JUDGMENT OF THE COURT (Second Chamber)
11 July 1985 *

In Case 119/83

Edmund Appelbaum, an official of the Commission of the European Communities, residing at 246 Avenue Tervueren, Brussels, represented by Edmond Lebrun of the Brussels Bar, with an address for service in Luxembourg at the chambers of Tony Biever, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

v

Commission of the European Communities, represented by Hendrik Van Lier, a member of its Legal Service, acting as Agent, assisted by Robert Andersen of the Brussels Bar, with an address for service in Luxembourg at the office of Manfred Beschel, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision appointing the applicant as a probationary official and the subsequent decision appointing him as an established official, in so far as those decisions classified the applicant in Grade B 2, Step 3, and for a declaration that the applicant should be classified in Grade B 1, Step 5, or at least Step 4,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: P. VerLoren Van Themaat
Registrar: H.A. Ruehl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 6 June 1985

gives the following

* Language of the Case: French.

JUDGMENT

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

Decision

1 By an application lodged at the Court Registry on 29 June 1983, Edmund Appelbaum, an official of the Commission of the European Communities, brought an action for the annulment of the Commission's decision of 30 June 1982 appointing him a probationary official with effect from 1 July 1982 and classifying him in Grade B 2, Step 3, and of the decision of 16 May 1983 appointing him an established official in the same grade and step; he further seeks a declaration that he should be classified in Grade B 1, Step 5, or at least Step 4.

Background to the dispute

2 The applicant entered the service of the European Association for Cooperation (hereinafter referred to as 'the EAC') under a special contract on 1 March 1968. The EAC is an international non-profit making association set up under Belgian law and incorporated by the Royal Decree of 15 September 1964 (*Moniteur Belge* of 3 October 1964, p. 10536).

3 Article 1 of the EAC Statute provided that the EAC was created 'in order to further cooperation between the European Communities and the developing countries and the territories and overseas departments associated with such Communities . . . '. The second paragraph of Article 3 of the Statute provided that the association was to 'be responsible under its Statute and the various conventions concluded with the Commission of the European Communities for the recruitment, placement and administration of persons appointed to carry out tasks in the field of cooperation, scientific and technical supervision and the administration of scholarships granted by the Community'. Though all the members of the Administrative Board of the EAC were to be Commission officials, the Director and Deputy Director were not to be in active employment with an institution of the European Communities (Article 25 of the Statute).

4 The Conventions of 13 July 1965 and 4 June 1974 concluded between the EAC and the Commission, referred to in Article 3 of the EAC Statute, entrusted the EAC, *inter alia*, with 'the task of recruiting and administering Commission delegates and officials to be placed under contract . . . in order to carry out projects financed by the European Development Fund or the Commission budget'. (Article 1 of the Convention of 13 July 1965). The Commission authorized the EAC to 'appoint at the place where it has its seat the officials needed to administer it', to select its personnel and lay down the conditions under which such personnel is appointed (Articles 2 and 3 of the same Convention). It is also clear from those Conventions that the EAC operated primarily on the instructions and under the control of the Commission.

5 The Financial Protocol on the management of the EAC's income and expenditure, adopted on 10 December 1965 by the EAC's Administrative Board, provided that expenditure incurred by the EAC was to be charged to the budget of the European Development Fund. Estimates of expenditure were to be approved each year by the Commission.

6 The Administrative Protocol on the organization and functioning of the EAC, also adopted by the Administrative Board, laid down, in Articles 28 to 37, the rules applicable to supervisory staff and staff concerned with technical co-operation and assistance. According to Article 28, 'requests for staff made to the Association by the Commission are to be drawn up by the department concerned and addressed to the Director of the Association . . . '. Pursuant to Article 31 of the same Protocol, a liaison department set up between the Commission and the EAC was to inform the latter of the names of the candidates selected for interview and their grading as provisionally accepted by the Commission. Though candidates had to be accepted by the Commission (Article 33), the contract of employment was drawn up by the EAC in the framework of the Protocol and the directives adopted by the Commission.

