JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
10 April 1992 *

In Case T-40/91,

Agostino Ventura, a former member of the auxiliary staff of the European Parliament, residing at Mamer (Luxembourg), represented by Carlo Revoldini, of the Luxembourg Bar, with an address for service in Luxembourg at his Chambers, 21 Rue Aldringen,

applicant,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, and Manfred Peter and José Luis Rufas Quintana, members of the Legal Service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the European Parliament of 30 July 1990 refusing to appoint the applicant as a probationary official in Category D,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fifth Chamber),

composed of: K. Lenaerts, President, H. Kirschner and D. Barrington, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 12 March 1992,

gives the following

* Language of the case: French.

Judgment

The facts giving rise to the application and the administrative procedure

1 The applicant passed the tests for Open Competition PE/2/D, organized by the European Parliament, and his name was entered on the reserve list drawn up at the conclusion of that competition for the purpose of recruiting 'staff and skilled workers' (option No 6 — transport and handling staff). The validity of that reserve list, in so far as it concerned the option selected by the applicant, was several times extended, on the last occasion up to 30 June 1989.

2 Following publication on 8 January 1990 of Vacancy Notice No 6143 for a skilled employee (F/M) (career bracket D3/D2) in the Parliament's Directorate-General III, Information and Public Relations (hereinafter referred to as 'DG III') in Paris, the applicant submitted his application for the post on 9 January 1990.

3 According to the Parliament's admissions the Director-General for DG III selected the applicant and on 18 February 1990 proposed his appointment as a probationary official to the post referred to in the abovementioned vacancy notice with effect from 1 April 1990.

4 On 13 March 1990, the Secretary-General of the Parliament decided, after receiving a unanimous favourable opinion from the Joint Committee, to extend retroactively the validity of the reserve list drawn up after competition PE/2/D from 1 July 1989 to 30 June 1990.

5 On 20 March 1990, the applicant underwent the medical examination provided for by Article 33 of the Staff Regulations of Officials of the European Communities. On 1 April 1990 he took up his new duties.

6 At the time he took up his duties in Paris, the applicant was a (freelance) auxiliary employee of the Parliament in Luxembourg. His contract of employment, which had been concluded on 15 January 1990, was normally due to expire on 30 April 1990, a month after he took up his new duties.

7 By letter of 30 July 1990, Mr Van den Berge, Director-General for Personnel, Finance and the Budget, informed the applicant that he would not be appointed an official and that his employment would be terminated. That letter reads as follows:

'In view of objections made by the auditors and adverse observations in memoranda addressed to me by your superiors in DG III on your conduct at work, the Secretary-General has decided not to propose that the President should overrule the auditors' refusal of approval. You cannot therefore be appointed an official.

Since, however, you have in fact performed the duties for which your appointment was contemplated from 1 April 1990, that period of work will be covered by a contract as auxiliary employee until 31 August next in extension of the contract which you had previously.'

8 It appears from the documents submitted by the Parliament that on 28 May 1990, the Financial Controller had refused to approve the proposed appointment of the applicant as a skilled employee (D 3, step 3) on the ground that the retroactive extension of the validity of the reserve list drawn up after competition PE/2/D was unlawful and that the applicant was not well placed on that list since he was 110th of 125 successful participants in the competition.

9 Following the decision of 30 July 1990, the Parliament sent the applicant a contract as an auxiliary employee dated 11 July 1990 signed by the Parliament's

representative and approved by the Financial Controller relating to the period from 1 May 1990, which was the end of the applicant's previous engagement, to 31 August 1990. An additional clause also dated 11 July 1990 stipulated that from 1 April 1990 the applicant would be employed in the Directorate-General for Information and Public Relations in the Information Office in Paris, but otherwise there would be no derogation from the clauses and conditions in the contract as an auxiliary employee of 15 January 1990.

