

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 May 1995 *

In Case T-10/94,

Achim Kratz, an official of the Commission of the European Communities, residing in Tervuren (Belgium), represented by Nicholas Lhoëst, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Fiduciaire Myson S.à.r.l., 1 Rue Glesener,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, and, in the oral procedure, by Gianluigi Valsesia, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremilis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the decision of the Commission of 3 May 1993 not to accept the applicant's candidature for the post of Head of the Unit 'Health and Aids programmes',

* Language of the case: French.

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

composed of: K. Lenaerts, President, R. Schintgen and P. Lindh, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 15 March 1995

gives the following

Judgment

Facts

- 1 On 21 January 1993 a notice that a management post was vacant was published in respect of the post of Head of the Unit 'Health and cancer programmes' ('the vacancy notice'). On 28 January 1993 it was rectified in order to replace the word 'cancer' with the word 'Aids'. That vacancy notice contained a single specification: 'COM/003/93 A 3/A 4/A 5 VIII.8 BRU Head of the Unit "Health and Aids programmes", with responsibility for directing and coordinating the work'. It was preceded by a standard text which reads:

'In accordance with the procedure for filling posts published in Administrative Notices No 556 of 18.4. 1988 and No 578 of 5.12.1988

Minimum qualifications required in order to apply for internal transfer/promotion:

- being in the same category/service/career-bracket as the COM (internal transfer);
- being in the career-bracket below that of the COM (promotion, in accordance with Article 45 of the Staff Regulations);
- knowledge and experience/abilities appropriate to the tasks to be carried out;
- for posts requiring particular qualifications: thorough knowledge and experience of/connected with the relevant sector’.

2 The applicant, who is an official in Grade A 3, applied for that post, as did another official in Grade A 3, two officials in Grade A 5 and one official in Grade A 6.

3 On 18 March 1993 the Advisory Committee on Appointments (‘ACA’) gave its opinion in four sections. In the first, it took formal notice of the fact that ‘five candidates have applied under Article 29(1)(a) of the Staff Regulations, namely ...’ It then goes on to state that ‘the committee has examined the application of each candidate under Article 29(1)(a) of the Staff Regulations and their personal files’. In the second section, it states that ‘the committee then heard the views of Mr Pooley, Deputy Director-General for Development, at the meeting on 18 March 1993. He said that the post to be filled should be at A 5/A 4 level and, on the basis of the vacancy notice, specified the qualifications required for the post’. The third section notes: ‘First of all the committee examined the level at which the post should be filled, having regard to the particular importance of the unit in terms of its tasks

and size, and reached the conclusion that the level ought to be A 5/A 4'. The fourth section states: 'Having regard to those views, the committee examined the candidatures of Mrs Dellicour and Mr Sweet and came to the conclusion that Mrs Dellicour's candidature should be considered'.

- 4 By letter of 24 March 1993, the secretary of the ACA informed the applicant as follows:

'Following publication of the post of Head of Unit COM/003/93, five candidatures were submitted under Article 29(1)(a) of the Staff Regulations.

At its meeting on 18 March 1993, the Advisory Committee on Appointments considered the level at which the post should be filled and the qualifications necessary for the post; it then examined all the candidatures and went on to hear the views of Mr Pooley, Deputy Director-General for Development.

On completion of those proceedings, the committee reached the following conclusion:

- the post of Head of the Unit "Health and Aids programmes" should be filled at A 5/A 4 level;
- your candidature could not therefore be taken into consideration on this occasion'.

- 5 By decision of 27 April 1993, the appointing authority appointed Mrs Dellicour to the post of Head of the Unit 'Health and Aids programmes' by way of internal transfer.

6 By memorandum dated 3 May 1993, the applicant was informed that 'the appointing authority was unable to accept (his) candidature for the post to be filled'.

