JUDGMENT OF THE COURT (Sixth Chamber)

13 April 2000 *

In Case C-153/99 P,

Commission of the European Communities, represented by G. Valsesia, Principal Legal Adviser, and J. Currall, Legal Adviser, acting as Agents, assisted by D. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 25 February 1999 in Joined Cases T-282/97 and T-57/98 *Giannini* v *Commission* [1999] ECR-SC I-A-33 and II-151, seeking to have that judgment set aside in so far as it contains an error of law regarding the abuse of power and the infringement of Article 176 of the EC Treaty (now Article 233 EC) which the Commission was alleged to have committed,

* Language of the case: French.

the other party to the proceedings being:

Antonio Giannini, an official of the Commission of the European Communities, residing in Brussels, represented by M. Dallemagne and C. Locchi, of the Brussels Bar, 85 Rue du Prince Royal, B-1050 Brussels,

applicant at first instance,

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann (Rapporteur), J.-P. Puissochet, G. Hirsch and F. Macken, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 25 November 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 April 1999 the Commission of the European Communities brought an appeal under Article 49 of the EC Statute and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the judgment of the Court of First Instance of 25 February 1999 in Joined Cases T-282/97 and T-57/98 *Giannini* v *Commission* [1999] ECR-SC I-A-33 and II-151 ('the contested judgment'), seeking to have that judgment set aside in so far as it contains an error of law regarding the abuse of power and the infringement of Article 176 of the EC Treaty (now Article 233 EC) which the Commission was alleged to have committed.

2 The legal framework and the facts which gave rise to the appeal are set out in the contested judgment in the following terms:

'1 On 15 December 1994 the Commission published a vacancy notice (COM/151/94, "the original notice") for the post of Head of the Unit responsible for negotiating and managing the agreements on textiles, footwear of Directorate D (Sectoral commercial questions) in Directorate General I (External economic relations) ("the post at issue"). The notice was headed:

"COM/151/94 A3/A4/A5 I/D/I Head of the Unit responsible for negotiating and managing the agreements on textiles, footwear."

2 The minimum requirements to be met by candidates wishing to transfer or be promoted to the post were as follows:

"— being in the same category/service/career bracket as the COM (internal transfer);

— being in the career bracket below that of the COM (promotion, in accordance with Article 45 of the Staff Regulations);

— knowledge and experience/abilities appropriate to the tasks to be carried out;

— for posts requiring particular qualifications: thorough knowledge and experience of/connected with the relevant sector."

3 The applicant, an official in grade A 4, applied with six others for the post. The appointing authority appointed Mr X to the post. The applicant was informed that he had not been successful by a note of 28 April 1995. After the complaint he lodged on 25 July 1995 had been rejected he brought on 21 February 1996 an action seeking the annulment of the decisions not to consider him for the post and to appoint Mr X to it and for compensation for material and non-material damage caused by the decisions. The Court of First Instance upheld the application for annulment and dismissed that for

compensation by its judgment of 19 March 1997 in Case T-21/96 *Giannini* v *Commission* [1997] ECR-SC I-A-69 and II-211 (hereinafter "the judgment of 19 March 1997").

4 In that judgment, the Court first reviewed the case-law of the Court of Justice to the effect that the exercise of the discretion which the appointing authority enjoys in the matter of appointments presupposes a meticulous examination of the application files and a careful regard for the requirements set out in the vacancy notice, so that the appointing authority must reject any candidate who does not meet those requirements. In this case, one of those requirements was to have "knowledge and experience/abilities appropriate to the tasks to be carried out" (third indent of the general conditions), a requirement which had to be assessed in conjunction with the description of the post, namely "Head of the Unit responsible for negotiating and managing the agreements on textiles, footwear".

