

follows that Articles 4, 29 and 45 of the Staff Regulations do not apply to a procedure of that kind.

However, the organization of the Community civil service is governed by certain general principles of law, including equality of treatment and protection of legitimate expectations, which may not be disregarded in the context of a procedure, such as that for the rotation of staff, which is not explicitly provided for by the Staff Regulations. The application of those principles implies, on the one hand, that the administration is obliged to undertake a proper comparative examination of the merits of the candidates and, on the other, that once it has decided to fill a specific post by means of that procedure, it must carry it through properly, observing the

terms of the notice which it has published, before calling for applications from external candidates under a different procedure.

2. The decision to terminate a staff rotation procedure without filling a particular job by appointing an internal candidate falls within the discretion enjoyed by the appointing authority in this context. Although the administration is not obliged to carry through a recruitment procedure initiated pursuant to Article 29 of the Staff Regulations with a view to filling a vacant post, that principle must, *a fortiori*, apply by analogy in cases where the administration calls for internal applications in the context of a staff rotation procedure.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
6 July 1993 *

In Case T-32/92,

Lars Bo Rasmussen, an official of the Commission of the European Communities, residing in Dalheim (Luxembourg), represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

* Language of the case: French.

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, and Ana Maria Alves Vieira, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Anzecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision not to accept the candidature submitted by the applicant following the publication of Notice of Post No 587 and of the decision to call for applications from external candidates for a temporary post in Grade A3,

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

composed of: C. W. Bellamy, President, H. Kirschner and C. P. Briët, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 18 March 1993,

gives the following

Judgment

The facts

The applicant is an official in Grade A5 at the Commission. His personal file, which was lodged at the Registry of the Court of First Instance in accordance with the final paragraph of Article 26 of the Staff Regulations of Officials of the European Communities (hereinafter the 'Staff Regulations'), shows that he was recruited by the Commission and assigned in 1975, as an administrator in Grade A6, to the Office for Official Publications of the European Communities in Luxembourg,

where he was responsible for the preparation of the indexes to the *Official Journal of the European Communities*. He was seconded to the Statistical Office from 1981 to 1983 and thereafter, still as an administrator (and from 1989 onwards as a principal administrator), held posts involving language questions in the translation directorate; since 1 March 1991, he has been assigned to the secretariat of the Advisory Committee on Safety, Hygiene and Health Protection at Work in the Directorate-General for Employment, Industrial Relations and Social Affairs, still at the Commission in Luxembourg.

- 2 The Commission has established a staff rotation system for its press and information offices in the Member States of the Community. The provisions governing that system, which were adopted on 24 November 1976 (hereinafter the ‘provisions of 24 November 1976’), include, in particular, the following:

‘The rotation will in principle take place by means of a general redistribution involving, on each occasion, a proportion of the officials in post, so as to ensure continuity of the service.

...

In the course of that general redistribution, the officials shall be assigned together with their budgetary posts.’

The officials concerned are appointed by a committee (hereinafter the ‘rotation committee’) composed of four director-generals.

- 3 On 11 November 1990, the Commission administration published a notice, entitled ‘Notice of Post No 587’ (hereinafter ‘Notice No 587’), informing its staff that the Directorate-General for Information, Communication and Culture (DG X) was seeking, by the rotation system, an official in Grade A3/A4/A5 to take up the duties of head of the Lisbon Office. Candidates were required to possess, *inter alia*:

- a thorough knowledge of Portugal's political, economic and social problems;

- very sound experience of the various information sectors and the media in Portugal;

- an excellent knowledge of the Portuguese language.

- 4 The applicant submitted his candidature on 28 November 1990.

- 5 On 20 December 1990, on the recommendation of one of its members, the rotation committee concluded that neither of the two candidates possessed all the necessary qualifications. On 21 January 1991, the appointing authority decided to 'note the opinion of the rotation committee, take formal note of the internal candidatures and terminate the rotation procedure; assign a temporary post in Grade A3 to the Community's office in Portugal (Lisbon); and initiate the procedure adopted by the Commission for the external selection of temporary staff' (see document PERS(91) 24 produced by the Commission at the request of the Court of First Instance).

