

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 December 2003

Case T-324/02

Hans McAuley
v
Council of the European Union

(Compliance with a judgment of the Court of First Instance – Appointment of a
Language Adviser in the English and Irish Language Division of the Council –
Termination of the procedure for filling the post
under Article 29(1)(a) of the Staff Regulations –
Misuse of powers – Action for damages)

Full text in French II - 1657

Application for:

first, annulment of the decision contained in the letter of
30 January 2002 of the Director General of Directorate
General A of the Council to terminate the procedure under
Article 29(1)(a) of the Staff Regulations for filling the post
of Language Adviser in the English and Irish Language
Division and to proceed to the next stage, namely the
organisation of an internal competition under
Article 29(1)(b) of the Staff Regulations, and, second, for
damages.

Held: The decision contained in the letter of 30 January 2002 of the Director General of Directorate General A of the Council to terminate the procedure under Article 29(1)(a) of the Staff Regulations for filling the post of Language Adviser in the English and Irish Language Division and to proceed to the next stage, namely the organisation of an internal competition under Article 29(1)(b) of the Staff Regulations, is annulled. The applicant's application for compensation is dismissed. The Council is ordered to pay the costs.

Summary

1. Officials – Actions – Act adversely affecting an official – Definition – Preparatory act – Decision, deemed to be in compliance with an annulling judgment, not to follow the procedure laid down in Article 29(1)(a) of the Staff Regulations to fill a vacant post, but to follow the procedure under Article 29(1)(b) – Admissibility

(Staff Regulations, Arts 29(1) and 90(2))

2. Officials – Actions – Annuling judgment – Effects – Obligation to adopt measures to comply with a judgment – Scope – Consideration of both the grounds and the operative part of the judgment – Annulment of a decision of the appointing authority rejecting a candidature at the end of the phase of the recruitment procedure provided for in Article 29(1)(a) of the Staff Regulations – Obligation to re-examine the candidature – Immediate progression to an internal competition, the next phase of the recruitment procedure – Unlawful

(Art. 233 EC; Staff Regulations, Art. 29(1))

3. Officials – Actions – Action for damages – Independent of action for annulment – Admissible notwithstanding failure to follow a pre-litigation procedure consistent with the Staff Regulations – Condition – Claim for compensation directly connected with an application for annulment (Staff Regulations, Arts 90 and 91)

4. Officials – Actions – Annuling judgment – Effects – Obligation to adopt measures to comply with a judgment – Scope – Annulment of a decision of the appointing authority rejecting the applicant's candidature and appointing another person to the post in question – Obligation to appoint the applicant – None (Art. 233 EC; Staff Regulations, Art. 29(1))

5. Officials – Actions – Action for damages – Annulment of the contested unlawful measure – Appropriate compensation for non-material damage (Staff Regulations, Art. 91)

1. Only acts or decisions producing binding legal consequences likely to affect the applicant's interests by significantly changing his legal situation may be the subject of an action for annulment. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, only a measure definitively establishing the position of the institution at the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision, is generally challengeable. Moreover, as regards staff cases, acts preparatory to a decision do not adversely affect officials within the meaning of Article 90(2) of the Staff Regulations and therefore cannot be contested incidentally in an appeal against measures capable of being annulled.

However, in so far as a decision to progress from the procedure in Article 29(1)(a) of the Staff Regulations to the procedure in Article 29(1)(b) in order to fill a vacant post is a measure to comply with a judgment of the Community judicature annulling a decision of the appointing authority to reject the applicant's candidature at the end of the phase of the recruitment procedure provided for in Article 29(1)(a) and appointing another person to the post in question, the applicant must be regarded as entitled to bring an action for annulment of that decision if the action is for a declaration that the decision was taken in disregard of the defendant institution's obligations under Article 233 EC.

(see paras 28, 34)

See: 60/81 *IBM v Commission* [1981] ECR 2639, para. 9; T-6/93 *Pérez Jiménez v Commission* [1994] ECR-SC I-A-155 and II-497, para. 34; T-586/93 *Kotzonis v ESC* [1995] ECR II-665, paras 28 and 29

2. In the event of an act of an institution being annulled by one of the Community courts, it is for the institution, pursuant to Article 233 EC, to take the necessary measures to comply with the judgment. In order to comply with a judgment granting annulment and to give it full effect, the institution which issued the annulled measure is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure.

As regards the effects of the annulment of a measure granted by one of the Community courts, the annulment takes effect *ex tunc* and thus has the effect of retroactively eliminating the annulled measure from the legal system. The defendant institution is required, by virtue of Article 233 EC, to take the necessary measures to reverse the effects of the illegalities established, which, in the case of an act that has already been executed, involves restoring the applicant to the legal position he was in prior to that act.

