

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

29 May 1997

Case T-6/96

Thémistocle Contargyris

v

Council of the European Union

(Officials – Rejection of candidature – Article 19(1) of the Rules of Procedure of the Council – Article 45 of the Staff Regulations – Authority of the Secretary-General of the Council to take decisions rejecting a candidature and a complaint – Vacancy notice – Manifest error of assessment – Articles 7 and 27 of the Staff Regulations – Obligation to state reasons – Misuse of powers)

Full text in French II - 357

Application for: annulment of the decision of the Secretary-General of the Council of 3 May 1995 rejecting the candidature of the applicant for a post in grade A 1 in the Directorate-General for Social and Economic Cohesion, Regional Policy, Social Policy, Employment, Social Dialogue, Education and Youth, Culture and Audiovisual media (DG J), and of the decision of the Secretary-General of the Council of 7 November 1995 rejecting the applicant's complaint.

Decision: Application dismissed

Abstract of the Judgment

The applicant, Mr Thémistocle Contargyris, a Greek national, joined the General Secretariat of the Council on 1 September 1982 and was posted to the Fisheries Division. In 1984 he was promoted to Director of Directorate I, 'Regional and Social Policy; Health; Education; Culture; Audiovisual media; Youth' in Directorate-General G (DG G).

On 9 February 1995, the General Secretariat of the Council published vacancy notices for five posts at grade A 1, including a 'post likely to become available' in the Directorate-General for Social and Economic Cohesion, Regional Policy, Social Policy, Employment, Social Dialogue, Education and Youth, Culture and Audiovisual media (DG J).

On 16 February 1995, the applicant applied for the above post.

Two other officials of the Council, Mr A., a Portuguese national, and Mr L., a Belgian national, also applied for the post.

To assist him in considering the comparative merits of these candidatures, the Secretary-General of the Council set up a selection committee made up of three Directors-General of the Council.

On 20 March 1995 the applicant was invited to an interview with the selection committee on 31 March. That interview took place on the appointed day.

The applicant discussed the post in issue with the Secretary-General in a conversation on 28 March 1995.

On 3 April 1995, in its report to the Secretary-General on the candidatures, the selection committee recommended, inter alia, that the applicant's candidature to DG J should be rejected and Mr L.'s candidature accepted.

By note of 4 April 1995, the Secretary-General put before the Committee of Permanent Representatives (Coreper) (Part 2 of the agenda) a draft Council Decision appointing Mr L. to grade A 1 and proposed to Coreper that the Council should adopt the decision under item A on the agenda.

According to the summary record dated 10 October 1995 of the 1 649th meeting of Coreper held on 5 April 1995 in Brussels, Coreper:

- agreed unanimously to include five additional items in its agenda relating to the appointment of officials in grade A 1 to the General Secretariat of the Council;

- agreed unanimously to include, as a consequence, five additional items in the provisional agenda for the 1 844th session of the Council on 10 and 11 April 1995;
- agreed to suggest to the Council that it adopt the proposed appointments put forward by the Secretary-General.

The draft decisions were included in part A of the agenda, dated 7 April 1995, for the 1 844th session of the Council held in Luxembourg on 10 April 1995. On that occasion the Council adopted the decision appointing Mr L. to grade A 1 with effect from 1 June 1995.

By note of 3 May 1995, the Secretary-General informed the applicant that it had been decided not to accept his candidature.

By note of 12 July 1995, the applicant lodged a complaint against the decision rejecting his candidature for the post at grade A 1 in DG J and against 'all subsequent decisions which led to the appointment of Mr L. to that post'.

By decision of 7 November 1995, the Secretary-General explicitly rejected that complaint.

By decision of 10 October 1996, the applicant was retired with effect from 31 December 1996.

Admissibility

A retired official retains a personal interest in pursuing an application for annulment of a decision not to promote him because, if the decision were to be annulled he would be able to lodge an application for compensation for the damage he might have suffered as a result of that decision (paragraph 32).

See: T-82/89 *Marcato v Commission* [1990] ECR II-735, para. 54; T-82/91 *Latham v Commission* [1994] ECR-SC II-61, paras 24 to 26

Thus, contrary to the Council's claim, the admissibility of the application, inasmuch as it seeks the annulment both of the decision of the Secretary-General rejecting the applicant's candidature and of that rejecting his complaint, is not conditional on the simultaneous lodging of an application seeking compensation for damage the applicant may have suffered as a result of the adoption of the two decisions (paragraph 33).