- 6 In February 1991, the Commission published an advertisement in the press in order to recruit a member of the temporary staff who would be highly qualified to perform, at Grade A3, the duties of head of the Commission's Lisbon Office. The qualifications required were similar to those set out in Notice No 587 but differed in certain respects. The advertisement specified that candidatures submitted by officials of the European Communities would not be considered.

- 7 On 21 February 1991, following the publication of that advertisement, the applicant sent a request to the appointing authority that it inform him of the result of his candidature, the date when the advisory committee had taken the decision to fill the vacant post at A3 level and whether the procedure for filling vacant posts, laid down in Article 29 of the Staff Regulations, had indeed been followed.
- 8 On 29 April 1991, the Director-General for Personnel and Administration replied to that request, summarizing the terms of the decisions of 21 January 1991 and pointing out that the opinion given by the rotation committee 'was based, *inter alia*, on the finding that you did not meet the conditions of knowledge of Portugal's political, economic and social problems, and experience in the fields of information and the media'.
- 9 On 22 July 1991, the applicant lodged a complaint under Article 90 of the Staff Regulations, in which he maintained that the decisions not to accept his candidature in response to Notice No 587 and to assign a temporary post in Grade A3 to the job of head of the Office in Portugal were vitiated by irregularity, illegality and procedural and substantive defects.
- 10 By decision of 9 January 1992, notified to the applicant by letter of 15 January 1992, the Commission rejected the complaint.

Procedure

- 11 It was in those circumstances that, by an application lodged at the Registry of the Court of First Instance on 30 April 1992, the applicant brought the present action.
- 12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry, but to ask the parties certain questions and to invite the Commission to produce certain documents.

13 The oral procedure took place on 18 March 1993. The Court heard oral argument from the representatives of the parties and their replies to the Court's questions.

Forms of order sought

14 The applicant claims that the Court should:

- annul the decision not to accept his candidature for post No 587 advertised on 11 November 1990;
- annul the decision of the administration to fill the vacant post by calling for applications from external candidates for a temporary post in Grade A3;
- order the defendant to bear the costs.

15 The defendant contends that the Court should:

- dismiss the application as unfounded;
- make an order as to costs in accordance with the law.

Pleas in law and arguments of the parties

16 In support of his claims, the applicant puts forward two pleas, one based on the infringement of Articles 4 and 29 of the Staff Regulations in so far as they require

that priority be given to filling vacant posts by means of promotion or transfer, and the other on the infringement of Article 45 of the Staff Regulations in so far as it requires a proper comparative examination of applications for promotion or transfer.

Arguments of the parties on the first plea

- 17 The applicant maintains that the procedure at issue, initiated by Notice No 587, was a promotion/transfer procedure and as such was subject to Articles 4 and 29 of the Staff Regulations. The appointing authority was, he maintains, obliged to observe the order of priority set by those provisions before calling for applications from external candidates. More specifically, he alleges, the decision to make such a call was taken in breach of the order of priority laid down by Article 29(1) of the Staff Regulations (see the judgment of the Court of First Instance in Case T-52/90 *Volger v Parliament* [1992] ECR II-121, at paragraph 19). In view of the major changes made, as regards the qualifications required, at the time of the call for applications from external candidates, that call, he argues, by no means constitutes a continuation of the procedure initiated by Notice No 587.
- 18 According to the defendant, the procedure at issue is a rotation procedure under which officials are assigned together with their posts and unlike a transfer procedure, therefore, it does not presuppose the existence of a vacant post within the meaning of Articles 4 and 29 of the Staff Regulations (see the judgments of the Court of Justice in Cases 161/80 and 162/80 *Carbognani and Coda Zabetta v Commission* [1981] ECR 543, at paragraph 19, and Case 791/79 *Demont v Commission* [1981] ECR 3105). In the alternative, the Commission adds that, even if there had been a vacant post, the appointing authority would not have been obliged to carry through a procedure initiated pursuant to Article 29 of the Staff Regulations in order to fill it (see, most recently, the judgment of the Court of First Instance in Case T-38/89 *Hochbaum v Commission* [1990] ECR II-43).
- 19 In reply, the applicant acknowledges that a mere rotation does not imply the existence of a vacant post and that the procedure laid down in Articles 4 and 29 of the Staff Regulations is not applicable to the re-assignment of an official with his post in so far as such a re-assignment does not give rise to a vacancy. He nevertheless maintains that the rotation system implies a general redistribution and that the rotation committee was set up in order to oversee that general redistribution and

