JUDGMENT OF THE COURT (Third Chamber)
10 March 1989 *

In Case 126/87

Sergio Del Plato, an official of the Commission of the European Communities, residing at 32 Via Sempione, Varese, 21100 Italy, represented by Marcel Slusny, of the Brussels Bar, 272 avenue Brugmann, Brussels, having an address for service in Luxembourg at the Chambers of Ernest Arendt, of the Luxembourg Bar, avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Joseph Griesmar, and by S. Van Raepenbusch, acting as Agents, having an address for service in Luxembourg at the office of Georgios Kremlis, Wagner Centre, Kirchberg,

defendant,

APPLICATION for:

(1) the annulment of the decision to reject the applicant's application to take part in an internal competition to fill post COM/536/86 at the Ispra Joint Research Centre;

(2) the annulment of Mr Friedemann Timm's appointment to that post;

(3) the annulment of the implied rejection of the applicant's complaint;

(4) in the alternative, an order that the Commission should pay him damages of ECU 20 000;

(5) an order that the Commission should pay the costs,

* Language of the case: French.

THE COURT (Third Chamber)

composed of: F. Grévisse, President of Chamber, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 14 February 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 28 February 1989,

gives the following

Judgment

1 By an application lodged at the Court Registry on 10 April 1987, Mr Del Plato, an official of the Commission of the European Communities in Grade B 3, employed in the Buildings and Infrastructures Division at the Joint Research Centre at Ispra, seeks the annulment of the implied decision of rejection inferred from the administration's failure to respond to his request that his candidature be taken into account in the filling of post COM/536/86, which had fallen vacant, and of the decision appointing Mr Friedemann Timm to that post, and compensation for the loss he has suffered as a result of those two decisions.

2 A vacancy notice for the Category A post of Head of the New Projects Department in the Buildings and Infrastructure Division at the Joint Research Centre at Ispra, in which Mr Del Plato works, was published on 4 April 1986. Mr Del Plato submitted his candidature on 29 April 1986 and, when it met with an oral refusal, confirmed it in writing on the following day. A new chart showing the organization of the service was published on 5 August 1986, from which it could be seen that Mr Timm had been appointed to the post in question. By a complaint lodged on 11 September 1986, Mr Del Plato sought the annulment of the decision

rejecting his candidature and of the decision appointing Mr Timm. Mr Del Plato has appealed to the Court against the implied decision rejecting his complaint, confirmed explicitly on 2 April 1987, and the decision to appoint Mr Timm, and is seeking compensation for the damage suffered.

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

The objections of inadmissibility raised by the Commission

4 The Commission claims, first of all, that the application is inadmissible in so far as it relates to the decision rejecting Mr Del Plato's candidature.

5 Although the Commission maintains, first, that Mr Del Plato's application erroneously refers to an alleged refusal to allow him to take part in an internal competition for the purpose of filling the post in question when no such competition was ever held, the application is in fact directed against the refusal to allow him to take part in the selection procedure for filling the post.

6 Secondly, the Commission claims that the application is out of time inasmuch as Mr Del Plato's candidature was expressly refused on 29 April 1986 and he should have lodged a complaint against that refusal within the three-month period prescribed by the combined provisions of Articles 90(2) and 91(2) of the Staff Regulations of Officials of the European Communities.

7 It should be pointed out that the applicant did not officially submit his candidature to the administration by registered letter with acknowledgment of receipt until 30 April 1986. The Commission failed to reply to that request, which gave rise to an implied decision of rejection which the applicant duly contested by means of a complaint lodged within the period prescribed by the Staff Regulations and then by an appeal to the Court.

8 Finally, the Commission claims that the application is inadmissible in so far as it concerns the rejection of the applicant's complaint, since that rejection was merely a confirmation of the decision contested in the complaint.

9 Under the provisions of Articles 90 and 91 of the Staff Regulations of Officials of the European Communities, an appeal by an official to the Court of Justice against a decision of the appointing authority relating to him may lie only if the official has previously submitted a complaint to the appointing authority and that complaint has been rejected by express or implied decision. Under the system established by the Staff Regulations, the official must thus submit a complaint against the decision which he is contesting and appeal to the Court against the decision rejecting his complaint. When those conditions are met, the action is admissible whether it is directed against the initial decision alone, the decision rejecting the complaint or both (judgment of 19 January 1984 in Case 260/80 *Andersen* v *Council* [1984] ECR 177, particularly paragraphs 3 and 4), provided, however, that the complaint and the appeal were brought within the periods prescribed by Articles 90 and 91 of the Staff Regulations, as in this case they were (judgment of 26 January 1989 in Case 224/87 *Koutchoumoff* v *Commission* [1989] ECR 99). Mr Del Plato's application is therefore also admissible in so far as it appeals against the implied decision rejecting his complaint.

