

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
10 December 1991 *

In Case T-60/91,

Mrs C., residing in Brussels, represented by Johan Vanden Eynde, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Véronique Demeester, 13 Rue Aldringen,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a national official on secondment to its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for an order requiring the Commission to recruit the applicant as an official, subject to a fixed penalty for non-compliance of BFR 100 000 per day from delivery of the judgment or, in the alternative, for an order that an inquiry be held to establish the real reasons for the failure to recruit her,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

composed of: R. García-Valdecasas, President, D. A. O. Edward and R. Schintgen, Judges,

Registrar: H. Jung,

makes the following

* Language of the case: French.

Order

1 By an application lodged at the Registry of the Court of First Instance on 16 August 1991, Mrs C., a successful candidate in Competition COM/R/C/1 organized by the Commission of the European Communities (hereinafter referred to as the 'Commission'), brought an action for an order requiring the Commission to recruit her, subject to a fixed penalty for non-compliance of BFR 100 000 per day to be paid from delivery of the judgment, or, in the alternative, for an order that an inquiry be held to establish the real reasons for the failure to recruit her.

2 In March 1989 the applicant was included in the reserve list drawn up following Open Competition COM/R/C/1 held at the end of 1987 by the Commission to constitute a reserve for the recruitment of French-language typists (Career Bracket C4/C5). The validity of the reserve list, which was initially valid until 31 December 1989, was extended until 31 December 1990.

3 After having worked several months as a temporary typist for the Commission, she was employed from 16 October 1989 for a period of three months as a member of its auxiliary staff and assigned to Directorate-General X, Information, Communication, Culture. She was not recruited as an official during the period of validity of the reserve list despite several initiatives to that end taken by her superior.

4 According to Mrs C., the real reason why she has not been recruited as she is entitled to be is that her brother, Mr C., was convicted in 1985 for his involvement in the 'Cellules Communistes Combattantes'. She states that she has never involved in that terrorist group or adhered to its political ideology and that therefore the Commission failed to recruit her on security grounds which were not justified.

- 5 By letter of 29 March 1990 the applicant wrote to the President of the Commission asking him to intervene to prevent her case from being ignored at the Commission and to accept that no blame attached to her and that the Commission would not be taking any security risk in recruiting her. She thanked him for having read the letter and for giving it the most favourable outcome possible.
- 6 Counsel for the applicant also sent a letter dated 9 July 1990 to the President of the Commission asking him to examine Mrs C.'s personal file and to inform him of the real reasons which had led to the refusal to recruit his client even though she was a successful candidate in a competition held by the Commission.
- 7 The Commission's Director-General of Personnel and Administration, Mr Hay, replied to Counsel for the applicant on 11 September 1990. In his letter he explained that in view of the problems which the Commission faced regarding the availability of posts, it was not yet been possible to accede to Mrs C.'s request to be recruited. He stated that it had been explained to Mrs C. at that time that the appearance of her name on a list of suitable candidates drawn up after a competition only made her eligible for appointment to a vacant post; it did not give her an unconditional right or give rise to an undertaking on the Commission's part. He added that the validity of the reserve list for Competition COM/R/C/1 had been extended until 31 December 1990 and that Mrs C.'s name would naturally continue to appear on it.
- 8 On 16 August 1991 the applicant began the present action against the Commission.
- 9 In a document received by the Registry of the Court of First Instance on 20 September 1991 the Commission raised a plea of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance and asked the Court to rule on the admissibility of the case without considering its substance. The

Commission considers that the Court of First Instance has no jurisdiction to hear the case since the order sought against it is beyond the powers conferred on the Community court by the Staff Regulations in disputes between the Community and its servants within the meaning of Article 179 of the EEC Treaty. It also observes that the application does not seek the annulment of any act of the defendant whose legality the Court is asked to review. The Commission refers to settled case-law according to which the Community court has no power to issue orders to the Community authorities when reviewing the legality of acts adversely affecting officials (see, for example, the judgment of the Court of Justice in Joined Cases 63/70 to 75/70 *Bode v Commission* [1971] ECR 549) because 'the obligations incumbent on the administration can derive only from the annulment, under Article 176 of the EEC Treaty, of a measure adopted by it' (judgment in Case C-137/88 *Schneemann and Others v Commission* [1990] ECR I-369).

The applicant has not filed any observations on the Commission's plea of inadmissibility within the time allowed.

Under Articles 113 and 114 of its Rules of Procedure, the Court of First Instance may at any time consider of its own motion whether there exists any absolute bar to proceeding with an action. Under Article 111 of the Rules of Procedure, when it is clear that an action before the Court of First Instance is manifestly inadmissible, it may, by reasoned order, give a decision on the action without taking further steps in the proceedings. In the instant case, the Court considers that it is sufficiently informed by the documents before it and has decided that it is not necessary to take any further steps in the proceedings.

It should be recalled that the Court of Justice has consistently held that under Articles 90 and 91 of the Regulations and Rules applicable to officials of the European Communities (hereinafter referred to as the 'Staff Regulations') 'any person to whom the Staff Regulations apply means not only officials who are at present serving but also those who were doing so previously and any candidates for a post' (judgment of the Court in Joined Cases 81/74 to 88/74 *Marenco v Commission* [1975] ECR 1247, at paragraph 5). The Court has also held that the provisions of the Staff Regulations may be relied on before the Community court not only by officials or other servants of the Communities but also by persons claiming to be such (see the judgments in Case 123/84 *Klein v Commission* [1985]

ECR 1907, at paragraph 10 and in Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno v Commission and Council* [1985] ECR 2523, at paragraph 24). Consequently, as a successful candidate in a competition, the applicant is entitled to bring an action before the Court of First Instance.

- 13 In this regard, the Court has also consistently held that Articles 90 and 91 of the Staff Regulations, pursuant to which the admissibility of an action is subject to compliance with the prior administrative procedure laid down in those articles, 'apply not only to those who are officials but also to candidates for a post' (Order in Case 130/86 *Du Besset v Council* [1986] ECR 2619, at paragraph 7).
- 14 Article 90(1) of the Staff Regulations provides that any person to whom the Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him. The terms of the applicant's letter of 29 March 1990, addressed to the President of the Commission, can be characterized as a request within the meaning of Article 90(1) of the Staff Regulations. The Court of First Instance considers that the applicant received the administration's reply to this request in the letter of 11 September 1990 sent by Mr Hay, Director-General of Personnel and Administration, to her Counsel in which it was stated that it had not yet been possible to accede to Mrs C.'s request that she be recruited, having regard to the problems which existed in connection with the availability of posts.
- 15 Article 91(2) of the Staff Regulations provides that an appeal shall lie only if the appointing authority has previously had a complaint submitted to it pursuant to Article 90(2) within the period prescribed therein (judgments of the Court of Justice in Case 91/76 *Lacroix v Court of Justice* [1977] ECR 225 and of the Court of First Instance in Case T-72/89 *Bocos v Commission* [1990] ECR II-58).
- 16 In the instant case, the applicant lodged her appeal outside the applicable period and without having previously submitted to the appointing authority a complaint

pursuant to Article 90(2) of the Staff Regulations against the decision to reject her request. Accordingly, Mrs C.'s action is manifestly inadmissible and must be dismissed.

Costs

17 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. However, Article 88 of those rules provides that in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Dismisses the action as inadmissible;**
- 2. Orders the parties to bear their own costs.**

Luxembourg, 10 December 1991.

H. Jung
Registrar

R. García-Valdecasas
President