not to recruit new officials and/or members of staff. In the present case, he argues, there was no general rotation exercise and Notice No 587 relates to the filling of a vacant post. It follows, he maintains, that the case-law cited by the defendant does not apply to the present case. Citing the judgment of the Court of Justice in Joined Cases 316/82 and 40/83 *Kohler v Court of Auditors* [1984] ECR 641, at paragraph 22, the applicant asserts that the Commission was obliged to give the reasons for its discontinuation of the procedure initiated pursuant to Article 29 of the Staff Regulations, but failed to do so.

Arguments of the parties on the second plea

- 20 The defendant objects that the second plea, based on the infringement of Article 45 of the Staff Regulations, is inadmissible on the ground that it was not put forward in the course of the pre-litigation procedure.
- 21 The applicant replies that, by referring, in his complaint, to the system of filling middle management posts, which is governed by the Commission decision of 19 July 1988, he did allege infringement of the procedure established by Article 45 of the Staff Regulations, even though the number of the article was not expressly cited. He points out, moreover, that in its decision rejecting his complaint, the Commission states that it has wide discretion in comparing the merits of candidates. However, he maintains, the decision of 19 July 1988 and the comparison of the merits of candidates for a vacant post both fall within the scope of Article 45 of the Staff Regulations.
- 22 On the substance, the applicant refers to the *Volger* judgment which held that the consideration of candidatures for internal transfer or promotion must comply with Article 45 of the Staff Regulations, which expressly provides for consideration of the comparative merits of the officials eligible for promotion and of the reports on them.

- 23 In the present case, the applicant alleges, not only were his views not heard prior to the rejection of his candidature and the decision to call for applications from external candidates, but his personal file, containing the reports to which the decision rejecting the complaint refers in order to justify the absence of an interview, was not even consulted.
- 24 Furthermore, the applicant maintains that the contested decision was adopted following an irregular procedure vitiated, in particular, by a manifest error of assessment. He refers, in this regard, to his staff report drawn up on 9 October 1992 for the period from 1 July 1989 to 30 June 1991, which, he claims, shows that he had become acquainted with the various information sectors and media in Portugal and therefore possessed the qualifications required by Vacancy Notice No 587.
- 25 The defendant asserted, in its defence, that the reference to the *Volger* judgment is irrelevant since the applicant's reports were in fact consulted and his merits properly assessed in the light of the conditions laid down for filling post No 587. The defendant likewise asserts that the appointing authority is not obliged as a matter of course to arrange interviews with candidates for a specific job. Since the rotation committee had available the reports on the applicant and his detailed application form, it was in a position to assess his merits.
- 26 Moreover, the defendant contests the relevance of the last staff report relied on by the applicant. On the one hand, it maintains, it relates to a reference period which was still current at the time of the procedure at issue and, on the other, it does not reveal either very sound experience of the Portuguese media or a thorough knowledge of that country's political, economic and social problems — two qualifications required in Notice No 587.
- 27 As regards the consultation of his personal file, the applicant pointed out, in his reply, and stressed at the hearing, that it is apparent from the documents produced by the defendant itself that the said consultation took place 11 months before the

publication of the post at issue, which, he claims, proves that the appointing authority could not properly have assessed his merits. In its rejoinder and at the hearing, the Commission confined itself to stating that the applicant's personal file was 'at the disposal' of the members of the rotation committee and that they had 'the opportunity' to consult it.

