

The wide discretion that the Community institutions have in the organization of their departments means that a measure reorganizing those departments cannot in itself be regarded as a breach of the legitimate expectations of the officials concerned.

6. It would be contrary to the interests of the service, which require that the administration should be able to benefit from all the professional experience of its officials and employees, to limit the duties that a person may be called upon

to carry out to the qualifications on the basis of which he was initially recruited.

7. The concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it.

A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)  
23 October 1990 \*

In Case T-46/89,

**Antonino Pitrone**, an official of the Commission of the European Communities, residing at Tervuren (Belgium), represented by **Nicolas Decker**, of the Luxembourg Bar, with an address for service at the latter's chambers, 16 avenue Marie-Therèse,

applicant,

v

**Commission of the European Communities**, represented by **Sergio Fabro**, a member of its Legal Department, acting as Agent, assisted by **Claude Verbraecken**,

\* Language of the case: French.

of the Brussels Bar, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision appointing Maurice Walker to the post of Head of Specialized Department XXI-01 and the reinstatement of the applicant as the person responsible for data processing in Directorate-General XXI,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

composed of: D. A. O. Edward, President, R. Schintgen and R. García-Valdecasas, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 22 May 1990,

gives the following

## Judgment

### Facts

- 1 On 1 January 1973, Mr Pitrone was appointed a principal administrator with the Commission after having been successful in Open Competition COM/A/78. As from 6 February 1984, Mr Pitrone assumed responsibility for the data-processing work of the Customs Union Service under the direct responsibility of the Director of Directorate A, Mr Chumas. On 20 February 1984, Mr Pitrone was appointed 'Information Systems Manager', with special responsibility for the data-processing work of the Customs Union Service. In November 1984 the Commission submitted to the Council a communication on the coordinated development of computerized administrative procedures ('CD project'), and on 20 November 1984 Mr Pitrone was appointed coordinator of that project.

- 2 On 15 November 1985 Mr Chumas submitted to the Project Management Board of the CD project a document (CD/PMB/85/No 1) in which he declared that Mr Pitrone was the person qualified for the role of both project coordinator and permanent secretary of the CD Board; he added that it would be necessary nevertheless to recruit a team leader with technical qualifications, a computer analyst.
  
- 3 On 29 November 1985, the Director-General of the Customs Union Service set out, for the purpose of transmission to the various national customs administrations, the job description for the post of Technical Manager of the CD project, for which the Commission proposed to recruit a temporary employee. The job description indicated *inter alia* that the person concerned was to work 'in cooperation with the Project Coordinator, with overall responsibility for the CD project'.
  
- 4 On 14 and 24 March 1986 Selection Group No 6 T/85 interviewed the candidates for the post of Technical Manager of the CD project. Its conclusion was to place Mr den Dekker and Mr Walker *ex aequo*, with 'a slight preference for Mr Walker, whose personality seems more energetic'.
  
- 5 On 23 April 1986, the Commission decided to establish DG XXI — Directorate-General for Customs Union and Indirect Taxation.
  
- 6 Mr Walker was recruited, with effect from 1 July 1986, as a temporary employee in Grade A 4 on a five-year contract as Technical Manager of the CD project. At the time of his recruitment, Mr Walker was, as 'Assistant Secretary' (a post comparable to A 3 grade), responsible for the development of the new system of computerized customs declarations in the United Kingdom and managed a staff of about 300 persons.
  
- 7 Mr Walker was assigned to the data-processing section of Division A 3, under the responsibility of Mr Pitrone. During the months which followed it became apparent that the separation of functions between the applicant and Mr Walker was not satisfactory, since those functions overlapped.