10 The Commission then claims that the application is inadmissible in so far as it relates to the appointment of Mr Timm, on the ground that the applicant has no interest in contesting an appointment for which he was not himself eligible. Since the answer to that objection depends on whether or not Mr Del Plato was eligible for appointment to the post in question, which the Commission denies, the decision to be adopted will be considered below, together with the substance of the case.

11 Finally, the Commission argues that the claim for damages was presented for the first time before the Court and was not raised, as required by Article 91 of the Staff Regulations, in a prior complaint.

12 That objection cannot be accepted. It has been consistently held by the Court 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 (judgment of 20 May 1987 in Case 242/85 *Geist* v *Commission* [1987] ECR 2181). It follows that although Articles 90 and 91 of the Staff Regulations are designed to permit the amicable settlement of disputes which have arisen between officials and the administration, it is not the purpose of those provisions to bind strictly and absolutely the contentious stage of the proceedings, provided that the claims submitted at that stage change neither the legal basis nor the subject-matter of the complaint (judgment of 7 May 1986 in Case 52/85 *Rihoux and Others* v *Commission* [1986] ECR 1555). This is the case particularly when, as here, the applicant requested in his complaint the annulment of a decision adversely affecting him, since such a request may, depending on the circumstances, imply a request for compensation for damage which may have been caused to the applicant by that decision (judgment of 26 January 1989 in *Koutchoumoff*, cited above). The objection of inadmissibility raised by the Commission in this respect against Mr Del Plato's action must therefore also be dismissed.

Substance

The conclusions relating to the refusal to take Mr Del Plato's candidature into consideration

13 Mr Del Plato maintains that the Commission wrongfully prevented him from taking part in a competition which was also, according to him, organized in an irregular manner. However, it should be noted, as pointed out above, that the Commission did not hold a competition to fill the post in question but merely initiated a procedure for the recruitment of a member of the temporary staff. The applicant's submissions contesting the conduct of such a competition on the ground of an infringement of Article 29 of the Staff Regulations are thus irrelevant.

14 The applicant also claims that, although he is an official in Category B, his candidature for the vacant post which was to be filled by a person in Category A should have been taken into consideration since Article 45(2) and the second paragraph of Article 98 of the Staff Regulations, read together, provide that officials in the

scientific or technical services may be promoted from one category to another without a competition and he also possessed the qualifications required for appointment to that post. While his name did not appear on the list of staff recognized as being able to perform Category A duties drawn up in accordance with the 'Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials and temporary staff in the scientific and technical services', the fact that he carried out duties comparable in all respects to those described in the vacancy notice obliged the Commission to depart from that list.

15 Although it is true that Article 45(2) and the second paragraph of Article 98, read together, allow officials in the scientific or technical services to be promoted from one category to another without a competition, the Commission has set up 'Procedures' for the selection, on an objective basis, of candidates suitable for transfer to a higher category. The validity of that system, considered with reference in particular to the Staff Regulations, has been recognized by the Court (judgment of 9 October 1984 in Joined Cases 80 to 83/81 and 182 to 185/82 *Adam and Others* v *Commission* [1984] ECR 3411) and was confirmed in the judgment of 10 December 1987 in Joined Cases 181 to 184/86 *Del Plato and Others* v *Commission* [1987] ECR 4991, in which the applicant's action for the annulment of the selection committee's refusal to enter his name on the list of persons capable of performing Category A duties was dismissed.

16 Although the applicant maintains that he had previously carried out duties comparable to those attaching to the post for which he was applying, or even those very same duties, and that the Commission should thus have been led to appoint him, the Commission did not, in the circumstances of the present case, make wrong use of its discretionary power in considering that those facts did not warrant a departure from the list drawn up in accordance with the 'Procedures' laid down in 1983.

17 It follows from the foregoing that Mr Del Plato is not justified in maintaining that the refusal to take his candidature into consideration was decided in an unlawful manner.

The conclusions relating to Mr Timm's appointment

18 As the Commission pointed out, it has consistently been held that, in order for an official to be able to bring proceedings against a decision of appointment, he must have a personal interest in its annulment (judgment of 30 May 1984 in Case 111/83 *Picciolo* v *Parliament* [1984] ECR 2323).

19 It follows from the foregoing that Mr Del Plato's application for the annulment of the refusal to take his candidature into consideration is not well founded.

20 In those circumstances, Mr Del Plato, who is not entitled to apply for appointment to the post in question, has no interest in challenging another candidate's appointment to that post. To that extent, his application must therefore be declared inadmissible.

21 It follows from all of the foregoing that Mr Del Plato's application must be declared unfounded in so far as it seeks the annulment of the refusal to take his candidature for post COM/536/86 into consideration as well as an order for the payment of damages, since the administration has not committed any wrong against him, and inadmissible in all other respects.

Costs

22 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the parties to bear their own costs.

Grévisse Moitinho de Almeida Zuleeg

Delivered in open court in Luxembourg on 10 March 1989.

J.-G. Giraud
Registrar

F. Grévisse
President of the Third Chamber