JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
6 July 1995

Case T-36/93

Girish Ojha
v
Commission of the European Communities

(Officials – Posting outside the Community – Recall to Commission headquarters – Action for annulment – Compensation for non-material damage)

Application for: first, the annulment of the Commission's decision recalling the applicant together with his post from the Commission delegation in Dacca (Bangladesh) to the headquarters of the Commission in Brussels, and, secondly, an order for damages against the Commission for the non-material damage allegedly suffered.

Decision: Application dismissed.

Abstract of the Judgment

The applicant was posted to the Commission delegation in Dacca (Bangladesh).

By note of 8 May 1992, the director of the 'Asia' directorate of DG I (External Relations) informed the applicant of four complaints of inappropriate conduct made against him in the exercise of his functions at the Dacca delegation.

On 13 July 1992 the Director-General responsible for North-South relations in DG I informed the applicant of his intention to request his recall to Brussels, stressing that this was not a disciplinary measure nor the result of a negative assessment of his professional capacity.

On 9 October 1992 the appointing authority decided that the applicant should take the necessary measures for his return to Brussels as from 1 November. By note of 19 October 1992, the applicant lodged an appeal against that decision before the Rotation Committee.

By note of 20 October 1992, the Director-General of Personnel informed the applicant that his appeal had been dismissed and notified him of the decision, adopted the same day, to recall him to Brussels. On 30 October 1992 the applicant lodged a complaint requesting the withdrawal of the decision of 20 October 1992 to recall him to Brussels as from 1 November 1992.

On 3 November 1992 the applicant lodged a 'supplementary' complaint in which he requested the withdrawal of the 'measures adopted in implementation of the decision of 20 October 1992'.

On 5 November 1992 the applicant lodged an application for interim measures, seeking suspension of the operation of the decision of 20 October 1992 (Case T-95/92 R) and brought an action for its annulment (Case T-95/92).

Before the hearing, the applicant received a letter from the Director-General of Personnel and Administration informing him of his intention to grant him special leave in Dacca from 23 November to 18 December 1992 to enable him to remove his personal effects to Brussels.

Following those assurances, the applicant discontinued his application for interim measures, his main action and his 'supplementary' complaint of 3 November 1992.

By fax of 18 December 1992, the applicant informed the Commission that he felt obliged to bring a new application for interim measures because of the difficulties he was encountering in carrying out his removal. By fax the same day, the Director-General of Personnel and Administration informed the applicant that his stay in Bangladesh was extended until 31 December 1992.

On 1 June 1993 the applicant brought this action challenging the implied rejection of his complaint of 30 October 1992 against the decision of 20 October 1992.

The claims for annulment

Admissibility

It appears from the order of the Court of First Instance of 22 January 1993, removing Case T-95/92 from the register, that the applicant stated at the hearing of 20 November 1992 that he was withdrawing the application for interim measures and the main application, and his supplementary complaint of 3 November 1992, but not the main complaint of 30 October 1992.

In those circumstances, the applicant must be regarded as having withdrawn in Case T-95/92 only the pre-litigation claims contained in his supplementary complaint, which concerned the Commission decisions implementing the decision of 20 October 1992, and not as having withdrawn his main complaint.

As regards the second plea of inadmissibility, alleging that the decision of 20 October 1992 does not constitute an act adversely affecting an official, the Court notes that it is settled case-law that the only measures which may be regarded as having an adverse effect are those which are capable of directly affecting an official's legal position and thus go beyond mere internal measures of organization of the service, which do not affect the position of the official concerned under the Staff Regulations.

See: 32/68 *Grasselli* v *Commission* [1969] ECR 505; T-50/92 *Fiorani* v *Parliament* [1993] ECR II-555

However, certain measures may be regarded as having an adverse effect, even if they do not affect the material interests or rank of an official, if they affect his personal interests or future prospects. A decision to reassign an official which involves his moving from one country to another, and even from one continent to another, and which is taken against his wishes, is an act adversely affecting an official within the meaning of Articles 90(2) and 91(1) of the Staff Regulations and

must be taken with the necessary diligence and with special care, having regard in particular to the personal interests of the official concerned.

See: 35/72 *Kley* v *Commission* [1973] ECR 679; 125/80 *Arning* v *Commission* [1981] ECR 2539; C-116/88 and C-149/88 *Hecq* v *Commission* [1990] ECR I-599, para. 23

Substance

The first plea, alleging infringement of the rotation procedure and of the duty to state reasons

It is settled case-law that, in staff cases, claims submitted by officials to the Community judicature must have the same subject-matter as those set out in the complaint and may contain only such heads of claim as are founded on the same legal basis as those relied on in the complaint. Nevertheless, such heads of claim may be developed further at the stage of the action by submissions and arguments which need not necessarily appear in the complaint but must be closely linked to it.