- 8 In November 1986, DG XXI was obliged, as a matter of urgency, to prepare and secure the adoption of the legislation necessary for the implementation of the Harmonized System, the Combined Nomenclature and the Integrated Customs Tariff of the European Communities (Taric), which was to enter into force on 1 January 1988. Mr Chumas suggested to the applicant that he should take on the job of coordinating and overseeing the adoption of that legislation. The applicant accepted the new tasks after asking for and obtaining an express statement that he would only be 'temporarily' responsible for them. By memorandum No 6458 of 6 November 1986, Mr Klein, then Director-General of DG XXI, laid down the internal organizational arrangements necessary to accelerate preparation of the legislative programme in question and temporarily assigned the work to Mr Pitrone. The memorandum added that Mr Walker would temporarily assume Mr Pitrone's responsibility for the coordination of the CD project. Mr Strack was temporarily appointed Information Systems Manager in place of Mr Pitrone.
- 9 On 11 November 1987, following a change in the organizational structure of DG XXI, Mr Walker was made responsible, within the Directorate-General, for computerization and data processing under the direct authority of the Director-General.
- 10 The implementation of the Harmonized System, the Combined Nomenclature and the Taric was completed with the publication in the *Official Journal of the European Communities* on 31 December 1987 of the various regulations relative thereto.
- 11 On 9 February, Mr Chumas sent a memorandum to the applicant in which he requested the latter to prepare a study on the future of the generalized system of preferences for the third decade. On the same day the applicant sent a memorandum to the Director-General of DG XXI, in which he reported on the completion of the tasks which had been assigned to him by memorandum No 6458 of 6 November 1986 and asked to return to his former post as CD Project Coordinator and Information Systems Manager.
- 12 On 11 February 1988, Mr Pitrone lodged two complaints through official channels: first, Complaint No 19/88, seeking annulment of Mr Walker's appointment as Head of Specialized Department XXI-01 and the reinstatement of the applicant as the person responsible for data processing and, secondly,

Complaint No 18/88 seeking to obtain from the Commission true copies of all the documents concerning that appointment.

13 By memorandum No 1181 of 17 February 1988, Mr Vilar, the new Director-General, replied to the memorandum which the applicant had sent him on 9 February 1988. He rejected the request for reinstatement made by Mr Pitrone and informed him that the Directorate-General had undergone a reorganization in 1987 in the light of the role that data processing played in its work. Accordingly, a structure more appropriate to the needs of the directorate had been introduced and, in the restructuring, the post of CD Project Coordinator had been abolished. At the same time, an autonomous computerization unit had been created, and Mr Walker, a temporary employee with considerable computer experience, had been appointed head of the new specialized department. The memorandum added that in view of the fact that Mr Pitrone wished to be transferred to DG I, he had been assigned tasks which, while important, would permit his transfer to DG I without causing organizational problems in DG XXI.

14 In a second memorandum to the applicant of 16 May 1988, the Director-General emphasized that the reorganization of DG XXI, approved by the Commission in November 1987, reflected significant changes in its data-processing work and that in order to meet the requirements of the new situation it had been necessary, in that sphere, to establish a clear structure and obtain staff with a high level of data-processing experience.

15 On 16 May 1988, Mr Pitrone lodged a complaint through official channels against the Director-General's memorandum No 1181 of 17 February 1988, and requested reinstatement in his former position.

16 The applicant's staff reports for the period from 1 July 1983 to 30 June 1985 and from 1 July 1985 to 30 June 1987 make it clear that he was not fully trained in the field of computers. The report for the period 1983-85 states:

'that the assignment of the applicant to the data-processing sector produced a sort of "cultural shock", as he had to master an entirely new field of technical work with which he was unfamiliar';

'that he was not entirely familiar with this area';

similarly, the report for the period 1985-87 reveals:

'that his talent could be better used in other areas';

'that he does not have the necessary experience for the operational implementation of large computer projects, but he is well qualified to resolve difficult policy problems'.

- 17 The two complaints of 11 February 1988 were rejected by the Commission on 7 July 1988. The complaint of 16 May 1988 was impliedly rejected.

### **Procedure**

- 18 It was in those circumstances that, by application lodged at the Court Registry on 7 October 1988, Mr Pitrone brought this action, pursuant to Article 91 of the Staff Regulations of Officials of the European Communities for the annulment of the decision appointing Mr Walker to the post of Head of Specialized Department XXI-01 and reinstatement of the applicant as the person responsible for data processing in DG XXI.