7 On 18 May 1993 the applicant submitted a complaint seeking in the first place 'the annulment of the decision of the Advisory Committee on Appointments adopted on 24 March 1993 and of the decision of the appointing authority adopted on 3 May 1993 rejecting (his) candidature'; 'in addition, the annulment of any decision appointing an official taken by the appointing authority or by the Advisory Committee on Appointments as a result of Vacancy Notice COM/003/93 of 21 January 1993 concerning the post at issue'; 'to have his candidature for the post at issue reconsidered on the basis of the same criteria as those set out in Vacancy Notice COM/003/93 of 21 January 1993'. In support of his complaint, the applicant claimed, first, that the ACA was not empowered to take a decision rejecting his candidature since it is, by definition, a consultative body and, secondly, that the ACA had unlawfully amended the qualifications originally required in the vacancy notice by taking the view that the candidatures of officials in Grade A 3 could not be taken into consideration since the post was to be filled at Grade A 4 or A 5.

8 By letter registered at the Commission on 26 May 1993, the applicant informed the appointing authority 'that it should be understood in fact and in law that (his) complaint was directed against the decision of the appointing authority of 3 May 1993 in so far as it is based on the unlawful decision of the Advisory Committee on Appointments of 24 March 1993'.

9 By memorandum of 5 August 1993, registered at the Commission on 9 August 1993, the purpose of which was 'to supplement by reasoned argument the complaint submitted on 26 May 1993', the applicant specified the subject-matter of his complaint by requesting the appointing authority 'to annul the decision rejecting (his) candidature for the post of Head of the Unit "Health and Aids programmes"'

(COM/003/93), and all subsequent and/or related decisions adopted by the appointing authority, to annul the decision adopted by the Commission on 19 July 1988 adopting a new procedure for filling middle-management posts and to recommence the procedure for filling post declared vacant by Vacancy Notice No 3 of 21 January 1993'. In support of his claims, the applicant relied on arguments which are essentially the same as those put forward in support of this action.

- 10 On 15 October 1993 the Commission rejected the applicant's complaint of 18 May 1993. The applicant was informed of this decision by letter of 25 October 1993, receipt of which he acknowledged on 28 October 1993.
- 11 By letter of 28 October 1993, the applicant's lawyer asked the Commission to reply to the arguments set out in the memorandum of 5 August 1993.
- 12 By letter of 13 December 1993, the Commission replied that the memorandum of 5 August 1993 constituted a new complaint since it raised new issues. Noting that the new complaint was out of time, the Commission stated that it did not have to give a decision on the new issues raised.
- 13 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 18 January 1994, the applicant brought the present action. Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure without instituting any measures of inquiry. The parties presented oral argument and replied to the Court's questions at the hearing on 15 March 1995, at which oral argument was also presented in Case T-16/94.

Forms of order sought by the parties

14 The applicant claims that the Court should:

— declare the action admissible and well founded;

in consequence,

— annul the Commission's decision to set at Grade A 5 the level of the post of Head of the Unit 'Health and Aids programmes' (COM/003/93) and all the decisions adopted by the Commission further to that decision, in particular the decision of 3 May 1993 expressly rejecting the applicant's candidature for the said post; and, in so far as is necessary, the decision adopted by the Commission on 15 October 1993 expressly rejecting the applicant's complaint and the decision notified by the Commission to the applicant's lawyer on 13 December 1993 expressly rejecting the applicant's supplementary memorandum;

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

The Commission contends that the Court should:

— dismiss the action as inadmissible and in any event as unfounded;

— make an appropriate order as to costs.