See: 23/87 and 24/87 *Aldinger and Another* v *Parliament* [1988] ECR 4395, para. 15; T-58/91 *Booss and Fischer* v *Commission* [1993] ECR II-147, para. 83; T-4/92 *Vardakas* v *Commission* [1993] ECR II-357, para. 16

In his complaint of 30 October 1992, the applicant challenged the legality of the rotation procedure which preceded the adoption of the decision of 20 October 1992, so that the head of claim alleging that the Rotation Committee did not have the power to take the contested decision is closely linked thereto and it is permissible to develop it further in this action.

Concerning the alleged infringement of the rules of procedure laid down by the Commission itself in the communication of 26 July 1988, the Court notes that specific movements may be decided upon by the appointing authority on the proposal of the Directorate-General and after taking the opinion of the Rotation Committee. Although the conclusions adopted by the Rotation Committee on 22 September 1992 use phrases such as 'Mr Ojha is transferred with his post in the interests of the service' and 'the date of this measure shall be determined by the Director-General of Personnel', the Court does not consider that the purely consultative capacity of that body, which does not have decision-making powers, has been exceeded in this case.

Concerning the second claim, alleging that insufficient reasons were given for the contested decision, it should be remembered that the extent of the duty to state reasons must be determined on the basis of the particular facts of each case. In particular, the reasons given for a decision are sufficient if the measure against which the action is brought was adopted in circumstances known to the official concerned and enables him to understand the scope of the measure concerning him.

See: 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, para. 36; C-169/88 *Prelle* v *Commission* [1989] 4335, para. 9; T-80/92 *Turner* v *Commission* [1993] ECR II-1465, para. 62; *Hecq* v *Commission*, cited above

It is undisputed that, in this case, the applicant was informed before the contested decision was adopted of the likelihood of his being transferred by a letter of 13 July 1992, having been personally informed beforehand by the assistant to the Director-General, and that he had a series of discussions on that subject with various persons. After the adoption of the decision of 9 October 1992 to transfer him with his post to DG V (Employment, Industrial Relations and Social Affairs) in Brussels, the applicant lodged an appeal by a faxed note of 19 October 1992.

In those circumstances, the Court considers that the applicant was in a position to assess whether the contested decision was lawful and justified and thus bring into operation the judicial review provided for in Article 91 of the Staff Regulations.

As regards the alleged breach by the Commission of its obligation to provide persons due to be assigned outside the Community with continuous diplomatic training beforehand, the Court finds that the communication of 26 July 1988 imposes no such obligation on the Commission and considers that, as regards the tasks entrusted to its services established outside the Community, the Commission cannot be required to provide its officials posted there with any diplomatic training beyond that which prevailing circumstances permit. In any event, the absence of such training cannot render the various decisions adopted by the appointing authority in managing its staff in the interests of the service unlawful.

As for the alleged irregularity of the appeal procedure before the Rotation Committee, the Court points out that the Staff Regulations have not imposed an *inter partes* procedure in all areas, requiring every official always to be directly consulted by the administration before a measure concerning him is adopted, and that, in the absence of an express provision in the Staff Regulations, the administration is in principle under no such obligation.

See: *Lux* v *Court of Auditors*, cited above, para. 36; *Prelle* v *Commission*, cited above, para. 9; 125/80 *Arning* v *Commission* [1981] ECR 2539; *Hecq* v *Commission*, cited above; *Turner* v *Commission*, cited above, para. 62; *Fiorani* v *Parliament*, cited above, para. 36

The second plea, alleging infringement of the duty to have regard to the welfare of officials, of the principle of the protection of legitimate expectations, of the rights of the defence and of Article 24 of the Staff Regulations

The first point to note is that the Community institutions have a wide discretion in organizing their departments, provided the staff are assigned in the interests of the service and in conformity with the principle of assignment to an equivalent post. Moreover, if such a measure does not affect an official's position under the Staff Regulations or infringe the principle that the post to which he is assigned should correspond to his grade, the administration is not obliged to give him a hearing beforehand.

See: *Hecq* v *Commission*, cited above

Secondly, it is settled case-law that, in the absence of any express provision in the Staff Regulations for an *inter partes* procedure, whereby any official must be consulted by the administration before a measure concerning him is adopted, there is in principle no such obligation on the administration, so that, in principle, the safeguards provided for in Article 90 of the Staff Regulations must be regarded as sufficient.

