

may be applied in the context of Articles 31 and 32 thereof.

Where, on the other hand, an official has been appointed pursuant to Regulation No 3018/87 introducing special transitional measures for the recruitment of overseas staff of the European Association for Cooperation as officials of the European Communities, the classification

of the person concerned in the appointment decision is lawful in so far as it was determined in accordance with the derogation set out in Article 3 of the regulation, under which the criterion automatically applying relates to the level of salary previously received from the said Association, whose application therefore rules out any reference to the classification criteria under the normal rules.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
29 March 1990 *

In Case T-57/89

Nikolas Alexandrakis, an official of the Commission of the European Communities, residing at Suva (Fiji), represented by Edmond Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Bieber, 83, boulevard Grande-Duchesse-Charlotte,

applicant,

v

Commission of the European Communities, represented by Sean van Raepenbusch, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of part of the Commission's decision of 12 February 1988 appointing the applicant an official, in so far as it is an

* Language of the case: French.

appointment as a Principal Administrator in Grade A 4, and for a declaration that in that decision the applicant is to be classified in Grade A 3,

THE COURT OF FIRST INSTANCE (Third Chamber)

composed of: A. Saggio, President of Chamber, C. Yeraris and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 15 February 1990,

gives the following

Judgment

Facts, procedure and opinions of the parties

1 The applicant, Mr Alexandrakis, is an official of the Commission. Before he was appointed as a member of the Commission's staff, he was engaged in 1981 by the European Association for Cooperation (hereinafter referred to as 'the EAC') — an international non-profit-making association set up under Belgian law for promoting economic cooperation between the Community and the developing countries. It should be noted that the function of the EAC was, subject to the terms of its articles of association and the agreements concluded with the Commission, to recruit and administer a specific body of staff — intended to take on duties in the field of cooperation and scientific and technical supervision — divided into three categories, including the category of overseas staff. Those were the circumstances in which Mr Alexandrakis, employed by the EAC as a member of the overseas staff, was placed at the service of the Commission, performing since 1984 the duties of a Commission delegate (in Grade I, Step 2) in an ACP country which was a signatory of the Lomé Convention.

- 2 Following the entry into force of Council Regulation (Euratom, ECSC, EEC) No 3018/87 of 5 October 1987 introducing special transitional measures for the recruitment of overseas staff of the European Association for Cooperation as officials of the European Communities (Official Journal 1987, L 286, p. 1), the applicant was appointed — by decision of the Commission of 12 February 1988, adopted pursuant to that regulation — ‘an official... employed as principal administrator/specialized head of department, in Grade A 4, Step 2, assigned to the Directorate-General for Development [as] head of the Commission’s delegation in Monrovia (Liberia)’. Regulation No 3018/87, as part of a policy of successively transferring the various categories of EAC staff to the employment of the Commission, sets up a special, transitional system for recruitment. In particular, Article 3 provides: ‘Officials appointed under this regulation shall be appointed, if necessary by way of derogation from Articles 31 and 32 of the Staff Regulations of Officials of the European Communities, to the category, grade and step whose basic salary corresponds to the basic salary received from the Association. Grading shall be determined by the appointing authority on the following basis: grades I, II and III of the Association shall correspond to category A under the Staff Regulations . . . ’.
- 3 Those were the circumstances in which, on 11 May 1988, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the aforesaid decision of the Commission, inasmuch as it classified him in Grade A 4, and sought to be classified in Grade A 3. In his complaint the applicant contested his appointment in Grade A 4 on the ground that it was in breach of the relevant classification criteria regarding his age, professional experience and university education, and that it also contravened the principle of non-discrimination; he further sought to have the classification duly carried out on the basis of the said criteria.
- 4 Since no reply to the complaint was forthcoming within the prescribed period, Mr Alexandrakis brought the present action by application lodged at the Registry of the Court of Justice on 24 November 1988, in order to obtain the annulment of part of the Commission’s decision of 12 February 1988 appointing him an official, in so far as the appointment is as a Principal Administrator in Grade A 4, and to be classified in the instrument of appointment in Grade A 3. In support of his action the applicant claims primarily that the disputed classification contravenes the principle that grade and post must correspond, and in the alternative, that the classification is not in accordance with the relevant classification criteria and, indeed, is discriminatory in character. After the application had been lodged, the Commission expressly rejected the prior complaint through official channels, by reasoned decision of 20 December 1988.

5 The written procedure was conducted entirely before the Court of Justice. At the end of the written procedure, the Court of Justice, by order of 15 November 1989, assigned the case to the Court of First Instance pursuant to the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.

