Case 219/84

Michael Powell
v
Commission of the European Communities

'Officials — Application for regrading'

Summary

Officials — Actions — Time-limits — Re-opening — New factor — Note addressed to an official informing him of the way in which the length of his practical experience had been calculated for the purpose of his classification upon recruitment
(Staff Regulations of Officials, Arts 90 and 91)

OPINION OF ADVOCATE GENERAL
SIR GORDON SLYNN
delivered on 6 June 1985

My Lords,

By a decision dated 1 March 1974, the applicant in this case was appointed as a probationary official at Grade A 5, step 3 in the Commission's Directorate-General for Economic and Financial Affairs with effect from 11 February 1974. By a further decision of 31 October 1974, he was established in his post at the same grade as from 11 November 1974.

Prior to his appointment, there had been an exchange of correspondence between the applicant and the competent departments of the Commission as to his grade. By a letter dated 2 November 1973, Mr Powell protested to Mr Baxter, Director of Personnel at the Commission, against the

proposal to appoint him at Grade A 5. In view of his professional experience he claimed that he should be appointed at Grade A 4 or above. Mr Baxter replied on 21 November 1973 that the committee responsible for determining the grading and incremental step for new recruits had made a special recommendation that the applicant's grade should be re-examined at the end of his probationary period. In the same letter the Director of Personnel undertook that his department would ensure that that recommendation was acted upon. The applicant thereupon wrote a second letter dated 26 November 1973 to Mr Baxter in which he accepted the post offered to him on the understanding that his initial grading would be re-examined at the end of the probationary period with a view to his being regraded at Grade A 4.

Despite these assurances it would appear from a letter sent to the applicant on 27 May 1982 by the Directorate for Personnel that his individual case (described as a 'marginal' case) had not been reviewed, though there had been a general review of the classification given to British, Danish and Irish officials recruited in A 4 and A 5. He was, however, told that he had been proposed for promotion to Grade A 4.

This last letter prompted the applicant to make a request under Article 90 (1) of the Staff Regulations that he be regraded retroactively at Grade A 4 with effect from 31 December 1974. That request, which was dated 1 September 1982, was rejected on 5 January 1983 by a letter from Mr Burke, the Commissioner responsible. Following that rejection Mr Powell made a complaint dated 28 March 1983 under Article 90 (2) of the Staff Regulations, which was also rejected by Mr Burke, by a letter dated 8 July 1983, in part on the basis that he was out of time to challenge the decision appointing him to Grade A 5. He did not, however, seek to bring that rejection before the Court.

Administrative Notice No 420 dated 21 October 1983 was then published. It set out a 'Decision on the criteria applicable to grade and step classification upon recruitment'. So far as relevant for these proceedings it contained the following terms:

'Staff are informed that Mr Burke, the Member of the Commission responsible for Personnel and Administration, has adopted a new decision on the criteria applicable to grade and step classification upon recruitment, which entered into force on 1 September 1983. It cancels and replaces the current decision, dating from 6 June 1973.

Exceptionally, any official graded under the old decision who feels that he has not been graded according to the criteria laid down by it has a final opportunity for regrading within three months of the date of this publication.

J.-C. Morel
Director-General
for Personnel and Administration'

On 22 November 1983 the applicant put in a request to be regraded in accordance with that Administrative Notice. That request was rejected by a note of 6 January 1984 from Mr Morel. On 2 February 1984, the applicant lodged a complaint under Article 90 (2) of the Staff Regulations against that decision but no reply was forthcoming.

In his application lodged with the Court on 28 August 1984 the applicant requests the Court to annul the decisions appointing him of 1 March 1974 and 31 October 1974 in so far as they relate to his grade; to annul the decision notified to him by the note of 6 January 1984 and the implied decision rejecting his complaint of 2 February 1984; and to declare that he has been, or ought to have been, made a Grade A 4 official as from 11 February 1974.

The Commission has put in an objection to admissibility under Article 91 of the Rules of Procedure on the grounds that the application is out of time. In its view the decision being contested is the decision of 1 March 1974 which came to the applicant's notice on 19 March 1975 at the latest, since on that date he signed an acknowledgement of receipt of the decision of 31 October 1974. It claims that the Administrative Notice of 21 October 1983 did not, and could not, cause time to run afresh.

On the previous decisions of the Court, there is no doubt, as Mr Advocate General Mancini has recently stressed in his Opinion in Case 231/84 *Valentini* v *Commission* [1985] ECR 3027 that the time limits prescribed by Articles 90 and 91 of the Staff Regulations are to be observed as a matter of public policy. It is not for the parties to waive or vary them (Case 227/83 *Moussis* v *Commission* [1985] ECR 3028). Moreover in a number of cases to which he also refers, the Court has consistently held that a decision merely confirming a previous decision does not start time running again.

None the less the Court has recognized that an important new fact may arise which enables an applicant to request the Commission to reconsider a decision which could not otherwise be contested (Cases 109/63 and 13/64 *Muller* v *Commission* [1964] ECR 663). A refusal to reconsider, or a rejection of an application to reconsider, may thus enable proceedings to be brought because time starts to run again.

Thus in Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981 the Court accepted that the publication to members of the Commission staff of the Decision of 6 June 1973, by a Staff Notice dated March 1981, was a new event causing time to run again, largely because the applicant had been unaware of the existence, or at least the terms, of the Decision in question.

In Case 231/84 the Advocate General took the view that time began to run against Mr Valentini on 12 May 1982, after he had received a reply to his demand lodged on 4 June 1981 for his grading to be re-examined, so that he could not rely on the *Blomefield* decision where the application was made within the prescribed periods on the basis that time started to run again.

