relating to the A 3 post of 'Head of the State Monopolies and Public Enterprises Division, implementation of Articles 101 and 102,' in the Directorate-General for Competition (DG IV) together with any other subsequent decisions adopted by the Commission under that unlawful procedure including the 'fresh' (third) appointment of Mr Waterschoot;

(d) as far as may be necessary, the express rejection by the Commission of the administrative complaint lodged by the applicant on 16 November 1987 and registered at the Secretariat-General under No 3194/87;

(ii) order the defendantto pay the sum of one franc on a provisional basis on account of damages to be assessed subsequently;

(iii) order the defendant to pay the costs together with costs necessarily incurred for the purposes of the proceedings.

The defendant claimed that the Court of First Instance should:

(i) declare the application inadmissible, or at least, ill founded;

(ii) make an order as to costs in accordance with the law.

Admissibility

7 The defendant claims that the application is inadmissible on the following grounds: the contested decision is not one adversely affecting the applicant and, moreover, the applicant has no interest to protect in bringing the proceedings. As regards the first of these submissions, the defendant points out that, in accordance with consistent case-law, only decisions capable of directly affecting the legal situation of the applicant may be regarded as adversely affecting him (judgments of 1 July 1964 in Case 26/63 *Pistoj* v *Commission* [1964] ECR 341, and of 11 July 1974 in Joined Cases 177/73 and 5/74 *Reinarz* v *Commission* [1974] ECR 819, paragraph 13). It infers therefrom that the contested acts do not therefore adversely affect the applicant inasmuch as, since the qualifications required by the two notices were in the same terms, Mr Hochbaum was able to submit his application subject to the same conditions under the fresh appointment procedure initiated by Vacancy Notice COM/83/87. In support of this view, it also places reliance on the wording of the *Küster* and *De Roubaix* judgments in which it was stated that 'in so far as the effect of the conditions governing access to a post, fixed by the vacancy notice, is to rule out the candidature of officials who are eligible for transfer or promotion, the vacancy notice constitutes an act adversely affecting such officials' (judgments of 19 June 1975 in Case 79/74 *Küster* v *Commission* [1975] ECR 725, paragraph 6, and of 11 May 1978 in Case 25/77 *De Roubaix* v *Commission* [1978] ECR 1081, paragraph 8).

8 The allegation of inadmissibility made by the defendant cannot be upheld. In fact, when a candidate has been admitted to take part in a competition, that confers on him an interest in the subsequent conduct by the appointing authority of that competition. In the present case, the abandonment of the initial procedure and the initiation of a fresh appointment procedure altered the objective conditions for the comparative examination of the various applications, enabling, on the one hand, new competitors to take part and, on the other hand, the experience and qualification acquired by candidates during the three years separating the two competition notices to be taken into consideration, where appropriate. Consequently, the applicant has an interest in bringing these proceedings.

9 Furthermore, the question of the admissibility of the application must be considered in the light of the specific nature of the contested acts, inasmuch as they were adopted following a judgment of the Court of Justice. In that connection, the Court has held that 'it cannot be contested that those to whom a judgment of the Court annulling an act of an institution is addressed are directly concerned with the way in which the institution executes the judgment. They are therefore entitled to request the Court to rule on any failure by the institution to perform its obligations under the provisions applicable' (judgment of 25 November 1976 in Case 30/76 *Küster* v *Parliament* [1976] ECR 1719, paragraphs 8 and 9). In the present case the cancellation of the first vacancy notice and the organization of a fresh appointment procedure by way of the adoption of the decisions in question indeed constitute the manner in which the defendant sought to execute the judgment of the Court and, accordingly, are of direct concern to the applicant.

10 It follows that application is admissible.

The substance of the case

11 In his application for annulment the applicant makes three submissions based respectively on an infringement of Article 176 of the Treaty, an infringement of Article 25 of the Staff Regulations and a misuse of powers.

12 As regards the first submission, Mr Hochbaum considers that, in order to comply with the abovementioned judgment of 9 July 1987, the Commission was bound to resume the appointment procedure initiated by the publication of Vacancy Notice COM/902/84 from the stage which it had reached prior to the adoption of the unlawful decisions, since the illegality of the annulled appointment decision did not vitiate the whole of the procedure.

13 In that connection it should be stated that the *Hochbaum* judgment relied on by the applicant annuls the decision appointing Mr Waterschoot on account of the irregularity of the procedure for examining the merits of the various candidates. Accordingly, it is clear from the grounds of that judgment that it has the effect of annulling both the appointment and the procedure for examining the applications. The illegality vitiating the selection procedure did not, however, affect the validity of the vacancy notice opening the procedure, which was never challenged.