Admissibility

Arguments of the parties

- 15 The Commission claims, first, that the action is inadmissible on the ground that the applicant failed during the pre-litigation procedure to call in question the decision to fill the post at issue at Grade A 5 or A 4. According to the Commission, the applicant confined itself to challenging the decision rejecting his candidature without calling in question the decision as to the level at which the post was to be filled. Consequently, the form of order sought from the Court is inadmissible, since its content is not the same as that of the heads of claim set out in the complaint (judgment of the Court of Justice in Case 133/89 *Del Amo Martinez v Parliament* [1989] ECR 689).
- 16 The Commission further considers that, having regard to the fact that the applicant is not entitled to challenge the grade at which it was decided to fill the post at issue, he has no interest in seeking the annulment of the decision rejecting his candidature or of the decisions adopted subsequently since his grade is higher than that at which the post is to be filled.
- 17 In reply, the applicant states that it is clear from his complaint of 18 May 1993, his memorandum of 25 May 1993 and his memorandum of 5 August 1993 that he was indisputably referring to the decision of the ACA to fill the post in question at Grade A 5, as also to the decision of the appointing authority of 3 May 1993 in so far as it confirms the ACA's position.
- 18 From that, he infers that the appointing authority could not have mistaken his intention to challenge the Commission's decision to fill the disputed post at Grade A 5, which is closely linked and therefore related to the decision expressly

rejecting his candidature, and that his action is therefore admissible in its entirety since the Commission's arguments concerning the inadmissibility of his second and third heads of claim assume that the first head is inadmissible.

Findings of the Court

- 19 The Court finds that in the proceedings before it the Commission no longer disputes the admissibility of the applicant's memorandum of 5 August 1993 as a supplementary complaint. Nor could it do so, having regard to the fact that it has not furnished proof either of the date on which the applicant received notification of the memorandum dated 3 May 1993 informing him of the disputed decision or of the date on which the applicant took cognizance of that decision.
- 20 It follows that the three complaints submitted one after the other by the applicant are admissible and must therefore be regarded as a single complaint. That complaint is directed against the decision of the appointing authority of 3 May 1993 that it was unable to accept the applicant's candidature for the post to be filled.
- 21 It should be borne in mind that that decision is in the form of a single decision based on the sole ground — as is apparent from another document, moreover, namely the letter from the secretary of the ACA of 24 March 1993 — that the applicant is an official in Grade A 3 whereas it was decided to fill the post at Grade A 4 or A 5.
- 22 It is apparent from the applicant's complaint of 18 May 1993 that he was clearly challenging the decision to fill the post at issue at Grade A 4 or A 5, which

constitutes the sole ground on which the decision not to accept his candidature was based (see part III, point 2, of his complaint).

23 Consequently, the Commission cannot claim that the applicant should have directed his complaint against both the decision to fill the disputed post at Grade A 4 or A 5 and the decision not to accept his candidature.

24 It follows that the Commission cannot have mistaken the purport of the applicant's complaint or the fact that it challenged the decision to fill the post at issue at Grade A 4 or A 5, and that the pre-litigation procedure therefore achieved its purpose in that respect. That analysis is borne out by the fact that, in its answer of 25 October 1993 to the applicant's complaint, the Commission disputed the applicant's right to challenge in his complaint the decision as to the level of the post to be filled, claiming that it did not adversely affect him and did not directly affect his legal position.

25 It follows that the applicant's first head of claim is admissible. Since the objection that the second and third heads of claim are inadmissible is based solely on the inadmissibility of the first head of claim, the action must be held to be admissible in its entirety.

26 Moreover, the Commission cannot rely on the judgment of the Court of First Instance in Case T-4/93 *André v Commission* [1994] ECR-SC II-471, paragraph 25, to claim that the complaint and the action could not seek the withdrawal and annulment of related decisions subsequent to the decision rejecting his candidature. A reference to related or subsequent decisions must be appraised by reference to its context. In the present case, in contrast to *André v Commission*, it is clear from

the context in which such reference was made that it was sufficiently precise and related to the decision concerning the level at which the post was to be filled and to the decision to appoint Mrs Dellicour to that post.