7 In order to achieve its objective, which was to facilitate the economic co-operation undertaken by the European Communities with the developing countries, the EAC employed three categories of staff, which it managed itself: headquarters staff, overseas staff and staff recruited by the EAC under a special contract (hereinafter

referred to as 'special contract staff') placing them at the disposal of the Commission's Directorate General VIII (Development).

8 The special contract between the applicant and the EAC was concluded for one year; the contract was renewable and always was renewed in this case. According to Belgian law, the applicant was therefore regarded as having been recruited for an indefinite period.

9 The terms of the applicant's contract of employment with the EAC were contained in two documents entitled 'General Terms of the special contract applicable to certain staff responsible for special duties in connection with projects financed by the European Development Fund' and 'Specific Terms of the special contract'. The latter laid down, *inter alia*, the date on which employment commenced, the duration of the contract and the basic salary.

10 By decision of the EAC's Administrative Board of 4 November 1976, changes were made in the salary scales of the EAC's special contract and headquarters staff, the effect of which was to assimilate the pay scales for both categories of staff to those applicable to Commission officials.

11 Since 1 September 1977, the applicant has been seconded to the Commission and served as a head of section in Directorate General VIII, dealing there with the technical administration of land transport projects financed by the Community in certain African States.

12 In Regulation No 3245/81 of 26 October 1981 setting up a European Agency for Cooperation (Official Journal, L 328, p. 1), the Council stated that, in order to help the Commission implement financial and technical co-operation with the developing countries, there should be set up, within the framework of the European Communities, an agency acting in conformity with Community law; it was intended that that agency should take over the activities formerly exercised by the EAC. Article 14 of that regulation provided that 'the general terms of recruitment and of employment . . . for the staff referred to in Article 3 (1) and for the staff of the agency's headquarters shall be determined by specific provisions adopted by the Commission . . . '. Those general terms have not yet been adopted; consequently, the agency is not yet operational and the EAC has not yet been dissolved.

13 Since Regulation No 3245/81 had set up the European Agency for Cooperation and it was thus necessary to resolve the problems concerning the position of the 56 members of the EAC's headquarters staff, the Council adopted Regulation No 3332/82 of 3 December 1982 laying down special transitional measures for the recruitment as officials of the European Communities of 56 members of the staff of the headquarters of the European Association for Cooperation (Official Journal, L 352, p. 5). Article 1 of that regulation provides that a staff member who occupied a post at the headquarters of the EAC on 1 January 1982 could be appointed a probationary official of the Commission. Article 3 provides that, 'by way of derogation from Articles 31 and 32 of the Staff Regulations, officials recruited by virtue of this regulation shall be appointed to the appropriate grade and step indicated in the table of equivalence in the Annex' to the regulation. Article 3 also provides that 'seniority in grade shall be reckoned from the date of appointment as a probationary official. Seniority in step shall be that acquired by the said official in the service of the [EAC].'

14 In that context and in order to permit the establishment of 32 special contract employees of the EAC, the budgetary authority, in the 1981 budget, granted the Commission 32 permanent posts including one B 1 post. The European Parliament stated that the permanent posts in question were intended for employees who had been seconded to Directorate General VIII for more than six years and were performing the same duties as their colleagues in the service of the Commission appointed in accordance with the Staff Regulations.

15 In order to establish those employees, the Commission applied the ordinary law of the European public service, that is to say the Staff Regulations of Officials of the European Communities. All the special contract employees received letters of dismissal from the EAC and, at the same time, the Commission offered them contracts as members of its temporary staff. On 16 July 1981, a vacancy notice for the 32 new permanent posts was published and the Commission held internal competitions, in which the great majority of those concerned, including the applicant, successfully took part. However, several exceptional appointments were made by the Commission under Article 29 (2) of the Staff Regulations.