Thirdly, the Court notes that the transfer of an official in order to put an end to an administrative situation which has become intolerable constitutes a measure taken in the interests of the service, and that a decision to reassign an official which involves his moving to another posting against his wishes must be taken with the necessary diligence and with special care, in particular having regard to the personal interests of the official concerned.

The decision to recall the applicant to the Commission's headquarters in Brussels did not involve a change in grade or affect the applicant's position under the Staff Regulations in any way, and was justified by the Commission on the ground that, although the applicant's professional capacity was not in any way in question, he did not show the necessary capacities for carrying out a diplomatic function. The disputed measure reassigning the applicant must therefore be regarded as having been adopted solely in the interests of the proper functioning of the Commission's delegation to Dacca and, in particular, in the interests of its external relations with the non-member country concerned.

Since the measure in question did not constitute a disciplinary measure and did not affect the position of the applicant under the Staff Regulations, the applicant cannot argue that his defence rights have been infringed. That submission must therefore be rejected.

The same applies to the submission based on the Commission's failure to conduct an enquiry as to whether the accusations against him were justified. Although Article 24 of the Staff Regulations requires that, where serious accusations are made against an official's professional integrity, the administration is to take all necessary steps to establish whether the accusations are justified and, where they are not, to refute them and to restore the good name of the official concerned, the administration is under such an obligation only where it decides to bring disciplinary proceedings against the official concerned and to take all necessary measures in that respect. Where, on the other hand, the Commission decides that there is no need to take the accusations made against the official any further, and that no consequence damaging to his professional integrity may result, such a decision amounts, according to the case-law of the Court, to a dismissal of the accusations against the applicant and the re-establishment of his professional reputation. In the present case, it is undisputed that the Commission did not draw any consequences from the complaints made against the applicant capable of justifying disciplinary proceedings against him.

See: 53/72 *Guillot* v *Commission* [1974] ECR 791, para. 3; 128/75 *N.* v *Commission* [1976] 1567, paras 10 and 15

Concerning the alleged infringement of the duty to have regard to the welfare of officials, in that the decision to recall the applicant to Brussels, adopted on 9 October 1992 and subsequently confirmed on 20 October 1992, was due to take effect on 1 November 1992, thus giving the applicant too little time to carry out his removal, the Court considers that, when adopting a decision taken in the interests of the service, the administration may have cause to fix the effective date of a measure without any constraints by reference to notice periods, if circumstances linked to the interests of the service so require.

The Court therefore considers that the contested decision is not rendered unlawful by the fact that its effective date was fixed at 1 November 1992.

Concerning the alleged infringement of the principle of the protection of legitimate expectations, it is settled case-law that the right to rely on the principle extends to any person concerned whom an institution has led to entertain reasonable expectations.

See: 289/81 *Mavridis* v *Parliament* [1983] ECR 1731, para. 21; T-18/90 *Jongen* v *Commission* [1991] ECR II-187, para. 35

In this case, the documents before the Court do not reveal any act or conduct on the part of the Commission which can have led the applicant to entertain such expectations in the period preceding the adoption of the contested decision. As for the assurances which, it is argued, the Commission gave to the applicant after the contested decision, the Court finds that, even if the Commission could have thus led the applicant to entertain reasonable expectations, the plea based on infringement of the principle of the protection of legitimate expectations cannot validly be raised for the first time before the Court unless the pre-litigation procedure laid down by Article 91(2) of the Staff Regulations has been completed. It follows that this plea, being directed against conduct of the Commission subsequent to the adoption of the contested decision, is inadmissible because it was not preceded by the pre-litigation procedure.

See: T-47/93 *C.* v *Commission* [1994] ECR-SC II-743; T-79/92 *Ditterich* v *Commission* [1994] ECR-SC II-907

The third plea, alleging infringement of Articles 24 and 26 of the Staff Regulations

As regards the alleged infringement of the duty to provide the applicant with further professional training, the Court points out that the only reason for the appointing authority's decision to reassign him with his post to Brussels was the difficulties experienced by the applicant in adapting to the particular requirements of his functions, which included a diplomatic aspect, without his professional capacity itself being called into question.

Concerning the alleged infringement of Article 26 of the Staff Regulations, it is well established in the case-law that the purpose of that article is to guarantee an official's defence rights by ensuring that decisions taken by the appointing authority affecting his administrative status and his career are not based on matters concerning his conduct which are not included in his personal file. In this case, as has already been established, the contested decision was adopted solely in the interests of the service, does not constitute a disciplinary measure, and does not affect either the administrative status or the career of the applicant.

