Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Third Chamber)

25 September 2013*

(Civil service — Member of the contract staff — Recruitment — Call for expression of interest EPSO/CAST/02/2010 — Conditions of employment — Appropriate professional experience — Rejection of the application for employment)

In Case F-158/12,

ACTION brought under Article 270 TFEU, applicable to the EAEC Treaty pursuant to Article 106a thereof,

Éric Marques, a member of the contract staff of the European Commission, residing in Ennery (France), represented by A. Salerno and B. Cortese, lawyers,

applicant,

v

European Commission, represented by C. Berardis-Kayser and G. Berscheid, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

composed of S. Van Raepenbusch (Rapporteur), President, R. Barents and K. Bradley, Judges,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 12 June 2013,

gives the following

Judgment

1 By application lodged at the Registry of the Tribunal on 24 December 2012, Mr Marques seeks, first, annulment of the decision of the European Commission of 6 March 2012 not to engage him as a member of the contract staff in function group III and, secondly, compensation for the damage suffered.

* Language of the case: French.

Background to the dispute

2 The applicant holds a secondary education diploma granting access to higher education. On 1 November 2006 he was recruited by the Commission as a member of the contract staff under Article 3a of the Conditions of Employment of Other Servants of the European Union ('the CEOS'). He was classified in function group I as referred to in Article 80 of the CEOS and was assigned to Luxembourg (Luxembourg), to the Office for Infrastructure and Logistics in Luxembourg (OIL), where he performed budgetary and financial duties.

3 On 17 May 2010 the European Personnel Selection Office (EPSO) launched call for expression of interest EPSO/CAST/02/2010 ('the CEI') to establish a database of candidates to be recruited as contract staff to carry out tasks as, inter alia, financial assistants within the European Commission.

4 According to the CEI, the financial assistants to be recruited would be required to undertake 'executive, drafting, accountancy and other equivalent technical tasks' and would be classified in function group III as referred to in Article 80 of the CEOS. As regards the qualifications required, the CEI stated that candidates must, on the closing date for applications (14 June 2010), have at least 'a level of post-secondary education attested by a diploma giving access to post-secondary education, and appropriate professional experience of at least three years'. The CEI also described the duties of a financial assistant and the skills required to perform them.

5 In 2010 the applicant passed the selection tests provided for by the CEI in respect of the profile of financial assistant.

6 On 30 May 2011 EPSO launched an additional selection phase in order to allow candidates who had been successful in the CEI to be considered for contracts of indefinite duration.

7 The applicant passed the additional selection tests in 2011.

8 On 24 October 2011 a selection committee set up within OIL decided that the applicant's profile and skills met 'the level of competence expected of a member of the contract staff in function group III'. Consequently, OIL requested that he be engaged as a financial assistant in function group III.

9 On 1 December 2011 the Head of the Catering Service — Foyer — Fitness Centre Unit of OIL, under whose direction the applicant had been working, drafted a note in which he stated that the tasks actually performed by the applicant 'clearly constitut[ed] relevant professional experience for access to function group III'. In the same note, the abovementioned head of unit described the duties actually performed by the applicant.

10 On 1 February 2012 the Head of Personnel — Communication — Conferences — Health and Safety Unit of OIL informed the Directorate General (DG) for Human Resources and Security of the Commission that '[a]lthough some of the tasks assigned [to the applicant] might be interpreted as being at the level [of tasks within function group] III, it is necessary to take account of the fact that [he] is mainly performing administrative tasks [within function group] I'.

11 On 6 March 2012 DG Human Resources and Security of the Commission informed OIL that 'analysis [of the applicant's] professional experience did not provide any evidence that he [had] acquired, as at 14 June 2010, three years of professional experience equivalent to [tasks within function group] III'. Consequently, the Commission decided not to act on OIL's request for the applicant to be engaged as a financial assistant in function group III ('the contested decision').

12 On 5 June 2012 the applicant lodged a complaint against the contested decision under Article 90(2) of the Staff Regulations of Officials of the European Union, applicable to contract staff under Article 117 of the CEOS.

13 The authority empowered to conclude contracts of employment ('the AECE') rejected the complaint on 11 September 2012. It took the view that neither the notes from the two OIL Heads of Unit, of 1 December 2011 and 1 February 2012, nor any of the information on the applicant's personal file, including the description of the posts he had occupied, provided a basis for the view that the tasks he had performed before 14 June 2010 were 'equivalent' to [tasks within function group] III'. According to the AECE, those tasks were mostly within function group I, or perhaps function group II, but not function group III.

Forms of order sought

14 The applicant claims that the Tribunal should:

— annul the contested decision;

— order the Commission to compensate the applicant for the material damage which that decision caused him;

— order the Commission to pay the costs.