6 The conclusions of the parties are as follows:

The applicant claims that the Court should:

- (i) annul the Commission's decision of 12 February 1988 appointing him an official, in so far as it lays down his grade and step;
- (ii) declare that in the decision appointing him the applicant is to be classified in Grade A 3;
- (iii) annul the decision rejecting the applicant's complaint of 11 May 1988;
- (iv) order the defendant to pay the costs.

The defendant contends that the Court should:

- (i) dismiss the application as unfounded;
- (ii) make an appropriate order as to costs.

Submission alleging infringement of the principle that grade and post must correspond, and of the principle of equality of treatment in that regard

7 The main submission made by the applicant is based on an alleged infringement of the Staff Regulations—in particular Article 5(4) thereof and Annex IA thereto—and the defendant's decision in pursuance of Article 5(4), and on a breach of the principle of equal treatment in that regard. Mr Alexandrakis argues

that Article 5(4) of the Staff Regulations sets out the principle that grade and post must correspond. He claims that, since he was appointed a Commission delegate in an ACP country, his duties correspond to the basic post of Head of Division — that is to say, Grade A 3 — and not to the basic post of a Principal Administrator in Grade A 4 to which he was appointed by the contested decision.

- 8 Although the issue of the admissibility of this first submission was not raised by the parties, it is incumbent on this Court to raise it of its own motion, by virtue of Article 92(2) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* to the Court of First Instance, whereby the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case (see judgments of 16 December 1960 in Case 6/60 *Humblet v Belgium* [1960] ECR 559, at p. 570, of 23 April 1956 in Joined Cases 7/54 and 9/54 *Groupement des industries sidérurgiques luxembourgeoises v High Authority* [1956] ECR 175, at p. 191, and of 27 June 1989 in Case 200/87 *Giordani v Commission* [1989] ECR 1877, paragraph 10). The question of admissibility arising in this case relates to consistency between the complaint and the application to the Court. A public-policy issue is involved, inasmuch as it relates to the legality of the administrative procedure which the Court has described as an 'essential procedural requirement', in its judgment of 3 February 1977 in Case 91/76 *De Lacroix v Court of Justice* [1977] ECR 225, paragraphs 10 and 11. Specifically, the Court is justified in considering the matter of its own motion in particular in view of the very purpose of the administrative procedure, as defined in the consistent case-law — most recently by the judgment of 14 March 1989, according to which 'the object of the pre-litigation procedure is to permit an amicable settlement of the differences which have arisen between officials or servants and the administration. In order that such a procedure may fulfil its purpose, it is necessary for the appointing authority to be in a position to know in sufficient detail the criticisms made by those concerned of the contested decision' (judgment of 14 March 1989 in Case 133/88 *Casto del Amo Martínez v Parliament* [1989] ECR 689, paragraph 9; similarly, see also *inter alia* the judgments of 17 February 1977 in Case 48/76 *Reinarz v Commission and Council* [1977] ECR 291, and of 1 July 1976 in Case 58/75 *Sergy v Commission* [1976] ECR 1139).
- 9 Accordingly, without there being any need to consider the substance of the first submission put forward by the applicant, it must be observed that the argument was not relied on in the complaint, and that it was first raised in the course of the written procedure. However, the Court has consistently held that an official 'may not submit to the Court conclusions with a subject-matter other than those raised in the complaint or put forward heads of claim based on matters other than those

relied on in the complaint. The submissions and arguments made to the Court in support of those heads of claim need not necessarily appear in the complaint, but must be closely linked to it' (see judgments of 20 May 1987 in Case 242/85 *Geist v Commission* [1987] ECR 2181, paragraph 9, of 26 January 1989 in Case 224/87 *Koutchoumoff v Commission* [1989] ECR 99, paragraph 10, and *Casto del Amo Martinez*, cited above, paragraph 10; see also the judgment of 7 May 1986 in Case 52/85 *Riboux and Others v Commission* [1986] ECR 1555, paragraph 13).

10 In that connection it must be observed that, in this case, the official complaint not only contains no reference to the first submission but also does not include — to quote the wording in paragraph 13 of the judgment of 14 March 1989, cited above — 'any argument from which the defendant institution, even endeavouring to interpret the complaint with an open mind, could have inferred' that the applicant wished to plead a breach of the principle that grade and post must correspond, or infringement of the principle of equality of treatment, viewed at this stage solely in conjunction with the preceding rule.