Substance

Summary of the pleas in law and arguments of the parties

- 27 The applicant puts forward six pleas in law in support of his action. The first alleges that the vacancy notice is illegal in that it does not satisfy the requirements of precision laid down in the case-law of the Court of Justice and the Court of First Instance. The second alleges disregard of that vacancy notice on the ground that, in deciding to fill the post at Grade A 5 or A 4, the appointing authority refused to consider candidatures such as the applicant's which met the requirements set out in the vacancy notice. The third alleges breach of the duty to provide reasons, inasmuch as neither the contested decision nor the decision rejecting the applicant's complaint sets out the reasons for which the applicant's candidature was rejected. The fourth plea alleges infringement of Articles 27 and 45 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), in that the appointing authority omitted to undertake a comparative examination of the merits of the applicant and the other candidates. The fifth alleges infringement of Article 7 of, and Annex I to, the Staff Regulations in that the appointing authority assigned the post in question to an official in Grade A 5 when, the post being that of head of division, it ought to have been reserved for an official in Grade A 3. The sixth alleges that the Commission's decision of 19 July 1988 amending the procedure for filling middle-management posts under which the contested appointment was made was unlawful, on the ground that the decision allows the level of the post to be filled to be determined not in the vacancy notice but after the ACA and the appointing authority have taken note of the candidatures for the post to be filled.

- 28 The Court considers that the last five grounds of the action must be considered together.

Second plea: infringement of the vacancy notice

29 The applicant maintains that the Commission disregarded the vacancy notice which constitutes its own self-imposed framework for the examination of the candidates' relative merits, in that it restricted access to the post at issue by limiting it to officials in Grade A 5 or A 4 only, whereas the vacancy notice provided for access to that post to be open also to officials in Grade A 3. In so doing, the appointing authority denied the applicant the opportunity to have his candidature examined and his merits and reports compared with those of the other candidates.

30 Consequently, the applicant considers that the Commission overstepped the limits of legality which it had imposed on itself by adopting the vacancy notice, as stated by the Court in its judgment in Case T-58/91 *Booss and Fischer v Commission* [1993] ECR II-147.

31 In reply, the Commission states that it has not in any way demanded of the applicant any particular qualification which was not mentioned in the vacancy notice and that the applicant's reference to the judgment in *Booss and Fischer v Commission* is therefore irrelevant. The fact that it decided to fill the post at a grade lower than A 3 did not amount to an alteration of the objective conditions set out in the vacancy notice. In deciding that the post was to be filled at Grade A 5, the Commission considers that it remained within the self-imposed limits of legality set by the vacancy notice, since the latter refers to the procedure for filling a post established by decision of the Commission of 19 July 1988, which provides that: 'posts of head of unit shall be published at A 3, A 4 and A 5 level ... (and) shall be filled at A 3, A 4 or A 5 level'. Moreover, by stating that the post was to be filled at one or another of Grades A 3, A 4 and A 5, the vacancy notice could obviously not have included among its 'objective requirements' the condition that only officials in Grade A 3 could be appointed to that post.

Third plea: breach of the duty to provide reasons

32 The applicant claims that the decision of the appointing authority of 3 May 1993 does not state any reasons at all and that the Commission did not remedy that omission in its reply to his complaint. It merely listed some general conditions clarifying the procedure for filling vacant posts, without indicating the criteria used to assess the qualifications and experience of the candidates when considering their comparative merits.

33 He concludes that the Commission's conduct did not enable him to ascertain the criteria used by the defendant to assess the qualifications and experience of the candidates when considering their comparative merits and he was not therefore in a position to establish whether the contested decision was well founded. He notes in that regard that, in paragraphs 34 and 38 of its defence, the Commission has acknowledged that 'the applicant's candidature was rejected for the sole reason that his grade was higher than the level at which it had been decided to fill the post', whereas the vacancy notice indicated that the post at issue was open to officials in Grade A 3 as well.

34 In reply, the Commission argues that it is apparent from the case-law that decisions rejecting candidatures for a post contain sufficient reasons if they indicate 'the existence of the legal conditions laid down by the Staff Regulations for the procedure to be lawful' (judgments of the Court of First Instance in Case T-25/90 *Schönherr v ESC* [1992] ECR II-63, paragraph 21, in Case T-52/90 *Volger v Parliament* [1992] ECR II-121, paragraph 36, and in Case T-108/92 *Caló v Commission* [1994] ECR-SC II-213, paragraphs 34 and 35).

35 The defendant considers that it set out in detail the various stages of the procedure for filling the post in question and stated that 'it has been decided to fill the post at career-bracket A 5/A 4, that is to say at a career-bracket lower than that of the complainant' and that 'the A 3 grade allotted to a post of head of unit is by no means conclusive and cannot give rise to the conclusion that the post is necessarily to be filled at A 3 level, where the particular importance of that unit does not

warrant it'. Finally it pointed out that 'as regards the appointment and posting of officials, the institution has a wide discretion, provided that it does not use its powers in a manifestly incorrect way, respects the principle that the grade must correspond to the post, does not exercise its powers for purposes other than those for which they were conferred upon it, and remains within the limits of legality imposed by the vacancy notice'.

36 It therefore considers that the applicant was fully informed of the reasons for which his candidature was rejected and was thus given sufficient information to assess whether there were grounds for rejecting his candidature and whether it would be appropriate to bring an action before the Court.

37 Furthermore, the Commission maintains that the applicant cannot complain that the reasons for the decision did not specify the criteria used to assess the qualifications and experience of the candidates when their comparative merits were examined since, having regard to his grade, the applicant could not have been included in that examination, which was confined to those candidates in a grade lower than A 3.

Fourth plea: breach of Articles 27 and 45 of the Staff Regulations

38 The applicant claims that the Commission infringed Articles 27 and 45 of the Staff Regulations since it did not consider his merits in comparison with those of the other candidates. In that way it denied itself the participation of the most experienced officials whom it had invited to apply by publishing the vacancy notice.

39 The Commission's reply is that in the present case it did not have to consider the applicant's merits because it had been decided that the post should be filled at a grade lower than his.

Fifth plea: infringement of Article 7(1) of the Staff Regulations and of Annex I thereto

40 The applicant claims that the Commission infringed Article 7 of the Staff Regulations and Annex I thereto by deciding to fill a post of head of unit, which corresponds to the post of head of division within the meaning of Annex I. In his view, Annex I requires the post to be filled at Grade A 3 and not at Grade A 5 or A 4. In so doing, the Commission separated the post from the grade pursuant to its decision of 19 July 1988, which is therefore illegal in that regard from the outset.

41 In reply, the Commission states that while the basic post of head of division admittedly corresponds to Grade A 3, the post of head of unit does not necessarily correspond to the basic post of head of division. It emphasizes that Annex II to its decision of 19 July 1988, adopted pursuant to the second subparagraph of Article 5(4) of the Staff Regulations, states that the post of head of unit may correspond either to the basic post of head of division or to the basic post of principal administrator. It follows that the basic post of head of division is not the only one to which the duties of head of unit may correspond.

42 The defendant considers that its decision of 19 July 1988 complies with the Staff Regulations, since it is apparent from the relevant case-law that, although the second subparagraph of Article 5(4) of the Staff Regulations requires the institutions to define the duties attaching to each basic post, it in no way implies that they must define them differently (judgment of the Court of Justice in Joined Cases 193 to 198/82 *Rosani and Others v Council* [1983] ECR 2841). The Commission concludes that identical duties as head of unit may be carried out in two different basic posts.

Sixth plea: illegality of the Commission's decision of 19 July 1988

- 43 The applicant claims that the decision of 19 July 1988 is also illegal, in that it provides that it is only after the vacancy notice has been published and the ACA has defined the qualifications required of the candidates that the ACA determines the level at which the post is to be filled. That practice makes it possible to examine the candidates' files and afterwards unlawfully to adjust the level of the post to be filled in accordance with the grade of the candidate who has already been selected.
- 44 In the applicant's view, that decision is in breach of Articles 7, 27 and 45 of the Staff Regulations, and also Annex I thereto establishing the basic posts and corresponding career brackets in each category.
- 45 In reply, the Commission states that, in practice, the ACA first considers the level at which the post could be filled and only subsequently does it examine the qualifications and abilities of the candidates. In so doing, the ACA is not acting contrary to point 3.2 of the decision of 19 July 1988, which in no way requires the ACA first to examine the qualifications and abilities of the candidates and only thereafter the level at which the post should be filled. Point 3.2 at most states that the ACA must express its opinion on both of those aspects.
- 46 In any event, according to the Commission, it is apparent from the opinion of the ACA that, at its meeting on 18 March 1993, after hearing the views of the Deputy Director-General for Development, it 'first of all considered the level at which the post was to be filled ... and reached the conclusion that this should be at A 5 or A 4 level'. Similarly, the ACA's opinion states that it is 'having regard to those views' that the committee has examined the candidatures of two officials in Grade A 5.