15 The Commission contends that the Tribunal should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Claim for annulment

16 In support of his claim for annulment, the applicant raises two pleas in law. The first plea alleges infringement of Article 82(2)(b) of the CEOS, Article 2(1)(c) of the general implementing provisions of 7 April 2004 on the procedures governing the engagement and the use of contract staff at the Commission, published in *Administrative Notices* No 49-2004 ('the 2004 GIP'), Article 1(3)(c) of Annex I to the general provisions of 2 March 2011 for implementing Article 79(2) of the CEOS, governing the conditions of employment of contract staff employed by the Commission under the terms of Articles 3a and 3b of the said Conditions, published in *Administrative Notices* No 33-2011 ('the 2011 GIP'), and the provisions of the CEI. The second plea alleges a manifest error of assessment.

17 In his first plea the applicant claims that, for access to function group III, Article 82(2)(b) of the CEOS, Article 2(1)(b) of the 2004 GIP and Article 1(3)(c) of Annex I to the 2011 GIP require, in addition to a secondary education diploma, only three years of 'appropriate professional experience'. The Commission's requirement that the experience needed should be 'equivalent' to tasks within that function group has no legal basis. According to the applicant, the 2004 GIP and the 2011 GIP do not contain requirements that are stricter than 'appropriate professional experience of three years' except for the purpose of grading contract staff. These are, however, additional conditions in relation to the professional experience required as a minimum condition of employment.

18 The Commission counters that Article 82(2) of the CEOS lays down only minimum conditions and that the Commission may therefore demand a higher level of qualification. However, the requirement of 'appropriate professional experience' contained in the 2004 GIP and in the 2011 GIP and also in the CEI could be interpreted as demanding a level of experience equivalent to the level which the

candidate seeks to attain, that is to say, in the present case, experience at the level of function group III. That interpretation is confirmed by Article 7(3) of the 2004 GIP. Lastly, the requirement of 'appropriate professional experience' appearing in the CEI is not unconnected with the profile of a financial assistant in function group III contained therein.

19 In that regard, the Tribunal notes that although the administration enjoys broad discretion in determining whether a candidate's previous professional experience can be taken into account for the purposes of his recruitment as a member of the contract staff in function group III, that broad discretion must inter alia be exercised in compliance with all the relevant provisions (judgment of 28 October 2010 in Case F-6/09 *Fares* v *Commission*, paragraphs 38 and 39).

20 Article 82(2) of the CEOS provides as follows:

'Recruitment as a member of the contract staff shall require at least:

…

(b) in function groups II and III:

(i) a level of post-secondary education attested by a diploma, or

(ii) a level of secondary education attested by a diploma giving access to post-secondary education, and appropriate professional experience of at least three years, or

(iii) where justified in the interests of the service, professional training or professional experience of an equivalent level.

…'

21 As regards the GIP, it is necessary to decide whether it is the 2004 GIP or the 2011 GIP which are applicable in the present case, since although they have the same subject-matter, there are slight differences between them, in particular concerning the concept of 'appropriate professional experience' as contained in the 2011 GIP.

22 It should be noted in that regard that the legality of a measure is to be assessed on the basis of the facts and the law as they stood at the time of the measure's adoption (judgments of 11 July 2007 in Case T-58/05 *Centeno Mediavilla and Others* v *Commission*, paragraph 151, and of 29 September 2011 in Case F-70/05 *Mische* v *Commission*, paragraph 70). The 2011 GIP were adopted and entered into force on 2 March 2011 and were therefore applicable at the time the contested decision was taken on 6 March 2012. At that date the 2011 GIP had repealed the 2004 GIP. The 2004 GIP were applicable when the CEI was published and on 14 June 2010 when the admission conditions needed to be met. However, the AECE did not at that time take any final decision as to whether the applicant had the appropriate experience required for recruitment to function group III. Moreover, the transitional provisions contained in Article 14 of the 2011 GIP governed the questions of persons who had passed a selection procedure prior to the entry into force of those GIP and of contracts in force, the difficulty arising in connection with the employment of staff on the basis of a derogating provision contained in the 2004 GIP, the situation of young experts in the delegations and the use of grant holders.