5 The Court went on to find that Mr X manifestly did not meet that requirement, since he did not possess, at the time when he submitted his application for the post, any experience either in the textiles or in the footwear sector, or in the general field represented by the post at issue, namely that of the common commercial policy. It also noted that the Commission had confirmed that the applicant, who had been responsible for negotiating and managing bilateral and multilateral textiles agreements of the Community for some 10 years and had been a principal negotiator of such agreements for a further five years, had good qualifications for the post.

6 The Court concluded that by appointing Mr X to the post when he did not meet one of the minimum requirements set out in the vacancy notice, while rejecting Mr Giannini's application, the Commission had, having regard to the comparative assessments which might have led to its conclusion, manifestly abused its powers and disregarded the interests of the service

within the meaning of Article 7 of the Staff Regulations. Consequently, it annulled the contested decisions of the appointing authority.

7 On 10 April 1997 the Commission published a new document annulling vacancy notice COM/151/94 and publishing a new vacancy notice for the post at issue ("the new vacancy notice"), worded as follows:

"COM/062/97 A 3 I/D/I Head of the Unit responsible for negotiating and managing the agreements on textiles; footwear; various. Preference will be given to candidates with proven experience in international negotiation and in the management of a unit."

8 That notice included the same minimum requirements as those of the original notice (see paragraph 2 above).

9 On 7 May 1997 the applicant lodged a complaint against the new notice and the withdrawal of the original notice, and an application for compensation.

10 By decision of 30 May 1997 the defendant re-appointed Mr X to the post at issue.

11 The applicant's complaint of 7 May 1997 was expressly rejected by decision of 24 July 1997, notified on 30 July 1997.

12 On 21 August 1997 the applicant lodged a complaint against the defendant's decision of 30 May 1997 appointing Mr X to the post. That complaint, too, was expressly rejected by a decision adopted by the defendant on 18 December 1997 and notified to the applicant on 6 January 1998.'

3 In those circumstances Mr Giannini brought two actions before the Court of First Instance seeking the annulment of the measures taken by the Commission to comply with the judgment of 19 March 1997, replacing the original notice with the new one and re-appointing Mr X to the post at issue (hereinafter 'the contested measures'). He relied on two pleas: infringement of Article 176 of the Treaty and abuse of powers on the one hand, and breach of the principles of the protection of legitimate expectations and officials' entitlement to a career and failure to have regard for the interests of the service on the other.

The contested judgment

4 In paragraph 29 of the contested judgment the Court observed that it was necessary to determine whether the measures adopted by the Commission replacing the original notice with the new one and appointing, on the basis of the latter, the same official as had been appointed under the first, supposedly adopted in order to comply with the judgment of 19 March 1997, showed a deliberate intention on the part of the defendant to favour one of the applicants for the post to the detriment of the others, in disregard of the interests of the service.

5 In paragraphs 30 to 33 of the contested judgment, the Court identified three factors which in its view showed that the Commission had failed to have regard for Article 176 of the Treaty and had committed an abuse of power. They were:

— the Commission's annulment of the original notice and thus the elimination of the original applicants for the post despite the fact that, far from criticising that notice, in the judgment of 19 March 1997 the Court had found that Mr X did not meet one of the minimum requirements laid down in that notice for appointment to the post at issue;

— the fact that the only essential difference between the new notice and the original one lay in the addition of two conditions regarding the 'preference' to be given when selecting a candidate, which corresponded precisely to the qualifications the Court found that Mr X possessed;

— the re-appointment of Mr X, when seven other officials had applied for the post at issue.

6 In paragraph 30 of the contested judgment the Court also observed that when the Commission was questioned at the hearing as to the reasons for replacing the original vacancy notice, it relied primarily on its wide power of discretion in such matters.

7 In the light of those considerations the Court concluded that there was objective, relevant and consistent evidence that the contested measures had been adopted with a view to achieving a purpose other than that of complying in good faith with the judgment of 19 March 1997 and that, in any event, far from serving the aims of Article 176 of the Treaty, they had prejudiced implementation of a judgment of the Court of First Instance. Consequently, it held that by deciding to

replace the original notice with the new one, stating preferences to be given which were favourable to Mr X's application, and re-appointing him to the post at issue, the Commission had infringed Article 176 of the Treaty and committed an abuse of power.