47 The Commission emphasizes that the decision as to the level at which the post should be filled was taken before examining the candidatures, as required by the relevant case-law, since the appointing authority is obliged to set the level of a post of head of unit on the basis of the importance of the post, irrespective of the qualifications of any candidate or candidates who have applied for it (judgment in Case T-82/91 *Latham v Commission* [1994] ECR-SC II-61, paragraph 46). It considers that there would have been a breach of that requirement if the appointing authority had first taken into consideration the qualifications and experience of the applicant and then, having selected him, had adjusted the level of the post to be filled accordingly, in keeping with the applicant's grade.

Findings of the Court

48 First of all, the Court notes that according to the settled case-law of the Court of Justice, the appointing authority is obliged, in following the procedure laid down in Articles 29(1)(a) and 45 of the Staff Regulations and considering the comparative merits of the candidates, to remain within the self-imposed limits of legality set by the vacancy notice (see, in particular, the judgments of the Court of Justice in Case 188/73 *Grassi v Council* [1974] ECR 1099, paragraph 26, and in Case C-343/87 *Culin v Commission* [1990] ECR I-225, paragraph 19.)

49 In the present case, it is apparent in particular from the opinion of the ACA and the reply to the applicant's complaint that the criterion on the basis of which the applicant's candidature was rejected was the level at which it had been decided to fill the post at issue, which was lower than the applicant's grade.

50 That criterion was not as such included in the vacancy notice, since the notice, taken alone, permitted the post in question to be filled at Grade A 3, Grade A 4 or Grade A 5.

51 Consequently, by setting the level at which the post was to be filled at Grade A 5 or Grade A 4, and thereby excluding the candidatures of officials in Grade A 3, the appointing authority infringed the vacancy notice by imposing on the candidates a condition which was not provided for in the notice, namely not being an official in Grade A 3. In so doing, the appointing authority did not consider the comparative merits of the applicant in accordance with Article 45 of the Staff Regulations, as the Commission has moreover admitted.

52 In order to defend its decision, the Commission relies on its decision of 19 July 1988 which provides at paragraph 3.1 that 'posts of head of unit shall be published at A 3, A 4 and A 5 level' and at paragraph 3.2 that 'posts of head of unit shall be filled at A 3, A 4 or A 5 level'. It follows from that decision, therefore, that posts may be published simultaneously at A 3, A 4 and A 5 level, even though they can be filled at only one of those grades.

53 Contrary to the applicant's assertions, the Court considers that there is nothing to prevent posts of head of unit from being filled at Grade A 3, A 4 or A 5, depending on the importance of the tasks entrusted to the unit concerned. Article 7 of the Staff Regulations and Annex I thereto do not require posts of head of unit necessarily to be filled at Grade A 3. As the Commission has observed, the requirement that the post must correspond to the grade does not mean that the institutions are obliged to define the duties attaching to each basic post in the same terms (judgment in *Rosani v Council*, cited above). The Commission was therefore entitled to conclude that identical duties as head of unit may be performed in different basic posts, that is to say in the case in point those of principal administrator and head of division.