23 The transitional provisions laid down in Article 14 of the 2011 GIP do not, however, deal with the question of assessment of the minimum employment qualifications required in order to apply for a job as a member of the contract staff in the various function groups, and especially in function group III. A transitional provision is, in principle, to be interpreted strictly where it derogates from permanent rules and values which apply immediately to the situations at issue in the absence of that

system (order of 13 December 2012 in Case T-641/11 P *Mische* v *Commission*, paragraph 45; judgments of 30 September 2010 in Case F-29/05 *Vivier* v *Commission*, paragraphs 67 and 68 and the case-law cited, and Case F-107/05 *Toth* v *Commission*, paragraphs 71 and 72 and the case-law cited). In the absence of particular circumstances justifying a broad interpretation of Article 14 of the 2011 GIP, it follows from the above that at the time the contested decision was adopted the AECE was required to assess the experience which the applicant had acquired as at 14 June 2010 in the light of the 2011 GIP.

24 That being established, Article 1(3)(c) of Annex I to the 2011 GIP provides that the 'minimum qualifications for engagement as a member of the contract staff' are:

'[I]n function group III:

i. a level of post-secondary education attested by a diploma,

or

ii. a level of secondary education attested by a diploma giving access to post-secondary education, and appropriate professional experience of three years. In this context professional experience is considered to be appropriate if it has been obtained in one of the areas of activity of the … Commission following the award of the diploma giving access to this function group,

or

iii. in exceptional circumstances and where justified in the interests of the service, professional training or equivalent professional experience; the Joint Committee shall be informed annually of the use made of this provision.'

25 According to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording and its context but also the objects of the rules of which it forms part (judgments of 17 November 1983 in Case 292/82 *Merck*, paragraph 12; of 8 July 2010 in Case T-160/08 P *Commission* v *Putterie-De-Beukelaer*, paragraph 70; and of 10 March 2011 in Case F-27/10 *Begue and Others* v *Commission*, paragraph 40).

26 In the present case, it should be noted from the outset that, in stating that candidates must have 'appropriate professional experience of at least three years', the CEI repeats the wording of both Article 82(2)(b) of the CEOS and Article 1(3)(c) of Annex I to the 2011 GIP.

27 In the absence of a diploma attesting a level of post-secondary education, Article 82(2)(b) of the CEOS requires either 'appropriate professional experience', where the person concerned has 'a level of secondary education attested by a diploma giving access to post-secondary education' or, if that is not the case, 'professional training or professional experience of an equivalent level'. Article 1(3)(c) of Annex I to the 2011 GIP repeats the same distinction, which is to be found in the different language versions of the CEOS and of the 2011 GIP (inter alia, in German 'einschlägige Berufserfahrung' and 'gleichwertige … Berufserfahrung', in English 'appropriate professional experience' and 'equivalent level', in Italian 'esperienza professionale adeguata' and 'esperienza professionale di livello equivalente', and in Dutch 'relevante beroepservaring' and 'gelijkwaardige beroepservaring').

28 It must be held that, where the legislature and the administrative authority use two different terms in the same text having general application, reasons of consistency and legal certainty preclude those terms being given the same scope. The same applies *a fortiori* where those terms have different meanings in ordinary usage. That is precisely the case of the adjectives 'appropriate' and 'equivalent'.

The usual meaning of the adjective 'appropriate' is 'suited to a particular use', which is supported by the second sentence of Article 1(3)(c)(ii) of Annex I to the 2011 GIP. The adjective 'equivalent', however, means 'of the same value' and therefore has a more restricted meaning.

29 In addition, it is clear from *Fares* v *Commission*, that Article 82(2)(b)(iii) of the CEOS must be interpreted as meaning that, where justified in the interest of the service, the institution may grant access to a post in function group III to a candidate who has neither a diploma attesting a level of post-secondary education nor a diploma attesting a level of secondary education giving access to post-secondary education, but who does have professional training or professional experience of an equivalent level, which does not meet the criteria contained Article 82(2)(b)(i) and (ii) but is of a level equivalent to them (*Fares* v *Commission*, paragraph 19 above, paragraph 50).

30 In other words, in Article 82(2)(b)(iii) of the CEOS, and in Article 1(3)(c) of Annex I to the 2011 GIP and in the CEI which reiterate its provisions, the requirement of equivalence refers to the criteria relating to the level of education and, where appropriate, the professional experience, described in Article 82(2)(b)(i) and (ii), and not, as the Commission maintained in the contested decision and in its rejection of the complaint, directly to tasks within function group III.

31 Lastly, Article 82(2)(b) of the CEOS stems from Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ 2004 L 124, p. 1). However, although that regulation, in the second recital, highlights the need for '[t]he Community [to] be equipped with a high-quality European public administration', it is not possible to infer from that general objective that the requirement of appropriate professional experience in order to gain access to posts in function group III should be understood as imposing a stricter requirement of experience of an equivalent level to that likely to be acquired only in that function group.