See: T-82/89 *Marcato* v *Commission* [1990] ECR II-735, para. 78; T-76/92 *Tsirimokos* v *Parliament* [1993] ECR II-1281, paras 33 to 35; T-109/92 *Lacruz Bassols* v *Court of Justice* [1994] ECR-SC II-105, para. 68

The fourth plea, alleging infringement of Article 86 et seq. of the Staff Regulations

It is settled case-law that a decision to reassign an official, such as the contested decision here, which is taken in the interests of the service and does not alter the rank of the person concerned or his material rights under the Staff Regulations, cannot be regarded as a disguised disciplinary measure.

See: *Hecq* v *Commission*, cited above

It follows from the considerations above that the application for annulment must be dismissed in its entirety.

The claims for compensation

Admissibility

As regards the applicant's request that the Court take formal note of his decision to bring a separate action in damages for his material loss, the Court states that it has no jurisdiction to accede to such a request, since in any event the admissibility of

a staff action under Article 179 of the Treaty depends solely upon the conditions laid down in Articles 90 and 91 of the Staff Regulations.

That request by the applicant must therefore be dismissed as inadmissible.

However, as regards the Commission's plea that the applicant's claim for compensation for alleged non-material damage is inadmissible, the Court points out that where there is a direct link between an action for annulment and an action for compensation, the latter may be held admissible as ancillary to the action for annulment, without having to be preceded either by a request that the appointing authority make good the damage alleged, or by a complaint challenging the implied or express rejection of such request.

See: T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others* v *Commission* [1993] ECR II-841, para. 46

However, in so far as the non-material damage is not alleged to have originated in the decision of 20 October 1992, and because the admissibility of staff actions remains conditional on completion of the prior administrative procedure laid down by Articles 90 and 91 of the Staff Regulations, it is necessary to examine whether that procedure was duly completed, bearing in mind that it varies according to whether the damage for which compensation is sought has been caused by an act adversely affecting an official within the meaning of Article 90(2) of the Staff Regulations, or has been caused by an act that is not in the nature of a decision. In the first case, the admissibility of the action for compensation is subject to the condition that the person concerned has submitted to the appointing authority, within the prescribed period, a complaint against the act which caused the damage and has brought the action within three months of the rejection of his complaint. In the second case, on the other hand, the administrative procedure is in two stages. A request must first be made to the appointing authority for compensation. Only the express or implied rejection of that request is capable of constituting an act adversely affecting the official, against which a complaint may be made, and only

after that complaint has been expressly or impliedly rejected can an action be brought before the Court of First Instance.

See: *C.* v *Commission*, cited above, para. 30

The Court finds that the applicant specifies the origin of his loss as both the decision of 20 October 1992 to recall him to Brussels and the conduct of the Commission subsequent to the adoption of that decision.

That conduct has not been the subject of any request for compensation or, *a fortiori*, any complaint against the rejection of such a request.

The applicant's claims for compensation for non-material damage caused to him by an act or by conduct of the Commission subsequent to the decision of 20 October 1992 must therefore be dismissed as inadmissible.

Substance

The applicant's complaints that the Commission failed to make any enquiry as to whether the accusations against him were justified were raised in the action for annulment and examined in that context, and dismissed as unfounded. The applicant's request for compensation for non-material damage must therefore also be dismissed in so far as the alleged unlawfulness of the Commission's conduct is based on the same complaints.

See: T-65/91 *White* v *Commission* [1994] ECR-SC II-23, para. 137

Concerning the allegation that the Commission took the decision to recall the applicant as early as June 1992, and thus behaved in a manner likely to mislead him and place him in a situation of unacceptable uncertainty, the Court finds that no decision concerning the applicant's recall to Brussels was taken by the Commission in June 1992. The documents before the Court show, moreover, that the Commission informed the applicant as early as July 1992 of its intention to recall him and subsequently maintained a constant dialogue with him for that purpose. This complaint cannot therefore be accepted.

As regards the allegation that the Commission gave the applicant insufficient time to organize his departure from Bangladesh, the Court points out that, as was established when examining the applicant's second plea in support of his claim for annulment, the date on which that decision took effect was justified to a sufficient legal standard by the interests of the service, bearing in mind the circumstances in which the decision recalling the applicant to Brussels had to be adopted. Since that complaint was rejected in the context of the claims for annulment, it must be rejected also in the context of the claims for compensation.

See: *White* v *Commission*, cited above

Operative part:

The application is dismissed.