Findings of the Court

Admissibility

- 28 As to the objection of inadmissibility raised by the Commission with regard to the applicant's second plea (see paragraphs 20 and 21 above), the Court of First Instance notes that the relevant principles were last set out, on the one hand, in the judgment of the Court of First Instance in Case T-4/92 *Vardakas v Commission* [1993] ECR II-357, at paragraph 16, and, on the other, in the judgment of the Court of First Instance in Case T-1/91 *Della Pietra v Commission* [1992] ECR II-2145, at paragraph 24. The Court considers that the applicant, by alleging in his complaint that the appointing authority was not in possession of any objective basis for assessing whether he possessed the requisite qualifications, with the exception of the rotation committee's opinion, 'which did not verify those facts', and by his numerous references to Articles 4 and 29 of the Staff Regulations, implicitly accused the Commission of failing to undertake a proper examination of the comparative merits of the candidatures, as required by Article 45 of the Staff Regulations, even though he did not explicitly mention that article.
- 29 In those circumstances, the Court considers that the application does not go beyond the scope defined by the complaint and that the second plea is therefore admissible.
- 30 Having regard to the conclusions which the Court has reached on the substance of the dispute (see below), it is not necessary to examine in more detail the other questions which the admissibility of the action might raise.

Substance

31 The Court considers that it is necessary, first of all, to characterize the procedure at issue in the present case in legal terms and, in particular, to determine whether the provisions of Articles 4, 29 and 45 are applicable in the context of such a procedure.

The legal nature of the procedure at issue

32 Under Article 4 of the Staff Regulations, no appointment or promotion may be made for any purpose other than that of filling a 'vacant post', which must be notified to the staff. In the case of such a 'vacant post', Article 29(1) of the Staff Regulations provides that the appointing authority must first consider whether the post can be filled by promotion or transfer within the institution, then, whether to hold internal competitions and, finally, whether officials should be transferred from other institutions, before initiating the competition procedure. Under Article 45(1) of the Staff Regulations, promotion must be exclusively by selection, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.

33 The Court notes, and it is common ground, that Articles 4 and 29 of the Staff Regulations apply only in the case of a 'vacant post' within the meaning of those articles. Consequently, the re-assignment of an official in the absence of such a 'vacant post' does not constitute a promotion or internal transfer within the meaning of Articles 4 and 29. Similarly, Article 45 of the Staff Regulations applies only to promotions within the meaning of those articles. The Court must therefore determine whether the procedure at issue in the present case related to a 'vacant post' within the meaning of the Staff Regulations.

34 The existence of a vacant post, within the meaning of Articles 4 and 29 of the Staff Regulations, presupposes that a post is not filled amongst the total number of permanent posts (the 'budgetary posts' referred to in the provisions of 24 November 1976) in the list of posts appended, in accordance with Article 6 of the Staff Regulations, to the section of the budget relating to the institution in question and indicating, for each category and each service, the number of posts in each grade for each career bracket.