The appeal

8 The Commission asks the Court to declare the appeal admissible and well founded, to set aside the contested judgment and to order Mr Giannini to pay the costs.

9 It relies on a single ground of appeal, that the Court of First Instance erred in law in holding that its withdrawal of the original vacancy notice and the initiation of a new recruitment procedure following the judgment of 19 March 1997 were incompatible with its obligations under Article 176 of the Treaty, and therefore that the Court could not have found that there had been an abuse of power.

10 The Commission considers that it had power to adopt such measures following the partial annulment of the original recruitment procedure, the decision to take that approach being a proper exercise of its power of assessment as confirmed by the decisions of the Court of First Instance, in particular that in Case T-56/94 *De Santis* v *Commission* [1996] ECR-SC I-A-473 and II-1325. It is for the appointing authority to state in the vacancy notice for the post to be filled the requirements it deems necessary for appointment to a post bearing in mind the needs of the service. In view of the essential role of vacancy notices, it is also for the appointing authority alone, if it discovers at a late stage that those requirements should be adjusted in the interests of the service, to decide to recommence the procedure for appointment by withdrawing the original notice and replacing it with an amended one.

11 The fact that the preference requirements included in the new vacancy notice corresponded to qualities Mr X had been found to have in the judgment of 19 March 1997 is not, the Commission maintains, conclusive evidence of an abuse of powers aimed at circumventing the effects of that judgment. For that to be so, it would have been necessary to show that those conditions were irrelevant to the post to be filled. In addition, the Commission considers that the judgment cannot have comprised any instruction to the Commission as to the conduct which it was to adopt following the annulment of the decisions then challenged before the Court. Any such instruction would have been contrary to the allocation of powers under Article 176 of the Treaty and would have prevented the Commission from acting in the interests of the service.

12 Accordingly, the Commission claims that the contested judgment is defective primarily because the Court appears to have relied on the premiss that in order to properly implement the judgment of 19 March 1997 it had, in reality, no choice but to resume the original procedure for appointment at the stage at which the decisions annulled by the judgment occurred, with the result that the procedure would continue on the basis of the original vacancy and the Commission could not initiate a new procedure for recruitment based on a new notice.

13 That allegation of error in law however is founded on a wrong analysis of the contested judgment.

14 Whilst it is true that when exercising judicial review of legality under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) the Community judicature has no power to issue directions to the institutions, even where they concern the manner in which its judgments are to be complied with (see, *inter alia*, the order of 26 October 1995 in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24), and, in a case such as this, it is for the Commission, after considering the interests of the service with regard to each post to be filled, to adopt the appropriate measures, which may include initiating a fresh recruitment procedure based on a vacancy

notice which has, if necessary, been amended (see paragraphs 30 to 45 of the Opinion of the Advocate General), it is clear that the Court of First Instance has not disregarded those principles.

15 Its decision that the contested measures should be annulled for infringement of Article 176 of the Treaty and abuse of powers was based on the evidence of a number of facts, referred to in paragraph 5 of this judgment, which it considered to be objective, relevant and consistent in showing that the measures had been adopted in order to achieve a purpose other than that of complying in good faith with the judgment of 19 March 1997.

16 In so far as the arguments of the Commission in support of its sole plea amount to challenging the Court's assessment of the facts, it is sufficient to recall that the Court has consistently held that under Article 168a of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts (see, *inter alia*, Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 25).

17 In the light of all those considerations the appeal must be dismissed.

Costs

18 Under Article 69(2) of the Rules of Procedure, applicable in appeals in accordance with Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since Mr Giannini has applied for the Commission to pay the costs and the sole plea of the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders the Commission of the European Communities to pay the costs.**

Moitinho de Almeida Gulmann Puissochet

Hirsch Macken

Delivered in open court in Luxembourg on 13 April 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber