Case T-63/92

Carlos Gómez González and Others
v
Council of the European Communities

(Inadmissibility)

Order of the Court of First Instance (Third Chamber), 23 March 1993 ..... II - 327

Summary of the Order

Officials — Actions — Prior complaint through official channels — Time-limits — Time-barred — Reopening of time-limits — Conditions — New fact — Condition not satisfied (Staff Regulations, Arts 90 and 91)

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
23 March 1993 *

In Case T-63/92,

Carlos Gómez González, Angeles Sierra Santisteban, Javier Mir Herrero, Pilar Arto Hijos, residing in Spain, and **Lidón Torrella Ramos**, residing in Belgium, former members of the temporary staff of the Council of the European

* Language of the case: French.

Communities, represented by Georges Vandersanden and Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 1 Rue Glesener,

applicants,

v

Council of the European Communities, represented by Moyra Sims, a Legal Adviser in its Legal Service, acting as Agent, with an address for service at the office of Xavier Herlin, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

APPLICATION for annulment of the decisions of the Secretary General of the Council of 16 June 1986 and subsequent decisions to engage, by successive contracts until 31 March 1989, the applicants as members of the auxiliary staff and the annulment of the decisions of 4 June 1992 expressly rejecting their complaints of 9 April 1992,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Biancarelli, President, B. Vesterdorf and R. García-Valdecasas, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

1 On 16 June 1986 the applicants were engaged by the General Secretariat of the Council of the European Communities as members of the auxiliary staff to work as Spanish-language translators. Their employment as auxiliary staff continued on the basis of a number of successive contracts, the last of which ended on 31 March 1989. Subsequently, each of the applicants received a temporary staff contract for the period 1 April 1989 to 31 July 1990. None of them was appointed as an official on the expiry of the latter contract.

2 By letters of 24 November 1989 to the pensions service of the Council, each of the applicants submitted the following identically worded request: 'In accordance with Staff Note No 210/83, I hereby request that my former contract as a member of the auxiliary staff be deemed to have been the equivalent of a contract as a member of the temporary staff for the purpose of acquiring pension rights, in particular according to the criteria set out in paragraph 4 of that note.'

3 By decisions of 27 July 1990, the Director for Personnel and Administration of the General Secretariat of the Council granted each of the applicants' requests in the following terms:

'Re: Article 39 of the Conditions of Employment

In reply to your request for your contract as a member of the auxiliary staff to be made equivalent to a contract as a member of the temporary staff, I am pleased to inform you that I have decided to grant your request; accordingly, the amounts payable to you will be calculated as from the date on which your contract as a member of the auxiliary staff took effect.

The contributions which you would have paid as a member of the temporary staff and the employer's contribution paid to the ONSS, 6.75% and 8.87% respectively of the basic salary received, will be deducted from the net amount payable.'

4 Pursuant to this decision, the Council calculated the balance of the severance grant payable to the applicants. From the net amount of the severance grant the Council deducted the personal contribution of 6.75%, calculated in accordance with Article 41 of the Conditions of Employment of other servants of the European Communities ('Conditions of Employment'), and the employer's contribution of 8.87% paid to the Belgium social security scheme. Each of the applicants submitted a complaint pursuant to Article 90(2) of the Staff Regulations concerning the deductions. All the complaints were dismissed by notes from the Secretary-General of the Council on 18 January 1991.

5 On 19 April 1991 the applicants brought actions T-24/91 and T-25/91 before the Court of First Instance for the annulment of the decisions of 27 July 1990 in so far as they upheld the disputed deductions from the severance grant. These cases were pleaded at the hearing of 15 January 1992 before the Court and the applications were dismissed by two judgments of the Court on 30 June 1992, which have become final (Case T-24/91 *Gómez González* v *Council* [1992] ECR II-1881, and T-25/91 *Pilar Arto Hijos* v *Council* [1992] ECR II-1907).

6 On 9 April 1992 each of the applicants for the first time sent the appointing authority for the Council a complaint seeking the annulment of the successive contracts as members of the auxiliary staff concluded between the parties from 16 June 1986 to 31 March 1989, the adoption of new decisions appointing them to the temporary staff for that period and the payment of the difference between the sums paid and those which, according to them, 'should have been paid in accordance with the Staff Regulations'.

7 Each complaint was expressly dismissed by a memorandum of 4 June 1992 from the Secretary-General of the Council, worded as follows:

'Your complaint under reference has been carefully examined.

Following the examination, I am not in a position to accede to your requests for the following reasons.

Article 90(2) of the Staff Regulations provides that a complaint must be lodged within three months of the date of notification of the act adversely affecting an official. However, your complaint of 9 April 1992 is clearly out of time in that it concerns a decision of the Secretary-General of the Council of 16 June 1986 and the successive renewals of that decision with effect up to 31 March 1989 concerning your employment as a member of the auxiliary staff.