- 35 In the present case, it is apparent from Notice No 587 and from the documents and explanations provided by the Commission that the procedure at issue falls within the scope of the rotation system established by the provisions of 24 November 1976. In principle, those provisions envisage a general rotation, but the system must necessarily also apply to individual cases such as those arising from deaths, resignations or specific re-assignments in the interests of the service. In such individual cases, just as with a general rotation exercise, the rotation system is based on the principle that the official concerned is assigned together with his post.
- 36 The Commission contended, and the applicant did not dispute, that the former head of the Lisbon Press Office had been re-assigned to Tokyo together with his post and that, by publishing Notice No 587, it was therefore seeking an official who could be re-assigned to Lisbon with his post.
- 37 Since the purpose of the procedure initiated by Notice No 587 was to find an official who would be re-assigned together with his post and since that notice made it clear that it was being published 'under the rotation system established for the offices in the Community', the present case did not concern the filling of a vacant post within the meaning of Articles 4 and 29 of the Staff Regulations.
- 38 That conclusion is not affected by the applicant's argument that the existence of a vacant post can be inferred, in the present case, on the one hand, from the existence of a job, of a permanent nature, as head of the Lisbon Office and, on the other, from the subsequent engagement of a member of the temporary staff in Grade A3 for the job in question.
- 39 The question of the existence of a given 'job', as opposed to a 'post', falls within the competence of the institution with respect to its departmental organization, whereas the question of the existence of a vacant post depends upon whether there is, amongst the total number of permanent posts set out in the budget, a post that is not filled. In so far as the budget does not define the duties amongst which the

total number of posts is to be distributed, the existence at Lisbon of a vacant post within the meaning of the Staff Regulations cannot be inferred from the mere fact that the job of head of the Lisbon Office has remained temporarily unfilled following the re-assignment of the former head together with his post.

40 With regard to the subsequent recruitment of a member of the temporary staff, the information supplied to the Court by the Commission reveals that the said member of the temporary staff was appointed under Article 2(a) of the Conditions of Employment of Other Servants of the European Communities, that is to say, to fill a post which is included in the list of posts appended to the section of the budget relating to each institution and which the budgetary authorities have classified as temporary. Consequently, it is not possible to infer from the engagement of a member of the temporary staff under Article 2(a) of the Conditions of Employment of Other Servants — as distinct from an engagement under Article 2(b) of those Conditions, which concerns staff engaged to fill temporarily a permanent post — the prior existence of a permanent post.

41 Finally, the Court notes that, even though the terminology employed by the Commission in the present case, in particular the term 'post' used in Notice No 587 and in the form sent to the applicant, informing him that the appointing authority was 'unable to accept your candidature for the post to be filled', may have given rise to confusion, the use by the parties of terminology inappropriate to the circumstances cannot affect the Court's legal analysis.

The consequences arising in the present case from the legal nature of the procedure at issue

42 It follows from the foregoing analysis that Articles 4, 29 and 45 of the Staff Regulations are not applicable to the procedure at issue in the present case and, consequently, that the applicant's arguments, in so far as they are based on those provisions, cannot be upheld.

- 43 Nevertheless, the Court observes that the organization of the Community civil service is governed by certain general principles of law, including equality of treatment and protection of legitimate expectations. It is implicit in the system of legal protection of officials, as established by the Staff Regulations, that those principles cannot be disregarded in the context of a procedure not explicitly provided for by the Staff Regulations, such as the rotation procedure at issue. The Court considers that the application of those principles in such a procedure implies, on the one hand, that the administration is obliged to undertake a proper comparative examination of the merits of the candidates and, on the other, that once it has decided to fill a specific post by means of that procedure, it must carry it through properly, observing the terms of the notice which it has published, before calling for applications from external candidates under a different procedure.
- 44 Those considerations must be taken into account in examining the complaints giving rise to the applicant's two pleas in law.

The comparative examination of the merits of the candidates

- 45 It is apparent from the documents produced by the defendant that two candidatures, including that of the applicant, were received and examined by one of the members of the rotation committee, who concluded that neither candidate possessed all the qualifications required by Notice No 587. That conclusion was then confirmed by the committee in its opinion. The appointing authority's decision of 21 January 1991 was taken on the basis of that opinion.
- 46 The Court notes that the applicant's application form included, in addition to a summary of the jobs which he had held at the Commission (see paragraph 1 above), a description of his higher education and of the posts which he had held prior to his recruitment by the Commission. It is apparent from those details that the applicant completed his higher education in the field of economic and political science in Denmark, the United States of America, the United Kingdom, Switzerland and France and that, prior to his recruitment by the Commission, he gained experience in Denmark as a science teacher and in business management. Apart from a cross

placed inside a box for knowledge of languages, in the 'very good' column for Portuguese, the application form did not contain any reference to knowledge or experience in connection with Portugal and matters relating to that country. It is clear from those findings that that document did not contain any information from which the appointing authority might conclude that the applicant was able to meet the requirements laid down by Notice No 587.