16 Thus, on 25 June 1981, the applicant was offered and accepted a contract of employment as a member of the temporary staff for a period of one year from 1 July 1981; the post which he was to occupy under that contract involved the

same duties as those which he had already been performing since 1 September 1977. At that time, the applicant was classified in Grade IV/8 at the EAC, corresponding to Grade B 1, Step 4, at the Commission. The contested decision of 30 June 1982, which took effect on 1 July 1982, appointed the applicant as a probationary official in Grade B 2, Step 3. That decision was based in particular on Articles 1, 2, 29 (2), 31, 32 and 34 of the Staff Regulations.

17 Since the applicant considered that he had been the victim of discrimination, he claimed, in his complaint of 14 December 1982 against the decision appointing him a probationary official and also in his application to this Court, that he was entitled to be classified in Grade B 1, Step 5, or, at the very least, Step 4, that is to say a grading equivalent to the one he enjoyed at the EAC. However, by decision of 16 May 1983, the applicant was established in his post at the expiry of his probationary period and classified in Grade B 2, Step 3, with effect from 1 April 1983.

18 It should be noted that the headquarters staff, who were recruited by a procedure which derogated from the ordinary rules for the recruitment of Community staff, were appointed probationary officials of the Commission, in most cases with effect from 1 January 1983.

Substance of the case

19 In support of his action, the applicant puts forward a single submission divided into three parts, each based essentially on the breach of the principle of non-discrimination. The applicant claims, *inter alia*, that there was no reason why the special contract staff should have been treated differently from the EAC's 56 headquarters staff, who were appointed to the same grades and steps as they previously had at the EAC.

20 The Commission admits that the establishment of the special contract staff and the headquarters staff had the same overall purpose, namely the transfer of the EAC's staff to the service of the Commission. The different methods employed to achieve that end produced results more divergent than the Commission had supposed.

21 None the less the Commission contends that there was no discrimination because the headquarters staff were in a different situation from that of the special contract staff, since the Council provided for exceptional measures only in respect of the headquarters staff. Moreover, in the absence of a regulation laying down identical provisions to those adopted with respect to the headquarters staff, the Commission could not adopt measures with respect to the special contract staff which derogated from the ordinary rules governing recruitment of staff. The authorization to create 32 permanent posts contained in the 1981 budget cannot be interpreted as an authorization to infringe the provisions of the Staff Regulations.

22 The Commission also emphasizes that the situation of the EAC's headquarters staff was different from that of the special contract staff. Firstly, the budgetary authority's decision to authorize permanent posts for the special contract staff was taken approximately a year and a half before Regulation No 3332/82 introduced provisions derogating from the Staff Regulations. At the date at which that regulation entered into force, the procedure leading to the establishment of the special contract staff was already in course. Secondly, the position and duties of the special contract staff at the EAC were different from those of the headquarters staff. The latter's duties concerned the management of staff and equipment, whereas the special contract staff had worked, at least since 1980, in the Commission's departments. It was also for that reason that their contracts with the EAC were different.

23 The Commission emphasizes that the effect of recruiting the special contract staff in accordance with the ordinary rules, while taking some account of the professional experience acquired by them, was that some of the staff concerned found themselves in a better position whereas others found themselves in a worse position. The Commission considers that the aim of the procedure, namely to arrive at a more or less balanced result, was largely achieved.

24 Before ruling on the complaint of discrimination, it must be pointed out that the Court held in the judgment which it delivered today in Joined Cases 87 and 130/88, 22/83 and 9 and 10/84 (*Salerno and Others* v *Commission and Council*, annexed to this judgment) that the EAC is an international association governed by Belgian law and may not therefore be regarded as an administrative unit of the

Commission or as a 'legal fiction'. Consequently, when the Commission appointed the EAC's special contract staff it was recruiting staff from outside the institutions. The fact that the relevant provisions of the Staff Regulations were applied involved no irregularity.