You are wrong in considering that the intervention of the Council's agent at the hearing of the Court of First Instance in Cases T-24/91 and T-25/91 is a "new fact re-opening the time-limit for the present complaint", the subject-matter of which is different.'

8 Consequently the applicants brought the present action by application lodged at the Registry of the Court on 4 September 1992.

9 The applicants claim that the Court should:

— annul the Council's decision of 16 June 1986 and all the subsequent decisions concerning the employment of the applicants until 31 March 1989 as members of the auxiliary staff to take up one of the 36 permanent posts as Spanish-language translators shown in the list of posts annexed to the section of the Council budget;

— order the defendant to pay the costs of the action.

10 On 6 October 1992 by a separate document the Council lodged a plea of inadmissibility within the meaning of Article 114(1) of the Rules of Procedure. It claims that the Court should:

— dismiss as inadmissible the action for annulment brought by the five applicants;

— order the applicants under Article 87(3) of the Rules of Procedure to pay the costs which they vexatiously caused it to incur.

11 The applicants submitted their observations concerning the plea of inadmissibility on 16 November 1992. They seek dismissal of the plea.

Admissibility

12 Under Article 114 of the Rules of Procedure, a party applying to the Court for a decision on admissibility not going to the substance of the case must make the application by a separate document. The Court is to decide on the application or reserve its decision for the final judgment.

13 Under Article 111 of the Rules of Procedure, where the action is manifestly inadmissible, the Court may, by reasoned order and without taking further steps in the proceedings, give a decision on the action. In the present case the Court considers that it has sufficient information from the documents in the file and finds that it is unnecessary to take further steps in the proceedings.

Arguments of the parties

14 The applicants state that at the hearing of 15 January 1992 before the Court of First Instance in Cases T-24/91 and T-25/91, the representative of the Council pointed out that in 1986 the Spanish translation division was in a critical situation and that, because insufficient candidates were successful in the various competitions, it had been possible to appoint only 13 Spanish-language translators to the 49 posts available. The applicants contend that, from these observations, it appeared for the first time that they had been engaged as members of the auxiliary staff to take up one of the 36 posts which had not been filled by the appointment of a candidate on the short list of one of the aforementioned competitions. According to the applicants, this 'admission before the court' shows that they have actually performed the permanent, well-defined tasks of translators in the Spanish translation division of the Council, for which posts shown in the list of posts annexed to the section of the Council budget were available.

15 The applicants point out that, according to the case-law of the Court of Justice, 'the difference between auxiliary staff and temporary staff lies in the fact that a member of the temporary staff fills a permanent post included in the list of posts, whereas, except in the case of temporary replacement of an official, a member of the auxiliary staff performs administrative work without being assigned to a post included in the list of posts' (Joined Cases 225/81 and 241/81 *Toledano* v *Commission* [1983] ECR 347, paragraph 6).

16 The applicants therefore consider that they have been unlawfully given the status of auxiliary staff, whereas according to the Staff Regulations and the Conditions of Employment, the Council ought to have given them the status of temporary staff.

17 The applicants consider that the admission by the agent of the Council is manifestly a new, substantial fact re-opening the time-limit for bringing an action against the Council decision of 16 December 1986 to engage them as members of the auxiliary staff to perform the duties of Spanish-language translators, corresponding to permanent posts in the list of posts of the Council.

18 The Council contends that, as the Court of Justice and the Court of First Instance have both consistently held, the mandatory time-limits laid down in Articles 90 and 91 of the Staff Regulations are a matter of public policy and are intended to ensure legal certainty. Therefore they cannot be left to the discretion of the parties or the Court, which must of its own motion point out that they have been disregarded. They are not therefore a matter for the discretion of the parties (see, *inter alia*, judgment in Case T-6/90 *Petrilli* v *Commission* [1990] ECR II-765) but rather 'the function of that period is to shorten disputes with the result that upon its expiry the measure in question is no longer subject to appeal' (Opinion of Advocate General Lenz in Case 227/83 *Moussis* v *Commission* [1984] ECR 3149).

19 The Council observes that in the present case each of the applicants submitted on 9 April 1992 for the first time a complaint concerning the decisions of the Secretary-General of the Council of 16 June 1986 and the subsequent decisions renewing the auxiliary staff contracts, that is more than three years after the last act allegedly adversely affecting them. According to the Council, the submission of a complaint after such a period is manifestly out of time and therefore the action is inadmissible.

20 With regard to the applicants' argument that the re-opening of the time-limit is justified by a substantial new fact, consisting in the statements of the representative of the Council at the hearing on 15 January 1992 before the Court of First Instance in Cases T-24/91 and T-25/91, the Council observes that, as the Court of Justice and the Court of First Instance have consistently held, only the existence of a substantial new fact capable of adversely affecting the person concerned can lead to the re-opening of mandatory time-limits and justify consideration of such an application (*Petrilli* judgment, cited above).