Where the Community court has identified manifest errors in the assessment of the candidatures of the applicant and of the person appointed to the post in question during the procedure set out in Article 29(1)(a) of the Staff Regulations for filling a vacant post, and has annulled the appointing authority's decision to reject the applicant's candidature and to appoint that other person to the post in question, the appointing authority must be regarded as not complying properly with the annulling judgment if it decides to proceed to the next phase of the recruitment procedure, the organisation of an internal competition, without having first re-examined the applicant's candidature under Article 29(1)(a) of the Staff Regulations in the light of the operative part and the grounds of the judgment. If, in order to fill a vacant post, the appointing authority decides, within its discretionary power, to examine the comparative merits of candidates for promotion or transfer, it is not until it has carefully examined the candidatures of officials put forward for promotion or transfer that it can decide to proceed to the next phases of the recruitment procedure.

(see paras 56, 57, 68-70, 81)

See: 22/70 *Commission v Council* [1971] ECR 263, para. 60; 92/78 *Simmenthal v Commission* [1979] ECR 777, para. 32; 21/86 *Samara v Commission* [1987] ECR 795, para. 7; 97/86, 99/86, 193/86 and 215/86 *Asteris and Others v Commission* [1988] ECR 2181, para. 30; C-8/99 P *Gómez de Enterría y Sanchez v Parliament* [2000] ECR I-6031, paras 19 and 20; T-480/93 and T-483/93 *Antillean Rice Mills and Others v Commission* [1995] ECR II-2305, para. 60; T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] ECR II-2941, paras 46 and 47; T-3/97 *Campogrande v Commission* [1998] ECR-SC I-A-89 and II-215, para. 65; T-47/97 *Plug v Commission* [2000] ECR-SC I-A-119 and II-527, para. 58; T-171/99 *Corus UK v Commission* [2001] ECR II-2967, para. 50; T-372/00 *Campolargo v Commission* [2002] ECR-SC I-A-49 and II-223, paras 92 and 109; T-330/00 and T-114/01 *Cocchi and Hainz v Commission* [2002]

ECR-SC I-A-193 and II-987, para. 36; T-119/99 *Hoyer v Commission* [2002] ECR-SC I-A-239 and II-1185, para. 35

3. Under the system of remedies established by Articles 90 and 91 of the Staff Regulations, an action for damages, which constitutes an autonomous remedy, separate from the action for annulment, is admissible only if it has been preceded by a pre-litigation procedure in accordance with the provisions of the Staff Regulations. That procedure differs according to whether the damage for which reparation is sought results from an act having adverse effects within the meaning of Article 90(2) of the Staff Regulations or from conduct on the part of the administration which contains nothing in the nature of a decision. In the first case it is for the person concerned to submit to the appointing authority, within the prescribed time-limit, a complaint directed against the act in question.

In the second case, on the other hand, the administrative procedure must commence with the submission of a request, within the meaning of Article 90(1) of the Staff Regulations, for compensation and continue, where appropriate, with a complaint against the decision rejecting that request.

Where there is a direct link between the action for annulment and the claim for compensation, the latter may be declared admissible as incidental to the action for annulment, without necessarily having to be preceded by a request to the appointing authority for compensation for the damage allegedly suffered and by a complaint challenging the validity of the implied or express rejection of the request. On the other hand, where the alleged damage does not arise out of the act whose annulment is sought but from a series of alleged wrongful acts and omissions on the part of the administration, it is mandatory that the pre-litigation procedure should commence with a request for the appointing authority to make good that damage.

In addition, where there is a direct link between an action for annulment and an action for damages, if the action for damages is brought separately it is still admissible even though it might also have been brought as ancillary to the action for annulment, without having been preceded by a request to the appointing authority for compensation for the damage allegedly suffered and a complaint challenging the validity of the implied or express rejection of the request.

(see paras 91-92)

See: T-15/96 *Liao v Council* [1997] ECR-SC I-A-329 and II-897, paras 57 and 58; T-78/96 and T-170/96 *W v Commission* [1998] ECR-SC I-A-239 and II-745, para. 159; T-378/00 *Morello v Commission* [2002] ECR-SC I-A-311 and II-1497, para. 102

4. Under Article 29(1) of the Staff Regulations, the appointing authority must be scrupulous in examining candidatures for promotion or transfer to fill a vacant post, but it is not bound absolutely to proceed by way of promotion or transfer, even where there are suitable candidatures from officials who satisfy all the conditions and requirements set out in the vacancy notice. It follows that if, after a judgment annulling a decision of the appointing authority to reject the applicant's candidature and to appoint another person to the post in question, the appointing authority was bound to re-examine the applicant's candidature in order to observe the order of priority set out in Article 29(1) of the Staff Regulations, it was nevertheless not bound to appoint the applicant.

(see para. 99)

See: C-174/99 P *Parliament v Richard* [2000] ECR I-6189, paras 38 to 40; *Campolargo v Commission*, cited earlier, paras 93 to 98

5. The annulment of the act of the administration contested by an official in itself constitutes appropriate and, in principle, sufficient reparation for any non-material harm which the official may have suffered as a result of the act annulled.

(see para. 100)

See: T-158/89 *Van Hecken v ESC* [1991] ECR II-1341, para. 37; T-52/90 *Volger v Parliament* [1992] ECR II-121, para. 46