Substance

The applicant relies essentially on the following pleas: infringement of Article 19(1) of Council Decision 93/662/EC of 6 December 1993 adopting its Rules of Procedure (OJ 1993 L 304, p. 1, 'the Rules of Procedure of the Council') together with paragraph (b) of the sole article of Council Decision 63/9/EEC of 14 May 1962 determining the appointing authority for the Secretariat of the Councils (OJ, English Special Edition 1963-1964, p. 4, 'the Council Decision of 14 May 1962'); infringement of Article 4 of the Staff Regulations applicable to officials of the European Communities ('the Staff Regulations'); infringement of Article 45 of the Staff Regulations; the lack of authority of the Secretary-General of the Council to adopt the decisions rejecting his candidature and complaint; lack of authority of the Secretary-General to adopt the decision appointing Mr L. to the post of

Director-General of DG J; illegality of the vacancy notice; manifest error of assessment; infringement of Articles 7 and 27 of the Staff Regulations; breach of the obligation to state reasons; misuse of powers (paragraph 35).

The first plea, alleging infringement of Article 19(1) of the Rules of Procedure of the Council together with paragraph (b) of the sole article of the Council Decision of 14 May 1962

The powers of the appointing authority are exercised, in the case of officials in grade A 1, by the Council, on a proposal from the Secretary-General. As part of that procedure Coreper must consider the candidatures and the proposal made by the Secretary-General for appointment to grade A 1 of the candidate selected for the vacant post, except where the Council decides the case is an urgent one or decides unanimously to make its decision without the draft decision having first been considered by Coreper (paragraphs 37 and 38).

A statement by the President of Coreper that Coreper has considered the question of the appointment of the candidate selected for the vacant post in the light of the explanations given by the Secretary-General concerning the identity and qualifications of the candidates for the vacant post, the results of the work of the selection committee and the outcome of his own consideration of the merits of the candidates constitutes sufficient proof that the draft decision has been considered beforehand (paragraphs 53 and 54).

The second plea, alleging infringement of Article 45 of the Staff Regulations

Article 45 of the Staff Regulations, which concerns the procedure for the promotion of officials, requires the appointing authority, first, to follow scrupulously the appointment procedure as provided for by paragraph (b) of the sole article of the

Council Decision of 14 May 1962 together with Article 151 of the Treaty and Articles 19 and 2(6) and (7) of the Council's Rules of Procedure and, second, to ensure that the relevant bodies undertake the required consideration of the comparative merits of candidates for a vacant post (paragraph 69).

As far as the Council is concerned, paragraph (b) of the sole article of the Council Decision of 14 May 1962 provides that the powers conferred by the Staff Regulations on the appointing authority are to be exercised, in the case of officials in grade A 1, by the Council on a proposal from the Secretary-General (paragraph 70).

It is thus the latter's role to consider the comparative merits of the candidates for a vacant post, since the task entrusted to him, of putting proposals for appointment to the Council, necessarily requires him to make a prior selection of candidates on the basis of the consideration of their comparative merits (paragraph 71).

In exercising its discretion the Council must not make systematic use, in all the procedures for appointment of officials to grade A 1, of its powers of examination and detailed discussion at its meetings. To require it to do so would be to deprive of all meaning the possibility provided for under Article 151 of the Treaty, as clarified by Articles 2(6) and 19(1) of its Rules of Procedure, of adopting decisions without discussion where Coreper has already given its opinion both as to the merits of the proposal of the Secretary-General and as to whether that proposal should be included in part A of the agenda and no discussion of it therefore held in the Council (paragraph 81).

The third plea, alleging that the Secretary-General of the Council had no authority to adopt decisions rejecting the applicant's candidature and complaint

It is clear from paragraphs (b) and (c) of the sole article of the Council Decision of 14 May 1962 that, in the event of a dispute, the powers conferred on the appointing authority by the Staff Regulations are exercised by the Councils on a proposal from the Secretary-General as regards the application of the provisions of Article 90 to servants in grade A 1, and by the Secretary-General in all other cases (paragraph 87).

