JUDGMENT OF THE COURT (Fourth Chamber)
7 February 1990 *

In Case C-343/87

A. Culin, an official of the Commission of the European Communities, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Yvette Hamilius, 11 boulevard Royal,

applicant

v

Commission of the European Communities, represented by Sergio Fabro, a member of its Legal Department, acting as Agent, assisted by Claude Verbraeken, of the Brussels Bar, with an address for service at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision appointing another official to a post of head of division for which the applicant was also a candidate, the decision rejecting the applicant's candidature, and the decision expressly rejecting his complaint against those acts,

THE COURT (Fourth Chamber)

composed of: C. N. Kakouris, President of Chamber, T. Koopmans and M. Díez de Velasco, Judges,

Advocate General: J. Mischo
Registrar: B. Pastor, Administrator

* Language of the case: French.

having regard to the Report for the Hearing and further to the hearing on 15 June 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 26 September 1989,

gives the following

Judgment

1 By application lodged at the Court Registry on 5 November 1987, Mr Annibale Culin, an official of the Commission of the European Communities, brought an action for the annulment of the Commission's decision of 24 November 1986 appointing Mr Nicholas Argyris to a post of head of division (Grade A 3), the decision rejecting his candidature for that post, and the decision of 3 August 1987 expressly rejecting his complaint. The application also seeks an order that the Commission pay Mr Culin the token sum of one franc by way of compensation for the non-material harm which he claims to have suffered as a result of those decisions.

2 Mr Culin, who entered the service of the Commission on 7 September 1959, has been assigned since 1 October 1984 to the Textiles, Clothing, Leather and Other Manufacturing Industries Division of Directorate B of the Directorate-General for Competition (hereinafter: 'IV/B-2').

3 When the Commission, on 26 September 1986, published Vacancy Notice COM/1607/86 for the post of Head of Division IV/B-2, Mr Culin, who was deputy Head of the division at that time, applied for the post, as did 17 other officials.

4 By opinion of 27 October 1986, the Advisory Committee on Appointments to Grades A 2 and A 3, following the proposal of the Director-General for Competition, listed the five candidates to be given particular consideration. The list did not include Mr Culin's name. The Commission decided on 24 November 1986 to

fill the post in question by appointing Mr Argyris, who at that time was employed outside Directorate-General IV.

5 The Commission's decision of 20 July 1987 rejecting the complaint which Mr Culin had lodged in the meantime included the following statement: 'The appointing authority took account . . . , in particular, of the functions as acting Head taken up by [Mr Culin] from 12 November 1985, and it was this aspect which was not considered satisfactory. Consequently, the Commission decided, on the expiry of his term as acting Head, to fill the post by appointing another official . . . Having thus answered the main argument, the Commission takes the view that the other arguments put forward by [Mr Culin] concerning the appointment of Mr Argyris become quite irrelevant'.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case and the conclusions, submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 As a preliminary matter it should be noted, with reference to the applicant's claim seeking the annulment of the decision expressly rejecting his complaint, that it is well established that an action commenced before the Court has the effect of bringing before it the act adversely affecting the applicant against which the complaint was submitted (see, most recently, the judgment of 17 January 1989 in Case 293/87 *Vainker* v *Parliament* [1989] ECR 23). The application in this case must therefore be regarded as seeking the annulment of the decisions appointing Mr Argyris to the contested post and rejecting the applicant's candidature.

Alleged infringement of Article 45 of the Staff Regulations

8 The applicant claims that there was an infringement of Article 45 of the Staff Regulations, under which 'promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them'.

9 Mr Culin asserts that the assessment quoted above set out by the Commission in the reply to his complaint, regarding the manner in which he had discharged his duties as acting Head, is totally at odds with the views on the subject expressed by his superiors and contained in his personal file.

10 The applicant goes on to argue that since his candidature was unsuccessful on the ground set out in the reply to his complaint, it follows that the consideration of the comparative merits of the candidates was vitiated by a manifest error which has invalidated the entire procedure culminating in the appointment of Mr Argyris to the post in issue.

11 For its part, the Commission describes as a 'simple misunderstanding' the reference to the assessment at issue, which was made in its reply to Mr Culin's complaint a long time after the contested decision and is therefore not capable of affecting its validity. The defendant contends that it adopted on 24 May 1988 — after the commencement of these proceedings — an addendum to the reply given to the applicant's complaint, which corrects the assessment in question and sets out the true reasons for the rejection of Mr Culin's candidature, namely that he did not have 'all the requisite qualifications to warrant his inclusion amongst the most suitable candidates . . . '.

12 In view of the foregoing it is appropriate, before dealing with the submission based on infringement of Article 45 of the Staff Regulations, to consider the reasons given for the contested acts.

13 In that connection it should be noted that the Court has consistently held that the appointing authority is not obliged to give reasons for a promotion decision in so far as they affect candidates who have not been promoted, but that it is obliged to give reasons for its decision rejecting a complaint lodged under Article 90(2) of the Staff Regulations by a candidate who has not been promoted (judgment of 30 October 1974 in Case 188/73 *Grassi* v *Council* [1974] ECR 1099), since the reasons given for the latter decision are deemed to be the same as those for the decision which was the subject of the complaint (see judgments of 27 October 1977 in Case 121/76 *Moli* v *Commission* [1977] ECR 1971 and of 13 April 1978 in Case 75/77 *Mollet* v *Commission* [1978] ECR 897). That case-law is also applicable to cases such as the present one.