10 It is common ground that the applicant did not sign either of those two documents. It appears from the documents lodged by the applicant after the oral procedure that during the period from 1 May 1990 to 31 August 1990 he received monthly advances the amount of which corresponded to the remuneration of an auxiliary employee. Those advances were made subject to a subsequent final account.

11 On 29 October 1990, the applicant submitted a complaint under Article 90(2) of the Staff Regulations to the appointing authority against the aforementioned decision of 30 July 1990. In a letter dated 19 April 1991 sent to Mr Vinci, Secretary-General of the Parliament, the applicant repeated the grounds of that complaint and requested that 'his probationary period as an official should be continued'.

12 On 22 April 1991, Mr Vinci, the Secretary-General of the Parliament, rejected the applicant's complaint, thus confirming the decision of 30 July 1990.

Procedure and forms of order sought by the parties

13 By application lodged at the Court Registry on 29 May 1991, the applicant brought an action challenging the decision of the Secretary-General of the Parliament of 22 April 1991 rejecting the complaint which he had lodged against the decision of the Director-General for Personnel, Finance and the Budget of 30 July 1990 according to which the latter had refused to proceed with the applicant's appointment as a probationary official in a post as a skilled employee.

14 The written procedure followed the normal course and terminated on 13 December 1991.

15 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance requested the Parliament on 12 February 1992 to specify in respect of the reserve list from Open Competition PE/2/D the number of options available and their respective date of expiry. By letter dated 28 February 1992, the Parliament complied with that request.

16 Upon hearing the report of the Judge-Rapporteur the Court of First Instance decided to open the oral procedure without any preparatory inquiry.

17 Following a request from the Court of First Instance during the oral procedure on 12 March 1992, the applicant lodged on 13 March 1992 five documents relating to the terms upon which his salary was paid him for the period from 1 April 1990 to 1 August 1990.

18 The applicant claims that the Court of First Instance should:

(i) declare the application admissible;

(ii) declare that there has been an infringement of Article 34 of the Staff Regulations of Officials of the European Communities;

(iii) declare that there has been an attempt to misuse the Staff Regulations by a non-authorized transformation of a contract for a post as a probationary official into a contract for a post as an auxiliary employee;

(iv) consequently, reinstate the applicant in his duties of probationary official as a skilled employee in the career bracket D 3/D 2;

(v) order the European Parliament to pay the entire costs.

19 The Parliament contends that the Court of First Instance should:

(i) dismiss all the claims in the application;

(ii) make an order for costs in accordance with the applicable provisions.

As to the annulment of the contested measure

20 In support of his application for annulment the applicant relies on two pleas, infringement of Article 34 of the Staff Regulations and abuse of the principles governing contracts of employment between the institutions and their staff.

The first plea: infringement of Article 34 of the Staff Regulations

21 The applicant maintains that following acceptance of his application for the post declared vacant by Notice No 6143 he duly began on 1 April 1990 the probationary period provided for in Article 34 of the Staff Regulations. In the applicant's view, completion of the probationary period would normally have led to his appointment as an official.

22 On that issue, the applicant claims that Article 34 of the Staff Regulations was infringed, in the first place because his probationary period was interrupted on

31 August 1990, four months after it began, whereas Article 34(1) of the Staff Regulations prescribes a probationary period of six months for officials in Category D and because the procedure provided for in Article 34(2) was not observed since no probationary report was made or communicated to him.

23 In the second place, the applicant alleges that the 'adverse observations contained in the memoranda which his superiors had sent to the Secretary-General of the Parliament' and which were referred to in the decision of 30 July 1990 can in no way be treated as a probationary report duly drawn up and communicated to the person concerned for any observations he may have. In the applicant's view that irregularity infringes his rights as a probationary official.

24 In any event, the applicant observes that the letter from the Secretary-General of the Parliament of 22 April 1991 rejecting his complaint of 29 October 1990 makes no further reference to those adverse memoranda. Consequently, the applicant considers that that argument is referred to only for the purpose of completeness.