It follows that the determination of the relevant body to exercise the powers conferred on the appointing authority by the Staff Regulations depends on the grade of the official who is the subject of the administrative act in issue. In the case of an official in grade A 2, it is thus for the Secretary-General to take any decision rejecting the initial administrative complaint made by the person concerned. The fact that the complaint relates to the appointment of an official in grade A 1 and that such appointments are the sole responsibility of the Council does not alter this conclusion given the very clear and unequivocal wording of paragraphs (b) and (c) of the sole article of the Council Decision of 14 May 1962, which does not make provision for any exceptions to the powers conferred on the Secretary-General as regards the rejection of complaints (paragraph 88)

The fourth plea, alleging the illegality of the vacancy notice

The function of a vacancy notice is, first, to give those interested the most accurate information possible about the conditions of eligibility for the post to enable them to judge whether they should apply for it and, second, to establish the legal framework within which the institution proposes to consider the comparative merits of the candidates (paragraph 97).

See: 188/73 *Grassi v Council* [1974] ECR 1099, para. 40; C-343/87 *Culin v Commission* [1990] ECR I-225, para. 19; T-169/89 *Frederiksen v Parliament* [1991] ECR II-1403, para. 69; T-45/91 *McAvoy v Parliament* [1993] ECR II-83, para. 48; T-13/95 *Kyrpitsis v ESC* [1996] ECR-SC II-503, para. 34

The appointing authority fails to respect this legal framework if it decides on the particular conditions required to fill the vacant post only after the vacancy notice has been published, having regard to the candidates who have come forward, and if it takes account, when considering candidatures, of conditions other than those stipulated in the vacancy notice. To proceed in this manner would deprive the vacancy notice of its basic function in the recruitment procedure, namely to give those interested the most accurate information possible of the nature of the conditions required to fill the post in question (paragraph 98).

See: T-58/91 *Booss and Fischer v Commission* [1993] ECR II-147, para. 67; *Kyrpitsis v ESC*, cited above, paras 34 and 35

As this was an important political appointment within the Council, the requirement of more detailed or even more technical qualifications, than those stipulated in the vacancy notice was not essential. As the Council argued, for a director-general's post, it was not so much the possession of specific experience in the matters covered by the directorate-general which was a determining factor as the possession of general management skills, analytical powers and judgment at a very high level, since technical experience is always available within the DG (paragraph 100).

See: *Booss and Fischer v Commission*, cited above, para. 69

Even if the vacancy notice had been drafted in such terms that all the potential candidates possessed in principle all the qualifications required, that, in itself, could not affect its legality. The fact that all the potential candidates meet in principle all the conditions in a vacancy notice does not mean that one or other of them is not better suited than the rest to perform the duties relating to the post in question. As the very purpose of a vacancy notice is to establish the conditions necessary to fill the vacant post it is not unusual to find that all or most of the officials who apply meet those conditions. It is for the appointing authority to exercise its wide discretion in choosing the most suitable candidate in the light of the interest of the service (paragraph 106).

The fifth plea, alleging a manifest error of assessment

The appointing authority has a wide discretion as regards its assessment of the interest of the service and the merits to be considered when making a decision on promotion under Article 45 of the Staff Regulations. Review by the Court of Justice and the Court of First Instance must be restricted to considering whether, regard being had to the various considerations which have influenced it in making its assessment, the administration has remained within reasonable limits and not used its power in a manifestly incorrect way. In particular, the Court cannot substitute its assessment of the merits and qualifications of the candidates for that of the appointing authority when nothing in the file suggests that, in assessing the merits and qualifications of the candidates, the appointing authority committed a manifest error (paragraph 120).

See: 282/81 *Ragusa v Commission* [1983] ECR 1245, paras 9 and 13; T-496/93 *Allo v Commission* [1995] ECR-SC II-405, paras 39 and 46; T-262/94 *Baiwir v Commission* [1996] ECR-SC II-739, paras 66 and 138

The Staff Regulations do not confer an enforceable right to promotion even for officials who meet all the conditions for promotion, and for a candidate, neither the fact of having occupied the post in an acting capacity nor length of service in the

grade below constitute decisive grounds overriding the interests of the service, which is the decisive criterion determining the choice of candidates to be promoted in a case such as the present (paragraph 121).

See: 306/85 *Huybrechts v Commission* [1987] ECR 629, paras 10, 11 and 13; *Baiwir v Commission*, cited above, para. 67