Mr Powell did not make any request based on the publication in 1981 of the 1973 criteria, so that on this point his case is different from that of Mr Valentini. However, Mr Advocate General Mancini also took the view that the measure of 21 October 1983 did no more than indicate that the Commission was prepared to follow a procedure of revision which was informal, atypical and in no way obligatory and that this was not a new fact which could be relied on.

I accept that there is a difference between the publication in 1981 of criteria hitherto secret, which prior to that date could not for that reason have been challenged, and the publication in 1983 of new criteria together with a notice that 'exceptionally' an official who felt that he had not been graded according to the criteria laid down by the former Decision had a final opportunity to apply for regrading within three months of the date of the publication.

That notice, even if given informally and being an unusual offer, was, however, signed by the Director-General for Personnel and Administration, who must be taken to have been authorized by the Commission to give it. It may not have been an offer which the Commission was obliged to make. Yet it was made and it must be taken to have been a serious offer and made for good reasons. On its face, in my view, it means that the Commission accepts that, if an official who could not otherwise require the Commission to review his grading, considers that he should have been differently graded according to the previous criteria, he may apply within three months and that the Commission will reopen the question of his grading. The official who applied in time (which of course is now long since past) was entitled to a decision. If that decision affected him adversely he was in my view entitled to follow the procedure prescribed by Article 90 (2) and Article 91 (2) of the Staff Regulations.

If the Commission initiates this procedure and takes a decision under it, I can see no valid reason why the Court should not have jurisdiction to review the legality of that decision, so long as proceedings are brought within the delays prescribed.

The position where an applicant on his own initiative applies to the Commission and the Commission takes the view that it is too late to complain of a decision on grading, or maintains its stand on such an application, seems to me to be different. Nothing said so far detracts from the decisions of the Court that an applicant cannot seek of his own motion to reopen by a new application a decision which was not challenged in time. In the present case, however, a serious open invitation, seriously accepted, in my view, results in a decision capable of judicial review. The time limits from the initial decision are not extended by the parties. A new decision has been taken.

With respect to the contrary opinion expressed in Case 231/84 I would therefore accept that the Commission's offer constituted a new fact, that a decision following an application was a completely new decision, and that the Commission cannot be heard to say that because this was *ex gratia* it was without legal consequences.

In my opinion, this application was made in time and is admissible.

In his written observations on the Commission's objection to admissibility the applicant has raised an argument based on Mr Morel's note of 6 January 1984. In addition to rejecting Mr Powell's request to be regraded, that note stated that his professional experience of 12 years and three months at the Midland Bank, the Department of Economic Affairs and the Greater London Council was to be regarded

as merely 11 years and three months. The note stated that this reduction of the applicant's professional experience for the purposes of his grading was based on paragraph 2 (a) of Annex II to the Staff Notice of March 1981 in which the Decision of 6 June 1973 was published. According to the applicant, before receiving the note of 6 January 1984 he had been unaware that his professional experience prior to his employment in the Commission was deemed to be one year shorter than it actually was. He therefore claims that that note constituted a new fact such as to cause time to run afresh.

At the hearing the Commission did not allude to this point and has not answered the applicant's contentions and allegations of fact. In these circumstances the admissibility of the action must depend on whether the terms of Annex II to the Staff Notice of March 1981 were such that he ought to have been aware of this: the file contains no other indication that prior to 6 January 1984 Mr Powell knew or ought to have known about the reduction of his professional experience for the purposes of his grading.

Article 3 of the Decision of 6 June 1973 stated that the appointing authority might appoint a candidate at Grade A 4 if he had 12 years professional experience. Annex II to the Notice of March 1981 set out the practice of the grading committee. Paragraph 2, which is headed 'Career bracket A 7/6', begins as follows:

'(a) On a recommendation from the grading committee based on the fact that the duration of university studies varies in the Member States between three and eight years, which can lead to distortions in grading, measures have been taken to reduce the gap in practice from five years to two years.

Where university studies are short, practical experience is taken into account only with effect from the fourth year following the completion of advanced secondary studies.

Where university studies are long, practical experience is taken into account from the seventh such year.'

I accept the applicant's submissions that on reading these provisions he could not have been expected to know of the reduction of his professional experience.

In the first place, paragraph 2 to Annex II was entitled 'Career bracket A 7/6' and it was therefore at the very least reasonable for him to assume that it did not apply to him.

Secondly, Mr Powell's university course at Trinity College Dublin lasted four years, as is shown by the certificate annexed to his application. It was held in Case 25/83 *Buick* v *Commission* [1984] ECR 1773 that the four-year period referred to in the second sentence of paragraph 2 (a) commences at the beginning of the candidate's university studies. To put it at its lowest, it thus seems reasonable to infer from this, as the applicant has done, that for the purposes of his grading his professional experience was considered to run from the end of those studies and the beginning of his post-university career. On that view his notional professional experience for these purposes would coincide with the actual length of his post-university career.

I therefore take the view that the terms of the Staff Notice of March 1981 were not such that the applicant ought to have known that his professional experience was deemed to be merely 11 years and three months. Whether or not his interpretation of Annex II is correct is a question of substance to be decided at a later stage.

Moreover, it is plain that this information gleaned from the note of 6 January 1984 is crucial to the applicant's case. The substantive part of his application is based exclusively, or at least very largely, on it.

In the light of these considerations the note of 6 January 1984 must be regarded as a new fact which caused time to run afresh. The present action is therefore admissible on that ground too.

The costs of this part of the case should, in my view be reserved to the hearing on the merits.