54 The Court notes, however, that the 'publication of A3, A4 and A5 posts' provided for by paragraph 3.1 of the decision of 19 July 1988 implies that the level at which the post is to be filled is to be determined after the candidatures have been

submitted, in accordance with the procedure laid down by paragraph 3.2 of the decision of 19 July 1988. As is provided for in that paragraph, 'after hearing the views of the competent director-general, the Advisory Committee on Appointments shall give an opinion on:

- the candidates' qualifications and their ability to perform the duties of head of unit;
- the level at which the post is to be filled, having regard to the particular importance of the unit in terms of its tasks and/or size'.

55 The fact remains that the order in which those two indents appear suggests, especially in the context of provisions which describe a procedure that the appointing authority is obliged to follow, that the ACA first gives its opinion on the qualifications of the candidates and their ability to perform the duties of head of unit and only subsequently determines the level at which the post can be filled, regard being had to the particular importance of the unit.

56 The Commission cannot object that the order of the two indents is of no importance, especially as the opinion of the ACA shows that, after formally noting that a number of candidatures have been submitted, the first stage of its proceedings is to consider 'each applicant's candidature and his or her personal file' and that therefore it is only afterwards that the ACA examines the level at which the post is to be filled (see paragraph 3, above).

57 It follows that in this case the ACA set the level at which the post was to be filled after taking note of the applicants' candidatures and of their personal files.

58 The Commission itself has pointed out that the relevant case-law requires the decision concerning the level at which the post is to be filled to be taken before the candidatures are considered, since the appointing authority is required to set that level by reference to the importance of the post, irrespective of the qualifications of the candidate or candidates (see the judgment in *Latham v Commission*, cited above, paragraph 46).

59 By taking that course, the Commission has undermined the requisite objectivity of the decision concerning the level at which the post is to be filled, since the ACA and the appointing authority were acquainted with the identity and personal files of the candidates when they determined the level of the post and there was accordingly a risk that they might lack the objectivity required to take a decision in that respect having regard solely to the interests of the service.

60 It follows that the decision of 19 July 1988, in so far as it permits the level of the post to be filled to be set at a time when the ACA and the appointing authority are already familiar with the identities and personal files of the candidates for that post, is illegal.

61 The Commission cannot challenge that conclusion by arguing that, in its judgment in *Volger v Parliament* (cited above, paragraph 20), the Court held that the simultaneous publication of an internal vacancy notice and a vacancy notice concerning inter-institutional transfers does not preclude compliance with the order of priority set out in Article 29(1) of the Staff Regulations. While in *Volger v Parliament* there was no evidence that the candidatures submitted under the inter-institutional transfer procedure had been considered before it became apparent that it had been impossible to fill the post concerned under the internal procedures, in this case the evidence available to the Court shows that the ACA took note of the candidatures and personal files of the candidates before setting the level of the post to be filled.

62 Similarly, the Commission cannot invoke the concern for speed mentioned in the preamble to the decision of 19 July 1988 in defence of the legality of the procedure

for filling middle-management posts laid down by that decision. Although setting the level of the post in the vacancy notice would admittedly slow down the procedure by necessitating a meeting of the ACA and a decision from the Commission before publication of the vacancy notice, the concern for speed cannot justify undermining the absolute need for objectivity and independence on the part of the Commission when determining the level of the post to be filled.

63 It follows that since the contested decision was adopted on the basis of an illegal procedure, it must itself be considered to be illegal.

64 It is clear from all the foregoing considerations that the contested decision was adopted in breach of the vacancy notice and on the basis of an illegal procedure.

65 Consequently, the application must be upheld without there being any need to consider the first plea.

Costs

66 Under 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. Since the Commission has been unsuccessful and the applicant has applied for an order as to costs, the Commission must be ordered to pay the whole of the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- 1. Annuls the decision of the Commission of 3 May 1993 rejecting the applicant's candidature for the post of Head of the Unit 'Health and Aids programmes' and the related decisions setting the level of that post at Grade A 5/A 4 and subsequently appointing Mrs Dellicour to that post;**
- 2. Orders the Commission to pay the costs.**

Lenaerts

Schintgen

Lindh

Delivered in open court in Luxembourg on 17 May 1995.

H. Jung

K. Lenaerts

Registrar

President