In this case, apart from the applicant's assertion, which is not backed up by any proof, that Mr L. had no general professional experience in certain areas falling within the remit of the new DG J, it is clear from the explanations given by the Council in its defence and rejoinder, which were not challenged by the applicant, that the candidate chosen by the appointing authority met the conditions in the vacancy notice, particularly as regards the requirement for a wide knowledge of the general policy of the European Communities and in the field of international relations. As regards the applicant's argument that the Council committed a manifest error of assessment, in that, in the light of his specific experience in relation to the vacant post and of his general knowledge, his candidature should have been selected in preference to that of Mr L., the Court takes the view that, as specific experience of the duties of the post in issue was not a condition of the vacancy notice, it could not be relevant to the question whether there was a manifest error of assessment in the decision in issue. Moreover, even on the assumption that the applicant did fulfil all the conditions in the vacancy notice, if there were several equally well-qualified candidates, there was nothing to prevent the appointing authority from exercising its wide discretion and selecting one candidate in preference to another for reasons relating to the interest of the service. The applicant does not put forward any argument capable of showing that the decision making the appointment was taken for reasons which were incompatible with the choice of candidate who best complied with the interest of the service and the conditions of the post to be filled (paragraphs 123, 124 and 126).

See: 151/80 *De Hoe v Commission* [1981] ECR 3161, para. 16; T-118/95 *Anacoreta Correia v Commission* [1996] ECR-SC II-835, para. 75

The sixth plea, alleging infringement of Articles 7 and 27 of the Staff Regulations

Under the third paragraph of Article 27 of the Staff Regulations, no post is to be reserved for nationals of any specific Member State. This rule must be respected in all the recruitment procedures provided for by Article 29 of the Staff Regulations, even those for recruitment of officials in grades A 1 or A 2 (paragraph 134).

See: *Booss and Fischer v Commission*, cited above, para. 85

The first paragraph of Article 27 of the Staff Regulations provides that recruitment must be on the broadest possible geographical basis from among nationals of Member States of the Communities. That provision does not allow the appointing authority to reserve a post for a particular nationality unless this is justified for reasons relating to the proper functioning of the service (paragraph 135).

See: 15/63 *Lassalle v Parliament* [1964] ECR 31; 85/82 *Schloh v Council* [1983] ECR 2105, para. 37

The seventh plea, alleging breach of the obligation to state reasons

The appointing authority is not obliged to give reasons for promotion decisions in so far as they affect candidates who have not been promoted, and the same applies to its decisions not to accept a candidature for a post. However, it must give reasons for a decision rejecting a complaint lodged under Article 90(2) of the Staff Regulations by a candidate who has not been promoted, the reasons given for the latter decision being deemed to be the same as those for the decision which was the subject of the complaint (paragraph 147).

See: *Grassi v Council*, cited above, para. 12; 101/77 *Ganzini v Commission* [1978] ECR 915, para. 10; *Culin v Commission* cited above, para. 13; T-18/92 and T-68/92 *Coussios v Commission* [1994] ECR-SC II-171, paras 69 to 74; *Kyrpitsis v ESC*, cited above, paras 67 and 68

As, under Article 45 of the Staff Regulations, promotion is 'by selection', the reasons to be given can concern only fulfilment of the conditions on which the validity of the promotion depends. In particular, the appointing authority is not obliged to give the candidate who is not selected details of the comparison of his merits and those of the candidate who is promoted or to set out in detail in what way it considered that the appointed candidate fulfilled the conditions in the vacancy notice (paragraph 148).

See: *Grassi v Council*, cited above, paras 11 to 15; 151/80 *De Hoe v Commission* [1981] ECR 3161, para. 13; T-25/90 *Schönherr v ESC* [1992] ECR II-63, para. 21; T-11/91 *Schloh v Council* [1992] ECR II-203, para. 73

Having regard to the explanations given in the Secretary-General's reply to the complaint, and given the wide discretion which the appointing authority enjoyed because this was a very important political appointment and the necessarily general terms of the vacancy notice, the decision of 7 November 1995 rejecting the complaint made by the applicant must be held to comply with the requirements laid down in the case-law as regards the obligation to state reasons. As regards the applicant's argument that the Secretary-General's refusal to inform him of the criteria allegedly established by the selection committee after the vacancy notice was published represented a breach of the obligation to state reasons, suffice it to note that, as found in paragraph 73 et seq., the selection committee did not base its decision on selection criteria which were different from those laid down in the vacancy notice as published and that, according to the case-law of the Court of Justice there is no obligation to give reasons for proposals from an internal administrative body having only consultative powers (paragraph 150 and 151).

See: 27/64 and 30/64 *Fonzi v Commission* [1965] ECR 481

The eighth plea, alleging misuse of powers

The concept of misuse of powers has a precisely defined scope and refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence to have been taken for purposes other than those stated (paragraph 156).

See: *Anacoreta Correia v Commission*, cited above, para. 25

The applicant has not furnished such evidence (paragraph 159).

Operative part:

The application is dismissed.