32 It follows from the above that Article 82(2)(b) of the CEOS, Article 1(3)(c) of Annex I to the 2011 GIP and the CEI must be interpreted as meaning that a candidate for recruitment as a member of the contract staff in function group III must have three years of experience appropriate for the functions to be filled, although not necessarily equivalent to those functions.

33 That interpretation is not affected by Article 7(3) of the 2004 GIP, which provided: 'In order to be taken into account [for grading purposes], professional experience must have been acquired in an activity corresponding at least to the level of qualification required for the access to the function group and having a link with one of the institution's sectors of activity. It shall be taken into account from the date on which the person fulfils the minimum qualifications for engagement set out in Article 2 (including, where applicable, any professional experience required by that Article)'.

34 Not only was Article 7(3) of the 2004 GIP no longer in force at the time the contested decision was adopted, but, moreover, stated merely that, in order to be taken into account for the purposes of grading contract staff, professional experience must have been acquired in an activity corresponding at least to the level of qualification required for access to the function group concerned, that is to say, in an activity corresponding to the 'appropriate professional experience' referred to in Article 2 (1)(b) of the 2004 GIP.

35 In the present case, the issue for the AECE was therefore whether, in the light of an examination *in concreto* of the tasks performed in his previous activity (*Fares* v *Commission*, paragraph 19 above, paragraphs 63 and 64), the applicant had acquired, as at 14 June 2010, three years of experience appropriate for performance of the duties of a financial assistant in function group III, as they were described in the CEI, but not to ascertain whether he had experience of the same value as the duties thus described.

36 It follows that in deciding not to recruit the applicant as a financial assistant in function group III on the ground that he had not 'acquired, as at 14 June 2010, three years of professional experience equivalent to [tasks within function group] III', the AECE infringed Article 82(2)(b) of the CEOS, Article 1(3)(c) of Annex I to the 2011 GIP and the CEI.

37 The first plea is therefore well founded.

38 The applicant contends, in his second plea, that the contested decision contains a manifest error of assessment. He claims that his professional experience was actually 'equivalent' to that resulting from performance of tasks in function group III and that it greatly exceeded the three years required. He relies in that regard on the description of the posts he had occupied and on the assessments of his superiors contained in his staff reports for 2007, 2009 and 2010, and also on the note of 1 December 2011 from the head of unit under whose direction he had worked.

39 Since the first plea is well founded and therefore the AECE should have confined itself to examining whether the applicant's professional experience could be described as 'appropriate' for performing the duties of a financial assistant in function group III as they were described in the CEI, the Tribunal cannot establish whether the Commission committed a manifest error of assessment in considering that he did not have professional experience 'equivalent to [tasks in function group] III', without itself basing its reasoning on a premiss that is legally incorrect.

Claim for damages

40 The applicant contends that the contested decision caused him material damage since, had it not been for that decision, he would have been engaged as a member of the contract staff in function group III in October 2011, with a higher salary than the salary he continued to receive in his post in function group I.

41 It should be noted, however, that the contested decision must be annulled because the AECE decided not to engage the applicant as a financial assistant in function group III on the basis of an incorrect interpretation of Article 82(2)(b) of the CEOS, Article 1(3)(c) of Annex I to the 2011 GIP and the CEI. Moreover, Article 266 TFEU requires the institution whose act has been declared void 'to take the necessary measures to comply with the judgment'. Lastly, the AECE has broad discretion when it is called upon to verify whether the activities actually performed by a candidate for recruitment as a member of the contract staff to a post in function group III do constitute at least three years of appropriate professional experience.

42 In those circumstances, since the Commission is required to exercise again, in the light of the grounds of the present judgment, its discretion as regards the applicant's professional experience, the Tribunal cannot, without substituting its own assessment for that of the Commission, order the latter to pay the applicant a sum equivalent to the difference between what he continued to receive in his post in function group I and the pay he would have received in function group III.

Costs

43 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that that party is not to be ordered to pay any.

44 It is clear from the grounds of the present judgment that the Commission has essentially been unsuccessful. Furthermore, in his pleadings the applicant has expressly applied for the Commission to be ordered to pay the costs. As the circumstances of the present case do not justify the application of Article 87(2) of the Rules of Procedure, the Commission must bear its own costs and be ordered to pay the costs incurred by the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Third Chamber)

hereby:

1. **Annuls the decision of the European Commission of 6 March 2012 not to engage Mr Marques as a member of the contract staff in function group III;**

2. **Dismisses the action as to the remainder;**

3. **Declares that the European Commission is to bear its own costs and orders it to pay the costs incurred by Mr Marques.**

Van Raepenbusch Barents Bradley

Delivered in open court in Luxembourg on 25 September 2013.

W. Hakenberg
Registrar

S. Van Raepenbusch
President