14 Nevertheless, it cannot be inferred from the fact that the vacancy notice — which was not annulled by the Court of Justice — remains valid that the Commission was bound, in order to comply with the judgment, to resume the procedure from the stage which it had reached before the adoption of the unlawful act. In fact, the sole obligation flowing from the judgment is that the Commission must remedy the flaws which vitiated the procedure leading to the adoption of the annulled decision. In particular, the fact — relied on by the applicant — that the judgment declined to grant him damages of one franc in compensation for non-material damage, on the ground that the annulment itself constituted sufficient restitution for the applicant, does not signify that the Commission was obliged to continue the procedure which had been initiated.

15 It is, in fact, settled case-law that the appointing authority is not obliged to carry through a recruitment procedure initiated pursuant to Article 29 of the Staff Regulations (see judgments of 24 June 1969 in Case 26/68 *Fux* v *Commission* [1969] ECR 145, paragraph 11, and of 9 February 1984 in Joined Cases 316/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641, paragraph 22). The principle thus laid down remains applicable even when, as in the present case, the recruitment procedure has been partially annulled by a judgment of the Court of Justice (see the judgment of 8 June 1988 in Case 135/87 *Vlachou* v *Court of Auditors* [1988] ECR 2901, paragraphs 23 to 25). Accordingly the judgment of 9 July 1987 could in no way affect the discretionary power of the Commission to extend its field of choice in the interests of the service. In fact, since the Commission was not obliged to carry through the procedure initiated, *a fortiori* it was entitled to initiate a fresh recruitment procedure.

16 In those circumstances, it must be held that the defendant did not infringe Article 176 of the Treaty by cancelling Vacancy Notice COM/902/84 and at the same time initiating a fresh appointment procedure, following the annulment by the Court of Justice of Mr Waterschoot's appointment.

17 The first submission must therefore be rejected.

18 The second submission relied on by the applicant in his claim for annulment is that Article 25 of the Staff Regulations was infringed, inasmuch as the cancellation of Vacancy Notice COM/902/84 in fact constitutes a fresh implied decision to reject his application. That decision, he says, adversely affects him and occasions him serious harm, so that it ought to have been notified to him by way of a reasoned decision, regard being had to the abovementioned judgment of 9 July 1987.

19 In that connection it is sufficient to state that, since the contested decisions fall within the discretionary power of the Commission to organize its departments, the obligation to state the grounds of a decision, laid down in Article 25 of the Staff Regulations, was satisfied by the publication of Vacancy Notice COM/83/87 which was adopted in circumstances known to the applicant enabling him to apprehend the scope of the measures in issue (see the judgment of 1 June 1983 in Joined Cases 36, 37 and 218/81 *Seton* v *Commission* [1983] ECR 1789, paragraphs 47 and 48).

20 The second submission must therefore be rejected.

21 The third submission is that the Commission misused its powers by publishing Vacancy Notice COM/83/87 in order to seek to give a semblance of legality to the decision appointing Mr Waterschoot. In reality, it is said that that decision had been taken before the publication of the abovementioned notice, the formal decision to appoint following only later without any actual comparative examination of the merits of the candidates.

22 However, as the Court of Justice has already held (see the abovementioned *Vlachou* judgment), a misuse of powers is deemed to exist only if it is proven that the appointing authority, in adopting the contested decision, was pursuing an objective other than that pursued by the rules in question. Consequently it is for the Court of First Instance to ascertain whether in the present case the applicant has produced proof that the appointing authority pursued an objective other than the interests of the service in adopting the contested decisions.

23 In that connection the applicant essentially alleges that the Commission cancelled the procedure which had been started and published a fresh vacancy notice in order to arrogate to itself the right to take into account the experience acquired by Mr Waterschoot following the annulment of his unlawful appointment as Head of Division. In support of his argument, he alleges more specifically that, at the time when the first vacancy notice was published, Mr Waterschoot did not satisfy the qualifications required for submitting a valid application.

24 It should be recalled that the appointing authority has a discretionary power of appraisal in matters of promotion and the Community judicature must limit its review to the question whether the appointing authority has used its power in a manner which is manifestly wrong (see, in particular, the judgment of 22 June 1989 in Case 104/88 *Brus* v *Commission* [1989] ECR 1873, paragraph 17). In the present case, there is no objective indication in the documents before the Court of First Instance that, prior to performing the tasks of Head of the State Monopolies and Public Enterprises Division, Mr Waterschoot did not satisfy the conditions required for submitting his application for the post in question.

25 It should, moreover, be pointed out that, even if the Commission did take account of the experience acquired by Mr Waterschoot following his first appointment, that does not mean that that institution acted with any objective in mind other than the interests of the service, in such a way as to commit a misuse of powers.

26 Consequently, the proof required to establish a misuse of powers on the part of the defendant has not been adduced. Accordingly, the third submission must be rejected.

27 It results from all the foregoing considerations that the application must be dismissed as unfounded.

Costs

28 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which are applicable to the procedure before the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those Rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the parties to bear their own costs.

Delivered in open court in Luxembourg on 14 February 1990.

Saggio Vesterdorf Lenaerts

H. Jung
Registrar

A. Saggio
President of Chamber