11 That being so, the first submission must be declared inadmissible.

Submission alleging breach of the relevant classification criteria and infringement of the principle of equality of treatment in connection with those criteria and with nationality

12 The second submission, put forward by the applicant in the alternative, is that there was an infringement of Article 5(3) of the Staff Regulations — which provides *inter alia* that identical conditions of recruitment are to apply to officials belonging to the same category — an infringement of Article 3 of Regulation No 3018/87, and a disregard of general principles of law. The submission has two limbs, one relating to the relevant classification criteria adopted by the Commission within the framework of the Staff Regulations and the other to the principle of equality of treatment.

13 As far as the first limb is concerned, Mr Alexandrakis maintains that he was not classified in accordance with any of the relevant classification criteria regarding his age (48 years), the length of his professional experience (21 years) and his university qualifications (Bachelor of Arts, Master of Arts, and Doctor of Economic Philosophy).

- 14 The Commission replies that the employment of overseas staff does not fall within the ambit of the Staff Regulations but is based on Article 3 of Regulation No 3018/87 which expressly derogates therefrom.
- 15 The Commission's argument on this point must be upheld. It must be observed that the relevant classification criteria, cited by the applicant, may be applied in the context of Articles 31 and 32 of the Staff Regulations when the appointing authority appoints an official under the general rules for recruitment laid down in the Staff Regulations. The applicant, on the other hand, was appointed pursuant to a special regulation, and his classification in the appointment decision is consequently lawful in so far as it was determined in accordance with the derogation set out in Article 3 of Regulation No 3018/87, which expressly excludes the application of Articles 31 and 32 of the Staff Regulations. In that connection it should be noted that the criterion mentioned in Article 3 relates to the level of salary previously received from the EAC: the individual concerned is appointed to the category, grade and step whose salary corresponds to the salary which he had been receiving from the EAC, and the automatic application of that criterion therefore rules out any consideration of the classification criteria referred to by the applicant.
- 16 In the second limb of the second submission alleging disregard of the principle of equality of treatment, Mr Alexandrakis asserts, first, that the contested classification is discriminatory in comparison with the classification of his colleagues appointed as officials under Regulation No 3018/87. The alleged discrimination arises from the fact that other overseas staff classified in the same grade as the applicant, or in a higher grade, are less qualified than himself according to the relevant classification criteria referred to above. Secondly, the applicant claims that his classification in Grade A 4 constitutes discrimination on the basis of nationality, because he is the only Greek head of delegation, and consequently that no A 3 post has been assigned to a Greek national.
- 17 The Commission rejects that view, contending that the classification of the applicant and his colleagues comprised in the category of overseas staff of the EAC was determined according to the same criterion laid down in Article 3 of Regulation No 3018/87 introducing special recruitment rules, and irrespective of any consideration regarding nationality.

18 With reference to the applicant's allegation that his classification was, in the light of the relevant classification criteria, discriminatory in comparison with that of other heads of delegation, it must be pointed out that those criteria do not apply in the context of Regulation No 3018/87 and cannot therefore legitimately be relied on by the applicant.

19 As far as the complaint of discrimination on the basis of nationality is concerned, it is sufficient to observe that the Commission classified the applicant on the basis of the objective criteria set out in Article 3 of Regulation No 3018/87, irrespective of any consideration regarding nationality.

20 The applicant further claims, in the alternative, that even if his classification — determined at the time of his appointment in accordance with the letter of Article 3 of Regulation No 3018/87 — cannot be held to be illegal either having regard to the relevant classification criteria or by reference to the principle of equality of treatment, the Commission was none the less under an obligation to ascertain whether the basic salary previously received from the EAC was not vitiated by an error of law or fact.

21 It should be noted that, in adopting the abovementioned article of Regulation No 3018/87, the Council established an objective, automatic criterion for the classification of EAC employees on their appointment, in order to maintain the position which they had previously acquired under their former employer — that is to say, the EAC and not the Commission (judgment of 13 July 1989 in Case 286/83 *Albert Alexis v Commission* [1989] ECR 2445, paragraph 11). It follows that the Commission was right to confine itself to applying that automatic classification criterion when it adopted, on the basis of Regulation No 3018/87, the decision appointing the applicant.

22 In those circumstances the second submission made by the applicant cannot be upheld.

Costs

- 23 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which apply to the procedure before the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, Article 70 of those Rules provides that, in proceedings brought by servants of the Communities, institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- (1) Dismisses the application;**
- (2) Orders the parties to bear their own costs.**

Saggio

Yeraris

Lenaerts

Delivered in open court in Luxembourg on 29 March 1990.

H. Jung
Registrar

A. Saggio
President