- 19 The written procedure took place entirely before the Court of Justice. It followed the normal course.

- 20 Pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of Justice (Third Chamber), by an Order of 15 November 1989, referred the case to the Court of First Instance.

- 21 After hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry.
- 22 The parties' representatives presented oral argument and replied to questions put by the Court of First Instance at the hearing on 22 May 1990.
- 23 The applicant claims that the Court should:
- (i) declare the application admissible;
  - (ii) declare it well founded; and therefore:
    - (a) order the Commission to produce true copies of all the documents concerning the appointment of Mr Maurice Walker to the post of Head of Specialized Department XXI-01;
    - (b) annul the appointment of Mr Maurice Walker to the post of Head of Specialized Department XXI-01;
    - (c) order the reinstatement of the applicant as the person responsible for data processing in DG XXI;
    - (d) order the defendant to pay all the costs of the proceedings.
- 24 The defendant contends that the Court should:
- (i) dismiss the application in its entirety as unfounded;
  - (ii) order the applicant to pay his own costs, in accordance with Articles 69(2) and 70 of the Rules of Procedure.

## Substance of the case

### *The first plea*

- 25 The first plea alleges a breach of Article 4 of the Staff Regulations and of the provisions of the Conditions of Employment of Other Servants of the European Communities concerning temporary employees. In the first place, the applicant claims that the appointment of Mr Walker, on 11 November 1987, as Head of Specialized Department XXI-01 was contrary to Article 4 of the Staff Regulations, which provides that no appointment is to be made for any purpose other than that of filling a vacant post and requires that vacant posts in an institution are to be notified to the staff of that institution once the appointing authority decides that the vacancy is to be filled. The applicant maintains that in the present case there was no vacant post to be filled, because the post was still occupied by him.
- 26 As the Commission has quite rightly pointed out, Article 4 of the Staff Regulations applies only to posts occupied by officials of the European Communities and not to those occupied by temporary staff. Article 10 of the Conditions of Employment states that only Article 5(1), (2) and (4) and Article 7 of the Staff Regulations are to apply by analogy.
- 27 Moreover, the applicant is wrong to maintain that he continued to occupy the post in question, in view of the fact that by virtue of memorandum No 6458 of 6 November 1986 from the Director-General of DG XXI he was assigned, albeit temporarily, to another post. The fact that the posting was on a temporary basis in no way means that he retained his former post. What is more, the applicant never held the post of Head of Specialized Department XXI-01, but that of the person responsible for data processing in DG XXI, as he admits in his reply.
- 28 In the second place, the applicant observes that in relation to the designation of Mr Walker the Commission used the word 'appointment', whereas the Conditions of Employment nowhere use that term, but instead use the words 'engagement' or 'assignment'. Consequently, he considers the decision making that 'appointment' null and void for breach of procedure.

- 29 In that connection it is sufficient to observe that the use of the word 'appointment' instead of 'assignment' or 'engagement' as regards the designation of Mr Walker cannot have any significance, since Article 7 of the Staff Regulations, which is applicable to other staff by virtue of Article 10 of the Conditions of Employment, states that assignment is to be by appointment or transfer.
- 30 It follows from the foregoing that the first plea cannot be upheld.

*The second plea*

- 31 The second plea alleges a breach of Articles 5, 7 and 86 to 89 of the Staff Regulations and the provisions of Annex IX thereto. The applicant considers that the refusal by the Commission to reinstate him in his former position amounts to a disguised disciplinary measure. He also claims that his work was reduced to duties inferior to those of an official in Grade A 4 and, more specifically, inferior to the responsibilities that he had held previously.
- 32 The Court of Justice has consistently held that the Community institutions have a broad discretion to organize their departments to suit the tasks entrusted to them and for those purposes to assign staff available to them in the light of such tasks, on condition however that the staff is assigned in the interests of the service and in conformity with the principle of assignment to an equivalent post (Case 69/83 *Lux v Court of Auditors* [1984] ECR 2447; Case 19/87 *Hecq v Commission* [1988] ECR 1681). Such a discretion is indispensable in order to achieve effective organization of work and to adapt the organization to varying needs (Case 263/81 *List v Commission* [1983] ECR 103).
- 33 As the defendant observes, while the Staff Regulations seek to ensure that an official retains the grade obtained and a post corresponding to that grade, they do not give him a right to any particular post, but instead leave to the appointing authority the power to assign officials in the interests of the service to the various

posts which correspond to their grade (Case 21/68 *Huybrechts v Commission* [1969] ECR 85, and Case 46/69 *Reinarz v Commission* [1970] ECR 275).

