

THE PRESIDENT OF THE COURT OF FIRST INSTANCE  
22 November 1991 \*

In Case T-77/91 R,

**Infried Hochbaum**, an official of the Commission of the European Communities, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

v

**Commission of the European Communities**, represented by G. Valsesia, Principal Legal Adviser, and S. van Raepenbusch, a member of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of R. Hayder, a national official seconded to the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the adoption of interim measures in the form of an order by the Court of First Instance that the procedure for filling the post declared vacant under reference COM/108/91 be suspended until delivery of the judgment of the Court of Justice in Case C-107/90 and, if necessary, the subsequent judgment of the Court of First Instance,

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makes the following

\* Language of the case: French.

## Order

### The facts

- 1 By application received at the Registry of the Court of First Instance on 30 October 1991, the applicant brought an action for the annulment of the Commission's decision to open the procedure for filling the post declared vacant under reference COM/108/91 and of the Commission's decision extending the time-limit for the submission of applications for that post.
- 2 By a separate document lodged at the Registry of the Court of First Instance on the same date, the applicant sought, under Article 185 of the EEC Treaty and Article 104(2) of the Rules of Procedure of the Court of First Instance, an order that the procedure for filling the post declared vacant under reference COM/108/91 be suspended until delivery of the judgment of the Court of Justice in Case C-107/90 and, if necessary, the subsequent judgment of the Court of First Instance.
- 3 The Commission submitted its written observations on the application for interim measures on 12 November 1991.
- 4 Before the merits of the present application for interim measures are considered, it is appropriate to give a brief summary of the factual background to the main action.
- 5 By judgment of 14 February in Case T-38/89, the Court of First Instance (Third Chamber) dismissed the applicant's application for the annulment of the Commission's decisions cancelling Vacancy Notice COM/902/87 and adopting in its place Vacancy Notice COM/83/87 relating to the procedure for filling the post of 'Head of the State Monopolies and Public Enterprises Division' in the Directorate-General for Competition (DG IV) of the Commission, which resulted in the appointment of Paul Waterschoot.

- 6 By an application lodged at the Registry of the Court of Justice on 17 April 1990, the applicant appealed against the abovementioned judgment on the ground that it had been delivered in breach of Community law. The hearing before the Court of Justice was held on 24 September 1991. Mr Advocate General Tesauro delivered his Opinion on 15 October 1991.
  
- 7 Since Paul Waterschoot had been promoted and appointed Director in DG XXIII, Directorate A, of the Commission with effect from 1 May 1991, the Commission proceeded, on 1 August 1991, to publish Vacancy Notice COM/108/91 with a view to filling the post of Head of Unit IV. A.5 'Public Enterprises, State Monopolies, implementation of Articles 101 and 102', previously held by Mr Waterschoot.
  
- 8 The time-limit for the submission of applications was initially fixed as 11 September 1991 at 5 p.m. and then extended to 26 September 1991 at midday.
  
- 9 By letter of 7 September 1991, the lawyer acting for the applicant wrote to the Commission expressing the view that a decision filling the post in question would have the effect of preventing the Commission from taking, in accordance with Article 176 of the EEC Treaty, the necessary measures to comply with a judgment in favour of the applicant. There was no response to that letter.
  
- 10 In those circumstances, on 28 October 1991 the applicant lodged a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities directed against both the Commission's decision to open the procedure for filling the post declared vacant under reference COM/108/91 and the decision to extend the time-limit for the submission of applications for that post.

**Law**

- 11 Pursuant to Article 104(2) of the Rules of Procedure of the Court of First Instance, an applicant must indicate the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for.
- 12 The applicant considers that such circumstances exist in the present case. In his view, by taking the step of opening the procedure for filling the post of Head of Unit IV. A.5 left vacant by the promotion of Mr Waterschoot, the Commission has knowingly placed itself in such a position that it could no longer re-open the procedure in respect of the post declared vacant by Notice COM/902/84 and could not, consequently, as required by Article 176 of the EEC Treaty, take the necessary measures to comply with a judgment of the Court of Justice setting aside the judgment of the Court of First Instance of 14 February 1990 and, if necessary, with the Court of First Instance's subsequent judgment. As a result, there would be no possibility of the applicant's being appointed to the post which was declared vacant in 1984, the filling of which is still the subject of proceedings before the Court of Justice, a situation liable to cause the applicant serious and irreparable damage.
- 13 In his main action, the applicant also alleges infringement of Articles 7 and 29 of the Staff Regulations and Annex I thereto in that the Commission arrogated to itself the right to proceed with the filling of the post of Head of Unit, a post which is reserved exclusively for officials in Grade A 3, by appointing an official previously in Grade A 5. The applicant also alleges that the Commission breached its obligation to give the statement of reasons required of it by failing to inform him — when he submitted his application — of its reasons for extending the time-limit for applications for the vacant post, and that it misused its powers and misused procedure by allowing an official seconded to the private office of a Member of the Commission to submit an application and thus be 'legally' appointed to that post.
- 14 The Commission contends, first, that the applicant has not shown that continuation of the procedure for filling post COM/108/91 is capable of causing him serious and irreparable damage.