25 With regard to the complaint of discrimination, it is clear and uncontested that the applicant's grading was less favourable than that which he had enjoyed at the EAC and which he would have obtained at the Commission had he been a member of the EAC's headquarters staff. Since the Court, in its judgment of 13 December 1984 in Joined Cases 129 and 274/82 (*Lux* v *Court of Auditors*, [1984] ECR 4127), held that Article 5 (3) of the Staff Regulations, which provides that 'identical conditions of recruitment . . . shall apply to all officials belonging to the same category or the same service', is of fundamental importance in Community staff law, the question which arises is whether the applicant's factual and legal position at the time of his recruitment justifies his being treated differently from the EAC's headquarters staff.

26 The Commission considers that the fact that at the time of the applicant's recruitment, namely in June 1981, it had no authority under any regulation to derogate from the Staff Regulations, in the way that it was entitled to do after the entry into force of Regulation No 3332/82 on 15 December 1982, constitutes a sufficient ground for the different treatment which he received.

27 However, it must be noted first that, according to the Commission's own statements, the recruitment of the special contract staff and the headquarters staff was designed to achieve the same goal, namely to resolve the problems concerning the position of EAC staff who had worked for many years in the Commission's departments.

28 Secondly, at the time when Regulation No 3332/82, derogating from Articles 31 and 32 of the Staff Regulations, entered into force, the applicant's appointment as an official and his grading had not yet become definitive, since he was established with effect from 1 April 1983.

29 Finally, the fact that Regulation No 3332/82 accorded the headquarters staff more favourable treatment than that accorded to the special contract staff was brought about by the Commission's failure to make any proposal designed to avoid a

difference of treatment between the members of the EAC's staff. Indeed, according to the explanation given to the Court, the Commission had hoped that, 'with upward or downward adjustments in certain cases', the overall position of the special contract staff would be the same as that of the headquarters staff. Of necessity, such conduct involved discrimination against those employees who, like the applicant, were subject to a 'downward adjustment'.

30 In those circumstances, the Commission's argument on this point cannot be accepted.

31 With regard to the Commission's argument that the conditions of employment of the EAC's headquarters staff were fundamentally different from those of the special contract staff, it must be held that those differences are of a purely formal character.

32 It is true that the special contract staff were normally appointed for a limited period, generally for one year, while the headquarters staff were appointed for an unlimited period. However, in practice, the special contracts were always renewed and consequently, under Belgian law, were to be regarded as contracts for an indefinite period. Although the conditions of employment of the two categories of EAC staff were laid down in separate documents, their salary arrangements were identical as a result of a decision of the EAC's Administrative Board dated 4 November 1976.

33 Furthermore, according to the explanations furnished by the Commission, both categories of EAC staff were engaged in a single task, namely financial and technical co-operation with the developing countries; moreover, although their duties were different, the Commission none the less considered that integration of the special contract staff already working in the Directorate General for Development should be given greater priority than the integration of the headquarters staff. It is therefore inconceivable that the special contract staff, although continuing to perform the same duties in the service of the Commission, should not have retained the same grade and step in the same way as the headquarters staff.

34 Consequently, there is no essential difference between the position of the headquarters staff and that of the special contract staff such as to justify a difference of treatment.

35 Finally, with regard to the Commission's argument that the fact that permanent posts were accorded to it does not permit it to derogate from the provisions of the Staff Regulations, it must be pointed out that a B 1 post had been newly created and that Article 31 (2) (b) of the Staff Regulations permits the appointing authority to make exceptions within certain limits to the general rule that appointments are to be to the starting grade. It would not therefore have been absolutely necessary to amend the existing rules in order to respect the principle of non-discrimination. Such an exception would have been justified in this case by the need to respect the principle of equality and non-discrimination in the recruitment of the EAC's staff.

36 Consequently, the Commission's decision of 16 May 1983 must be annulled and the case remitted to the Commission, which must take the necessary measures to comply with the present judgment, in accordance with Article 176 of the Treaty.

Costs

37 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Annuls the Commission's decision of 30 June 1982 appointing the applicant as a probationary official and that of 16 May 1983 appointing him as an established official in so far as they determine the applicant's grade and step;

(2) Remits the case to the Commission for a new decision;

(3) Orders the Commission to pay the costs.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 11 July 1985

P. Heim
Registrar

O. Due
President of the Second Chamber