- 34 Furthermore, the rule that the post must correspond to the grade, set out in particular in Article 7 of the Staff Regulations, involves, in the event of a change of the duties of an official, a comparison between his present duties and his grade and not between his present and previous duties (Joined Cases 33/79 and 75/79 *Kubner v Commission* [1980] ECR 1677).
- 35 In addition, for a measure to reorganize departments to affect adversely the statutory rights of an official, it is not sufficient that it should bring about a change or even any particular diminution in the official's responsibilities; it is necessary that, taken together, his residual responsibilities should fall clearly short of those corresponding to his grade and post, taking account of their character, their importance and their scope (Case 66/75 *Macevicius v Parliament* [1976] ECR 593, and Case 19/87 *Hecq v Commission*, cited above).
- 36 In the light of those considerations, it must be concluded that the decision appointing Mr Walker to the post of Head of Specialized Department XXI-01 was taken by the Commission within the limits of its discretion in the organization of its departments, having regard to their needs in the area of data processing and Mr Walker's background.
- 37 The question whether the duties that the Commission assigned to the applicant after he ceased to be head of the CD project are duties corresponding to his grade in the hierarchy is a separate one. However, as the applicant has not asked the Court to rule on the point, since he seeks only the annulment of the appointment of Mr Walker and reinstatement in his former post, the Court considers that it is not necessary to examine that question.
- 38 It follows from the foregoing that the second plea must be rejected.

*The third plea*

- 39 The third plea alleges a breach of the principle of protection of legitimate expectations and failure to fulfil the undertaking made by the applicant's superiors to reinstate him in his former post after completion of the urgent tasks which had been temporarily assigned to him.
- 40 The applicant considers that by appointing Mr Walker on 11 November 1987 to the post of Head of the Unit 'Computerization and Data Processing', the Commission breached the principle of protection of legitimate expectations. He claims that having regard first to the temporary nature of the specific urgent tasks which were assigned to him on 6 November 1986 and, secondly, to the temporary nature of the duties assigned to Mr Walker and Mr Strack, he expected to return to the post in question once he had completed the tasks in question. He adds that the appointment of Mr Walker abruptly deprived him of the administrative responsibilities he held until that time.
- 41 The defendant denies that the assignment to the applicant of certain tasks on a temporary basis can be interpreted as a specific assurance that he would be re-assigned to his previous duties after their completion.
- 42 An official may not plead a breach of the principle of the protection of legitimate expectations unless the administration has given him precise assurances (Case T-123/89 *Chomel v Commission* [1990] ECR II-131).
- 43 In the present case, examination of the terms of the Director-General's memorandum of 6 November 1986 does not permit the conclusion that it could constitute a precise assurance that the applicant could return to his former post.
- 44 Furthermore, the Court considers that the wide discretion that the Community institutions have in the organization of their departments means that a measure reorganizing those departments cannot in itself be regarded as a breach of

legitimate expectations of the officials concerned. The circumstances referred to by the applicant do not permit the Tribunal to depart in the present case from that fundamental consideration.

45 It follows from the foregoing that the third submission cannot be upheld.

*The fourth plea*

46 The fourth plea alleges deliberate deception of the applicant by Mr Chumas, Director of Directorate A and his direct hierarchical superior. The applicant maintains that he was led to believe that if he successfully completed his new tasks in the required time, he could be promoted to head of division and that in any event, even if he did not succeed in achieving the hoped for results, he would retain his former responsibilities in the computer sector.