25 Thirdly, the applicant maintains that the Parliament cannot rely on the 'objection made by the Financial Controller' referred to in the decision of 30 July 1990, in order to justify the refusal to appoint him as an official since neither Article 34 nor, moreover, any other provision in Title III of the Staff Regulations gives any power to a body responsible for financial control in relation to the recruitment of officials. In the same way, the applicant claims that it is not for the Financial Controller, in his capacity as the authority responsible for checking the formal regularity of Community expenditure, to determine the substantive or political expedience of Community measures. In the applicant's view, were it otherwise, the probationary official and, as a corollary, all officials would be deprived of the institutional protection guaranteed by the Staff Regulations.

26 Fourthly, the applicant states that even if some involvement of the Financial Controller were to be recognized in the appointment of probationary officials any

observations he may make must be directly connected with a matter personally associated with the probationary officials and not, as in the present case, the question of observance of budgetary rules. In the applicant's view such an interpretation is dictated by Article 34 of the Staff Regulations which provides for personal assessment of the probationary official's ability.

27 In the oral explanation which he gave at the hearing the applicant, moreover, stated that contrary to the Parliament's allegations, the reserve list from Open Competition PE/2/D was still valid when his application was accepted. In that respect, the applicant states that another successful candidate whose name was included in the same reserve list after he had taken part in competition PE/2/D was certainly recruited on 19 July 1991. He adds that in that particular case, the decision to appoint, signed by the Secretary-General of the Parliament, was duly approved by the Financial Controller.

28 The applicant furthermore challenges the Parliament's right arbitrarily to subdivide a reserve list under various headings with various expiry dates, for the principle of sound administration demands that all persons who are included in the same list should receive the same treatment.

29 The Parliament contends that the applicant cannot rely on the provisions of Article 34 of the Staff Regulations since he was not appointed a probationary official by the competent appointing authority.

30 In reliance on the provisions of Articles 1, 2 and 3 of the Staff Regulations, as interpreted by the case-law of the Court of Justice and the Court of First Instance, especially the judgment of the Court of Justice in Case 102/75 *Petersen* v *Commission* [1976] ECR 1777 as well as that of the Court of First Instance in Joined Cases T-18/89 and T-24/89 *Tagaras* v *Court of Justice* [1991] ECR II-53, the Parliament states that the appointment of an official presupposes that there is a written measure of appointment which must be adopted by the competent

appointing authority and specify the date on which the appointment takes effect as well as the post to which the official is assigned. The Parliament contends that in the present case there is no such measure.

31 Furthermore, the Parliament considers that in the present case one of the conditions of appointment provided for in Article 28 of the Staff Regulations, namely that every probationary official must have passed a competition based on either qualifications or tests, or both qualifications and tests, as provided for in Annex III, was not satisfied. All the administrative selection procedure, from publication of the vacancy notice to the proposal to appoint the candidate chosen by the Directorate-General concerned, took place during a period in which the applicant was not a successful candidate in any competition since the reserve list on which his name had been entered following competition PE/2/D had already ceased to be effective as far as he was concerned.

32 The Parliament admits that the retroactive extension of the reserve list on 30 March 1990 was unlawful but contends that the applicant cannot rely on that unlawfulness, which it terms an internal administrative problem, in order to derive rights. In that respect, the Parliament refers to the judgment of the Court of Justice in Case 257/78 *Devred* v *Commission* [1979] ECR 3767, paragraph 22 of which reads as follows: 'An administrative authority which remedies an unlawful situation cannot be considered as committing an act which is wrongful or such as to render it liable.'

33 In the present case, the Parliament considers that the applicant wrongly regards his taking up his duties in Paris as an appointment in good and due form. In the Parliament's opinion, the applicant disregards the powers possessed in the matter by the appointing authority as well as by intermediate bodies including the Financial Controller.