21 The Council considers that no new fact has arisen in the present case because the statements by the Council's agent in open court on 15 January 1992 in Cases T-24/91 and T-25/91 could not by their very nature alter the applicants' legal position. The mere reference by the Council to the factual situation prevailing in the General Secretariat of the Council at the time when the applicants received auxiliary and temporary staff contracts cannot constitute a 'new fact' justifying reconsideration of their administrative position.

Findings of the Court

22 Firstly, it should be observed that Staff Note No 210/83 from the General Secretariat of the Council of 29 November 1983 concerning the 'Pension rights of officials who have held one or more auxiliary contracts before being appointed as temporary staff or officials' provides as follows:

'1. Following the recent decision of the Court of Justice on the nature of temporary staff and auxiliary staff contracts, the Administration has examined the possibility of recognizing certain (former) auxiliary staff contracts as having the status of a temporary staff contract (judgment of the Court in Joined Cases 225/81 and 241/81 *Toledano Laredo and Garilli* v *Commission* [1983] ECR 347). Such recognition would, for the purposes of acquiring pension rights, serve to make a period of service in the Institutions of the Communities as an auxiliary employee equivalent to a corresponding period of service as a temporary employee.

In the operative part of the aforementioned judgment, the Court ruled that an auxiliary contract may be recognized as having the status of a temporary contract provided both that it was first proven that the posts corresponding to the duties carried out appeared in the establishment plan of the Institution and were available, and that the duties carried out as auxiliary employee were not of a transitory nature, i. e. they were permanent Community public service duties.

2. ...

3. ...

4. However, before being in a position to conclude that a period of service as an auxiliary employee can be made equivalent to a corresponding period of activity as a temporary employee, the Administration will have to investigate each individual case, with particular reference to the criteria laid down by the Court of Justice, i. e. on the one hand, whether the former auxiliary employee, during his period on the auxiliary staff, filled a post included in the overall establishment plan, and on the

other hand, whether the person concerned carried out well-defined permanent Community service duties.'

23 The Court finds that, on the basis of the publication of that Council Note, the applicants submitted a request under Article 90(1) of the Staff Regulations on 24 November 1989, seeking to have their former auxiliary staff contracts recognized as temporary staff contracts in accordance with the two criteria in paragraph 4 of Staff Note No 210/83.

24 As the Council had, by the aforementioned decisions of 27 July 1990, granted, with regard to pension rights, each of the applicants' requests seeking to place their auxiliary staff contracts on the same footing as temporary staff contacts, it is clear that the Council acknowledged, implicitly but necessarily, that the applicants met the abovementioned criteria.

25 It follows that the applicants were aware, at the latest from the Council decisions of 27 July 1990 acknowledging that they met the criteria in Staff Note No 210/83, that from 16 June 1986 to 31 March 1989 they, as auxiliary staff members, had held a post shown in the overall establishment plan and had carried out specified permanent tasks in the Community public service.

26 Therefore the Court considers that there is no foundation for the applicants' argument that they first learnt of the abovementioned circumstances, described by them as a new fact, from the statement by the Council's agent at the hearing of 15 January 1992 in Cases T-24/91 and T-25/91. Contrary to the applicants' submissions, the statement is in no way a new fact capable of re-opening the time-limit for bringing an action against the decisions of 16 June 1986 and the subsequent decisions.

27 There is all the less foundation for the applicants' allegation concerning a new fact in that, during the written procedure in Cases T-24/91 and T-25/91, they argued that the status of auxiliary servants was conferred on them because of an error by the Administration, as appears from paragraphs 30 and 33 of each of the aforementioned judgments of the Court of 30 June 1992. The Court dismissed this argument on the ground that it did not come within the subject-matter of the disputes which were submitted to it. Thus, whatever the Council's agent may have said at the hearing of 15 January 1992, prior to the judgments of 30 June 1992, it is clear that the applicants were already aware of the alleged new fact which they now plead.

28 It follows that the complaints of 9 April 1992 concerning the decisions of 16 June 1986 and the subsequent decisions retaining the applicants as auxiliary staff until 31 March 1989 were submitted after the three month time-limit laid down by Article 90(2) of the Staff Regulations had expired and consequently this action is inadmissible because it is out of time.

Costs

29 Pursuant to Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

30 The Council considers that applicants' claims are vexatious and asks the Court to apply Article 87(3), second sentence, of the Rules of Procedure, under which the Court may order a party, even if successful, to pay the costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur. In this connection the Council observes that the present case centres entirely around 'mercenary considerations' and that it is inadmissible for auxiliary staff members to to call into question the terms of their employment and remuneration three years after voluntarily signing their successive contracts.

31 The Court considers that, although the Council's argument is not wholly unfounded in that the present action shows a regrettable querulousness, in the circumstances of the case, the costs which this action has caused it to incur cannot be described as unreasonable or vexatious within the meaning of Article 87(3) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The action is dismissed as inadmissible;

2. The parties shall bear their own costs.

Luxembourg, 23 March 1993.

H. Jung — Registrar

J. Biancarelli — President