47 The applicant bases his assertion on the wording of the memorandum of 6 November 1986, referred to above, and on alleged promises of promotion, which he himself calls vague, made to him by Mr Chumas.

48 It is clear from an examination of the documents in the case that neither the memorandum of 6 November 1986 nor the other documents to which the applicant refers provide any support for his assertion that he was promised a post at a higher grade. On the contrary, some memoranda and, more especially, his staff reports make it clear that he did not have the necessary training in the computer field.

49 It follows from the foregoing that the fourth plea must be rejected.

*The fifth plea*

50 The fifth plea alleges a breach of the second paragraph of Article 25 of the Staff Regulations. The applicant claims that the failure to set out the grounds for the decision abruptly to deprive him of administrative responsibility for the data-processing sector and assign it to a temporary official constitutes a breach of the requirement that any decision adversely affecting an official must state the grounds on which it is based.

51 It is clear from an examination of the documents in the case that it was by a memorandum of 6 November 1986 that the Director-General withdrew from the applicant administrative responsibility for the data-processing sector. Since he did not make any complaint against that decision within the following three months, the applicant has not observed the procedure provided for in Articles 90 and 91 of the Staff Regulations. Consequently, he cannot, in support of the present application, plead an alleged irregularity which he failed to challenge in good time.

52 It follows from the foregoing that the fifth plea must be rejected as inadmissible.

*The sixth plea*

53 The sixth plea alleges an abuse of powers. The plea is in two parts. In the first place, the applicant alleges that the misuse of powers is evidenced by the insufficiency and inconsistency of the reasons relied on by the Director-General in his memorandum No 1181 of 17 February 1988 in rejecting the request of the applicant to be reinstated in his former post and justifying the assignment to Mr Walker of the duties previously carried out by the applicant.

54 The applicant accepts that the organization and functioning of its departments is a matter for the Commission alone, but he denies that the latter may exercise that power in disregard of all consistency and logic and in a manner contrary to other organizational measures previously taken by it.

- 55 The defendant considers that this plea amounts to criticism of memorandum No 1181 of 17 February 1988 of the new Director-General, Mr Vilar, in which he indicated that memorandum No 6458 of 6 November 1986, by which his predecessor, Mr Klein, had assigned the applicant new responsibilities temporarily, must 'be interpreted in the light of all the circumstances which have arisen since that date', in particular 'the changes in DG XXI' and in 'the conception of the role that data processing must play in the work of our DG'. The same memorandum of 17 February 1988 added, moreover, that having regard to Mr Walker's very specialized experience in the matter it had been considered opportune to appoint him head of the new specialized department.
- 56 The applicant maintains that since Mr Vilar could not contest the undertaking given by Mr Klein, he sought to justify failure to observe it by referring to the circumstances that had arisen after the signature of the memorandum of 6 November 1986.
- 57 In order for the circumstances relied on by Mr Vilar to absolve him from complying with an undertaking given by his predecessor, says the applicant, they must not only have arisen after 6 November 1986 (date of Mr Klein's note) but must above all be attributable to *force majeure* or unforeseeable circumstances, that is to say, unforeseeable and inevitable events, which in his opinion was not the case.
- 58 The applicant claims that the need to take account of 'changes in DG XXI' and in 'the conception of the role that data processing must play' existed well before 6 November 1986. According to him, it dates back to 15 May 1984, the date on which the Council adopted its Resolution on the computerization of administrative procedures in intra-Community trade (Official Journal 1984 C 137, p. 1).
- 59 In that connection it must be recalled that the organization and functioning of its departments is a matter for the Commission alone; an official may not bring proceedings criticizing that organization, but may put forward only such claims as relate to him personally (Case 85/82 *Schloh v Council* [1983] ECR 2105 and Case 204/85 *Strogili v Court of Auditors* [1987] ECR 389).

60 The administration alone is responsible for the organization of its departments and it is for it alone to assess the needs of the service and assign the staff at its disposal accordingly (Case 16/67 *Labeyrie v Commission* [1968] ECR 293 and Case 61/76 *Geist v Commission* [1977] ECR 1419).

