JUDGMENT OF THE COURT (First Chamber)
15 May 1985 *

In Case 127/84

Erwin Esly, an official of the Commission of the European Communities, residing at Luxembourg, represented by Victor Biel of the Luxembourg Bar, with an address for service in Luxembourg at his attorney's Chambers,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Dimitrios Gouloussis, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision refusing to regrade the applicant in a higher grade,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, T. Koopmans and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

after hearing the Opinion of the Advocate General delivered at the sitting on 7 March 1985,

gives the following

* Language of the Case: French.

JUDGMENT

(The account of the facts and issues, which is contained in the complete text of the judgment, is not reproduced)

Decision

1 By application lodged at the Court Registry on 14 May 1984 Erwin Esly, an official in Grade B 5 at the Commission of the European Communities, brought an action for the annulment of the Commission's decision of 24 March 1984 rejecting his complaint lodged against the decision to refuse his request for a regrading and for a declaration that the Commission must apply to him the same grading criteria as are applied to all of its officials.

2 By Commission decision of 11 July 1980 the applicant was appointed a probationary official in Grade B 5, Step 2 and assigned to the Customs Union as an assistant administrator with effect from 1 May 1980. Having passed an open competition organized by the European Parliament he was appointed by decision of 28 July 1980 taking effect from 1 May 1980 a probationary official of that institution in Grade B 5, Step 2 in the post of an assistant. Without having actually carried out that function he was transferred and appointed to the Commission as from that same date.

3 According to the documents before the Court, immediately after his appointment by the Parliament the Commission requested and obtained the applicant's transfer to itself. The applicant's medical examination was carried out by the Commission's medical officer on 10 December 1979 before his appointment to the Parliament. By letter of 14 January 1980 the head of the Recruitment Division of the Commission asked the Director of Personnel of the Parliament to appoint the applicant as a probationary official with a view to his simultaneous transfer to the Commission. It was stated in the letter that according to the criteria followed by the Commission the applicant could be classified in Grade B 5, Step 2.

4 In 1983 the applicant, who in the meantime had been established, learned that two of his colleagues who did similar work to his own in the same department had at their own request been retroactively regraded to Grade B 4 in view of their professional experience. On 30 May 1983 the applicant lodged a request with the

Commission with a view to obtaining a review of his grading. He contended that his professional experience and the time he had spent in military service ought to have been taken into account for that purpose, particularly in view of the Commission's decision of 6 June 1973 relating to the criteria applicable to grade and step classification upon recruitment.

5 By letter of 20 June 1983 the Commission refused to grant that request on the ground that since he had been recruited in 1980 by the Parliament he was subject to the internal rules of that institution. It stated that it was unable to change the grading which the Parliament had given to the applicant in accordance with its own rules which did not in fact provide for appointment to be made to a grade above the basic career grade.

6 The applicant's complaint was dismissed by the contested decision on 24 February 1984. The reasons relied upon in that decision are in substance those given in the letter of 20 June 1983.

7 In support of his application the applicant puts forward six submissions alleging in particular that the Commission acted in breach of certain provisions of the Staff Regulations, in particular Articles 5 (3) and 32, the Commission's decision of 6 June 1973 on the criteria applicable to classification and the principles of non-discrimination and of the protection of legitimate expectation.

8 The Commission first raises an objection of inadmissibility. It contends that the measure adversely affecting the applicant was the instrument of appointment of 11 June 1980 against which he has not submitted a complaint and that a request for regrading submitted nearly three years later cannot cause time to start running again for the purposes of the time-limits laid down in Articles 90 and 91 of the Staff Regulations since those are a matter of public policy.

9 The applicant contends that the Commission is no longer entitled to rely upon the expiry of the limitation period since it did not take this point when dismissing the complaint. He did not learn about the regrading of his colleagues in a similar position to his own until the spring of 1983 and so his specific complaint that he was discriminated against in relation to his colleagues arose at that moment and was of a nature to justify his request.

10 Article 90 (1) of the Staff Regulations provides that any official may request the appointing authority to take a decision relating to him. However, according to a consistent line of decisions of the Court, that right does not allow an official to set aside the time-limits laid down in Articles 90 and 91 for the lodging of a complaint and an appeal by indirectly calling in question by means of a request a previous decision which has not been challenged within the period prescribed. Only the existence of new substantial facts may justify the submission of a request for a review of such a decision.

11 In the present case the applicant does not complain about the application to him of the classification criteria such as the Commission used to apply when he first took up his duties but about the refusal of the Commission, which in 1983 applied other criteria to his colleagues pursuant to its internal rules, to apply those same rules to him.

12 The Court is of the view that in such a case the appointing authority may not refuse a request for a review of the grading of the official concerned. A regrading of one or more of the applicant's colleagues in a position similar to his own must be regarded as a new fact which is sufficiently substantial to allow him to request such a review.

13 The application must therefore be considered admissible.

14 As regards the substance of the case, the applicant's submissions all amount to contending that after having regraded his colleagues the Commission was not entitled to refuse to review his grading. In reply to that argument the Commission repeats its view that for the purposes of the Staff Regulations the applicant was 'recruited' by the European Parliament and that his grading is therefore governed entirely by the internal rules of that institution.

15 The only issue is therefore whether the Commission was entitled to rely on the fact that the applicant was recruited by the European Parliament in order to refuse to review his grading.

16 It must be observed in this regard that, for the purposes of the classification of officials, the distinction made by the Commission between persons directly recruited by itself and persons transferred to it after being recruited by another institution must in principle be accepted.

17 However, in the circumstances of this case, a difference in treatment cannot be justified by that distinction. The applicant was never in fact a member of the Parliament's staff. Although he passed a competition organized by the Parliament and was appointed a probationary official by the Parliament, the applicant was transferred on the same day to the Commission where he has worked ever since. It was the Commission which proposed his grading, requested his immediate transfer, carried out the medical examination and fixed the date of his entry into service.

18 Since it is not asked to consider the legality of the recruitment procedure followed, the Court must confine itself to the finding that the Commission could not refuse the applicant the regrading accorded to his colleagues on the ground that, unlike them, he had been 'recruited' by the Parliament. Consequently, the applicant is entitled to have his grading reviewed.

19 The Commission's decision of 24 February 1984 rejecting the applicant's complaint against the rejection of his request for regrading must therefore be annulled.

Costs

20 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they are asked for in the successful party's proceedings. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Annuls the Commission's decision of 24 February 1984 rejecting the applicant's complaint against the rejection of his request for regrading;

(2) Orders the Commission to pay the costs.

Bosco Koopmans Joliet

Delivered in open court in Luxembourg on 15 May 1985.

P. Heim
Registrar

G. Bosco
President of the First Chamber