- 15 It submits, in the first place, that pursuant to Article 53 of the Protocol on the Statute of the Court of Justice of the EEC, appeals against judgments of the Court of First Instance are not to have suspensory effect, without prejudice to the right to ask the Court to order suspension of the effects of the judgment and to prescribe other interim measures. It follows that the Commission was fully entitled to initiate the procedure for filling the post under reference COM/108/91, in conformity with the judgment delivered by the Court of First Instance on 14 February 1990.
- 16 The Commission also observes that, by virtue of settled case-law (see in particular the judgment of the Court of Justice in Joined Cases 316/82 and 40/83 *Kobler v Court of Auditors* [1984] ECR 641, paragraph 22), even if the Court of Justice were to annul the judgment of the Court of First Instance of 14 February 1990 and if the latter were, as a result, to declare void the Commission's decision annulling Vacancy Notice COM/902/84, the appointing authority would not be under any obligation to re-open the previous procedure for filling the vacant post. In the Commission's view, if the Court of First Instance were to uphold the applicant's main action in the present case, its judgment would in itself adequately safeguard the applicant's interests.
- 17 The Commission contends, secondly, that doubts of a most serious nature arise as to the merits of the main action. According to the Commission, it cannot be accused of any infringement of Article 176 of the EEC Treaty since no decision whose enforcement might call in question the opening of the procedure for filling the post under reference COM/108/91 has yet been taken by the Court of Justice or the Court of First Instance.
- 18 The Commission adds that the application in the main action contains no argument capable of establishing any infringement of Articles 7 and 29 of the Staff Regulations through publication of a vacancy notice for a post to be filled in Grade A 3 — A 4 — A 5 or of establishing how the extension of the period for the submission of applications for the post declared vacant could be an act adversely affecting the applicant. In response to the plea alleging breach of the obligation to state reasons and misuse of powers and of procedure, the defendant states, finally, that in its opinion of 29 October 1991 the Joint Committee on Appointments asked it to consider the applications of two officials in DG IV, and that fact is sufficient to rebut the applicant's claim that the extension of the period for the submission of applications pursued an illegal objective, namely that of allowing an official seconded to the private office of a Member of the Commission to secure appointment to the post at issue.

- 19 It must be observed, as a preliminary point, that, as is apparent from Article 53 of the Protocol on the Statute of the Court of Justice of the EEC, an appeal to the Court of Justice against a judgment of the Court of First Instance has no suspensory effect, without prejudice to Articles 185 and 186 of the EEC Treaty, which allow the Court of Justice to order that the application of the contested act be suspended or to prescribe other interim measures.
- 20 In the present case, the applicant has not, in the appeal brought before the Court of Justice, requested suspension of the effects of the judgment of the Court of First Instance.
- 21 In applying to the President of the Court of First Instance for suspension of the procedure for filling the post in question on the ground that the Commission could no longer take the measures necessary to comply with a judgment of the Court of Justice annulling the judgment of the Court of First Instance and, if necessary, with the subsequent judgment of the Court of First Instance, what the applicant is in fact seeking is an order suspending the effects of the judgment of the Court of First Instance of 14 February 1990 until a final decision has been delivered in this case on completion of the appeal proceedings in respect of that judgment.
- 22 In order to secure such a suspension, the applicant should, pursuant to Article 53 of the Protocol on the Statute of the Court of Justice of the EEC, have applied to the Court of Justice for an order suspending the effects of the contested judgment of the Court of First Instance.
- 23 It must also be observed that, as is apparent from Articles 110 and 123(2) of the Rules of Procedure of the Court of First Instance, provision is made for the Court of First Instance to order suspension of the effects of a decision only if application is made for a stay of execution of the judgment in accordance with Articles 44 and 92 of the ECSC Treaty, Articles 187 and 192 of the EEC Treaty or Articles 159 and 164 of the EAEC Treaty or at the request of a third party.

- 24 In view of the foregoing considerations, the application for interim measure made by the applicant to the Court of First Instance must be dismissed as inadmissible.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders as follows:

1. **The application for interim measures is dismissed as inadmissible;**
2. **The costs are reserved.**

Luxembourg, 22 November 1991.

H. Jung  
Registrar

J. L. Cruz Vilaça  
President