61 The applicant's argument that the assignment to a temporary employee of the duties of head of a specialized department is contrary to the principles of sound administration cannot be upheld either. The provisions of the Staff Regulations give the appointing authority a wide discretion in filling permanent posts; consequently, it may engage a temporary member of staff before appointing an official permanently (Joined Cases 341/85, 251/86, 258/86, 259/86, 262/86 and 266/86, 222/87 and 232/87 *Van Der Stijl v Commission* [1989] ECR 511).

62 It follows that in the present case it was for the administration alone to determine whether Mr Walker or the applicant was better qualified to carry out the duties in question.

63 Consequently the first part of the plea must be rejected.

64 In the second part of the same plea, the applicant alleges a distortion of the facts. He considers that such a distortion appears in memorandum No 1181 of the Director-General, of 17 February 1988, where it says that 'it seemed desirable . . . to appoint Mr Walker, a temporary member of staff who was recruited for his very specialized experience in the matter, head of the new specialized department'. The applicant alleges that Mr Walker was never engaged with a view to his being appointed head of the specialized department, but solely to fill the post of technical manager of the CD computerization project. It was wrong for the Director-General to invoke the specialized knowledge for which Mr Walker had been recruited in order to justify his assignment to the duties of head of department.

65 The second part must also be rejected. First of all, it must be borne in mind that the duties of head of a data-processing department need not necessarily be of a

purely administrative nature; on the contrary, thorough technical knowledge may be very useful for the proper discharge of those duties.

- 66 Furthermore, to limit the duties that a person may be called upon to carry out to the qualifications on the basis of which he was recruited would be contrary to the interests of the service, which require that the administration should be able to benefit from all the professional experience of its officials and other employees.
- 67 In the present case, the applicant has not put forward anything to counter the argument of the Commission that the experience acquired by Mr Walker in the United Kingdom, as 'Assistant Secretary' at the head of a department of 300 persons, gave him the ideal background for the post in question.
- 68 It follows from the foregoing observations that the sixth plea cannot be upheld.

*The seventh plea*

- 69 The seventh plea alleges a misuse of powers. The applicant considers that the appointment of Mr Walker was not motivated by the interests of the service and that the events which followed the recruitment of Mr Walker, and his rapid 'appointment' as head of a specialized department, amount to objective, relevant and consistent evidence that the true end pursued by the Commission, right from the time of the recruitment, was to replace the permanent official responsible for data processing in DG XXI by the outside employee.
- 70 The concept of misuse of powers has a precisely defined scope and refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it (see the judgment of the Court of Justice in Case 817/79 *Buyl v Commission* [1982] ECR 245 and the judgment of the Court of First Instance in Case T-108/89 *Scheuer v Commission* [1990] ECR II-411).

- 71 Furthermore, it has consistently been held that a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated (see for example, the judgment of the Court in Case 69/83 *Lux v Court of Auditors*, referred to above, and the judgment of the Court of First Instance in Case T-108/89 *Scheuer v Commission*, referred to above).
- 72 The applicant has not put forward any evidence to permit the conclusion that the true end pursued by the Commission at the time of Mr Walker's recruitment was to replace the applicant with Mr Walker as the person responsible for data processing in DG XXI.
- 73 Moreover, the decision to create a specialized department and the appropriate time for creating such a department are questions which relate to the manner of organizing administrative departments and, as has already been said, fall within the wide discretion possessed by the Community institutions in the matter. The applicant's lengthy remarks concerning the time at which the department was created are, accordingly, of no relevance.
- 74 It follows from the foregoing that the seventh plea cannot be upheld.
- 75 It appears from all the foregoing considerations taken together that the application must be rejected as being without foundation.

### Costs

- 76 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to the Court of First Instance by virtue of Article 11 of the Council Decision of 24 October 1988, cited above, 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 OF FIRST INSTANCE (Fourth Chamber)**

hereby:

- (1) Rejects the application.**
- (2) Orders each party to bear its own costs.**

Edward

Schintgen

García-Valdecasas

Delivered in open court in Luxembourg on 23 October 1989.

H. Jung

Registrar

R. Schintgen

President