34 More particularly, the Parliament maintains that it is clear, *a contrario*, from the provisions of Article 3 of the Staff Regulations that the effective date of an appointment may be subsequent to the date on which he takes up his duties. In that respect, the Parliament points out that the French version of Article 3 of the

Staff Regulations uses the word 'fonctionnaire' (official) when referring to an instrument of appointment but only 'intéressé' (person concerned) when it refers to the date he takes up his duties.

35 As regards the reserve list drawn up after competition PE/2/D, the Parliament states that it has never claimed, without further qualification, that the reserve list had expired on 30 June 1989 but that the list was no longer valid in relation to the applicant's candidature for the post to which he laid claim.

36 In the Parliament's view, there is thus no contradiction between its argument in this case and the fact that another successful candidate, whose name was entered on the reserve list for competition PE/2/D, could subsequently be appointed an official, since the list was still valid in relation to option 3 (removal) — the option chosen by the successful candidate in question — whereas the list had expired in relation to all the other options.

37 In the explanations which it provided at the oral procedure, the Parliament in addition maintained that it was fully entitled to subdivide the reserve list on the basis of the various qualifications of the persons whose names were included in it, without such a practice infringing the principle cited by the applicant.

38 As regards the applicant's argument in relation to the financial controller's refusal of approval, the Parliament states that according to Article 38(1)(c) of the Financial Regulation applicable to the General Budget of the European Communities (Official Journal 1991 C 80, p. 1) the purpose of the Financial Controller's approval is to establish that 'the expenditure is in order and conforms to the relevant provisions'. It infers from that that by confirming the Financial Controller's refusal and not requesting the superior authority to overrule it, the Parliament adopted the Financial Controller's arguments. Accordingly, the Parliament considers that the Financial Controller's refusal can no longer be challenged but only its own decision.

39 According to the Parliament, it follows that the applicant's argument in relation to the limitation on the powers of the Controller is without any substance and even inadmissible. In that respect, the Parliament states that with the sole concern of showing the irregular circumstances in which the applicant had been proposed for the post in question it has annexed the refusal of approval to its defence.

40 In view of the respective arguments of the parties, the Court of First Instance states that according to the principles of law which govern the Community civil service, the appointment and establishment of staff may be effected only in accordance with the requirements and procedures laid down by the Staff Regulations (see in particular the judgment of the Court of Justice in Case 18/69 *Fournier* v *Commission* [1970] ECR 254).

41 The legal tie which binds the official to the administration is governed by the regulations and is not of a contractual nature. According to Article 3 of the Staff Regulations, the appointment of an official necessarily has its origin in a unilateral instrument of the appointing authority stating the date on which the appointment takes effect and the post to which the official is appointed (see in particular the judgment of the Court of First Instance in the aforementioned Joined Cases T-18/89 and T-24/89 *Tagaras* v *Court of Justice*).

42 The Court of First Instance observes that in the present case there is no such instrument, as the applicant expressly admitted, moreover, during the oral procedure.

43 On that subject, it is to be observed that the 'note for the file' made by the Personnel Division of the Parliament, which the applicant lodged on 13 March 1992 at the Registry of the Court of First Instance after the oral procedure, mentions indeed that the applicant was employed as a probationary official. Nevertheless, such a document cannot in any event be treated as an instrument of appointment in good and due form issued by the competent appointing authority.

44 It follows that in the absence of any instrument of appointment as an official, the applicant cannot rely on the provisions of Article 34 of the Staff Regulations which presuppose his appointment in good and due form admitting him to the probationary period.

45 Accordingly, there is no need to consider the substance of the alleged infringements of Article 34 of the Staff Regulations cited by the applicant.

46 That plea must therefore be rejected.

The second plea: disregard of the principles governing employment contracts between the institutions and their staff

47 On that issue, the applicant states that after receiving the letter of 30 July 1990 from Mr Van den Berge he also received on 16 August 1990 a copy of a contract for a member of the temporary staff dated 11 July 1990, signed by the Parliament's representative and approved by the Financial Controller, engaging him as a member of the auxiliary staff for the period from 1 May 1990 to 31 August 1990. In the applicant's view, the Parliament thus attempted unilaterally and retroactively to transform the probationary period which he had started in Paris on 1 April 1990 into a simple contract as a member of the auxiliary staff.