14 Accordingly, the reasons set out in the reply to Mr Culin's complaint should be regarded as the grounds for the contested acts, inasmuch as those acts do not set out the grounds on which the applicant's candidature was unsuccessful. However, in the abovementioned addendum to the reply to Mr Culin's complaint the Commission later withdrew that statement of reasons, describing it as a misunderstanding.

15 The corrective statement of reasons in the addendum cannot be taken into account, since it was submitted after the commencement of these proceedings.

16 In those circumstances it must be concluded that there is no statement of reasons for the contested acts. Those acts must therefore be annulled.

Alleged infringement of the terms of Vacancy Notice COM/1607/86

17 Mr Culin points out that the qualifications required by Vacancy Notice COM/1607/86 for the post in question include, in point 3, 'knowledge of one or more of the sectors involved'.

18 He claims that the candidate appointed to the post had never dealt with any of the sectors concerned and had no knowledge of the problems involved. Indeed, that is quite apparent from the memorandum which the Director-General for Competition sent to the administration on 28 October 1986, via a Member of the Commission, expressing his preference for the candidate in question; the memorandum states: '... it is not any specific knowledge but rather the individual's open-mindedness and organizing ability which must be regarded as the decisive criteria in the choice of candidate to fill the post in question'.

19 The Court has consistently held that although the appointing authority has wide discretion in comparing the candidates' merits and reports, especially with a view to the post to be filled, it must exercise it within the self-imposed limits contained in the notice of vacancy (see the judgment of 30 October 1974 *Grassi*, cited above).

20 In this case the requisite qualifications for the post to be filled included, in point 3 of the vacancy notice, 'knowledge of one or more of the sectors involved', and those sectors could be none other than those covered by Division IV/B-2 — that is to say, restrictive practices and abuse of a dominant position in the textiles, clothing, leather and other manufacturing industries.

21 Nevertheless, the documents before the Court show that the appointing authority regarded as the decisive criterion in its choice of candidate for the post not the criterion defined in the vacancy notice but rather '... the individual's open-mindedness and organizing ability ... '.

22 Since, therefore, the appointing authority failed to comply with the conditions laid down in Vacancy Notice COM/1607/86, it breached the self-imposed legal limits contained in that notice.

23 Accordingly, the submission must be upheld.

24 In the light of the foregoing considerations it must be concluded that the Commission's decision of 24 November 1986 appointing Mr Argyris to the post of Head of the Textiles, Clothing, Leather and Other Manufacturing Industries Division of the Directorate-General for Competition and the Commission's decision rejecting Mr Culin's candidature for that post must be annulled, and there is no need to consider the other submissions made in the application to the Court.

Claim for damages

25 The applicant claims that the Court should order the Commission to pay him 'one franc by way of compensation for the material and non-material harm suffered by him'. In view of the fact that any material harm which Mr Culin may have incurred could not — even if it were substantiated — be represented by the sum sought, it must be assumed that the applicant's claim seeks compensation for the non-material harm which he alleges.

26 As the Court has held, the annulment of an administrative act challenged by an official constitutes appropriate reparation for any non-material harm which he may have suffered, and the claim for damages serves no purpose (see judgments of 7 October 1985 in Case 128/84 *Van der Stijl* v *Commission* [1985] ECR 3281 and of 9 July 1987 in Joined Cases 44, 77, 294 and 295/85 *Hochbaum and Rawes* v *Commission* [1987] ECR 3259).

27 However, in this case the reasons set out in the Commission's reply to Mr Culin's complaint included an unfavourable assessment of his managerial abilities which proved to be incorrect. Since that assessment was offensive in itself and was widely disseminated within the Commission, it caused the applicant clear non-material harm, independently of the decision rejecting his candidature.

28 The non-material harm suffered by Mr Culin cannot be considered to have been entirely remedied by the correction contained in the addendum to the reply to his complaint, published by the Commission and dated 24 May 1988. It is doubtful whether publication of the addendum reached all those who may have been aware of the offensive assessment, especially if regard is had to the fact that the correction was made more than nine and a half months after the reply to the applicant's complaint.

29 It must therefore be concluded that the annulment of the decisions appointing Mr Argyris and rejecting the applicant's candidature cannot, in itself, constitute appropriate reparation for the non-material harm which he suffered. Accordingly, the Commission should be ordered to pay Mr Culin the token sum of one franc by way of compensation for the non-material harm suffered by him.

Costs

30 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

(1) Annuls the Commission's decision of 24 November 1986 appointing Mr N. Argyris to the post of Head of the Textiles, Clothing, Leather and Other Manufacturing Industries Division of the Directorate-General for Competition;

(2) Annuls the Commission's decision rejecting Mr Culin's candidature for that post;

(3) Orders the Commission to pay Mr Culin the token sum of one franc by way of compensation for the non-material harm suffered by him;

(4) Dismisses the remainder of the application;

(5) Orders the Commission to pay the costs.

Kakouris Koopmans Díez de Velasco

Delivered in open court in Luxembourg on 7 February 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Fourth Chamber