48 The Parliament explained in its defence that the extension of the contract as a member of the auxiliary staff between the applicant and the Parliament constituted the only means of remedying the situation resulting from the refusal to proceed with the applicant's appointment as an official and its purpose was to avoid any prejudice which might be caused him by the irregularity vitiating the procedure as a result of which he took up his duties in Paris.

49 Although the Parliament recognizes that that extension of the contract was never expressly accepted by the applicant, it nevertheless maintains that there are two grounds for assuming there was tacit acceptance on his part.

50 Thus, in the first place, the Parliament observes that the applicant himself admits that he received the notification of that extension on 16 August 1990 but that he rejected it only in his complaint of 29 October 1990.

51 Secondly, the Parliament states that during the whole period in question from April to August 1990, the applicant was paid as a member of the auxiliary staff (at a basic monthly salary of BFR 64 767, or FF 10 500) and not as an official and that at no time did he challenge that circumstance.

52 In any event, the Parliament claims that the applicant cannot rely on any lack of express acceptance of the contract which had been proposed to him for the purpose of recognition of a right to be appointed as a probationary official.

53 After noting the absence of any instrument of appointment which would have allowed the applicant to begin the probationary period provided for in Article 34 of the Staff Regulations, the Court of First Instance considers that there is no ground for reproaching the Parliament for having remedied the situation resulting from the fact that the applicant was not appointed a probationary official by proposing to extend the duration of the contract of temporary appointment which until then had bound him to the Parliament. An administrative authority which remedies an unlawful situation cannot be considered as committing an act which is wrongful or such as to render it liable (see in particular the judgment of the Court of Justice of 14 December 1979 in the aforementioned Case 257/78 *Devred* v *Commission*).

54 Even if it has to be admitted that the applicant never expressly or tacitly accepted the terms of the contract of temporary employment which the Parliament sent him on 11 July 1990, it must nevertheless be accepted that in the absence of an appointment in good and due form the Parliament had to remunerate the applicant for the services which he rendered.

55 It follows that in the absence of an appointment of the applicant in good and due form there is no purpose in any of the considerations in support of that plea.

56 That plea must therefore also be dismissed.

57 It follows that the application must be dismissed as a whole.

The claim that the Court of First Instance should order the applicant's reinstatement as a probationary official

58 In that respect, the Community judicature may not give directions to a Community institution without encroaching upon the powers of the administration.

59 Pursuant to that principle, it must be concluded that in the present case the above claim is inadmissible.

Costs

60 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 88, in proceedings between the Communities and their servants, the institutions are to bear their own costs.

61 Furthermore, under the first paragraph of Article 87(3) of the Rules of Procedure, where the circumstances are exceptional, the Court of First Instance may order that the costs be shared.

62 In that respect, the Court of First Instance observes that during the oral procedure the Parliament admitted that certain mistakes had been made which led the applicant to believe that he had in fact been appointed a probationary official whereas he had not.

63 The Parliament gave the applicant the impression that he would be employed as a 'probationary official'. The applicant was apparently subjected to all the formalities, such as the medical examination provided for in Article 33 of the Staff Regulations, which normally precede appointment as a probationary official. In those circumstances, it is fair that, in addition to its own costs, the Parliament should bear three-quarters of the applicant's costs. The applicant must bear one-quarter of his own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the Parliament to pay, in addition to its own costs, three-quarters of the applicant's costs. The applicant is ordered to bear one-quarter of his own costs.

Lenaerts Kirschner Barrington

Delivered in open court in Luxembourg on 10 April 1992.

H. Jung
Registrar

K. Lenaerts
President