47 In those circumstances, and having regard to the wide discretion which the appointing authority enjoys in this respect, the latter's decision not to accept the applicant's candidature, on the ground that he did not meet the conditions of knowledge of Portugal's political, economic and social problems and experience in the fields of information and the media, is consistent with the content of the application form.

48 In the context of a notice inviting candidatures for a specific job which is to be filled under a rotation system such as the one at issue, the Court considers that it is not for the administration, on its own initiative, to give a candidate who has not indicated in his application form that he fulfils the requirements set out in the notice in question, a second opportunity to prove that he does in fact meet those requirements. The rotation committee's conclusion, delivered after an examination of his application form, that the applicant did not possess all the requisite qualifications, cannot therefore be held to be irregular.

49 As regards the applicant's contention that his personal file was not consulted, the Court notes that the defendant's assertion in its response to the applicant's complaint and again in its defence, that his file was consulted at the time of examining

the applicant's candidature, seems to be invalidated by the entries made on the register of requests for that file, produced by the defendant itself.

50 Nevertheless, since the application form did not indicate that the candidate possessed any of the qualifications required by Notice No 587, consultation of his personal file was not essential.

51 The Court notes, moreover, that the personal file contains nothing which could, at that time, have made the administration aware of the applicant's possession of knowledge which was relevant in the light of the requirements of Notice No 587. A manifest error on the part of the appointing authority has, therefore, certainly not been established.

52 Finally, it must be added that the applicant's staff report of 9 October 1992, which was drawn up later than the facts under consideration, is not relevant to the assessment of the rotation committee's decision of 20 December 1990. In those circumstances, the fact that that report was not consulted cannot vitiate the regularity of the procedure at issue.

53 It follows that the applicant has not shown the existence of an irregularity in the comparative examination of the merits which had to be undertaken as part of the rotation procedure at issue.

Consideration of internal candidatures before calling for applications from external candidates

- 54 It is clear from the foregoing that, by publishing Notice No 587, the appointing authority did call for applications from internal candidates under a rotation procedure and that that procedure was properly terminated, after a valid comparative examination of the merits of the candidates, by the appointing authority's decision of 21 January 1991. Priority was therefore given to consideration of the internal candidatures over the external candidatures.
- 55 The decision to terminate a rotation procedure without filling the job in question by appointing an internal candidate falls within the discretion enjoyed by the appointing authority in this context. If it is settled case-law that the appointing authority is not obliged to carry through a recruitment procedure initiated pursuant to Article 29 of the Staff Regulations (see, in particular, *Hochbaum* at paragraph 15), that same principle must, *a fortiori*, apply by analogy in the present case.
- 56 With regard to the statement of reasons for the decision not to fill the job under the rotation procedure, it is clear from the note of 29 April 1991, which was sent to the applicant in response to his request for information of 21 February 1991, that the appointing authority took that decision on the basis of the rotation committee's opinion that 'none of the candidates possessed all the requisite qualifications'. The applicant was therefore aware, in due time, of the relevant reasons underlying that decision. The reasons given are, moreover, confirmed by all the documents relating to the taking of the said decision and produced by the defendant at the Court's request. The *Kohler* judgment, which concerned the situation of a successful candidate in a competition, is not, in any event, relevant in the present case.
- 57 Accordingly, neither the decision to terminate the rotation procedure without filling the job in question by appointing an internal candidate, nor the decision to call for applications from external candidates, was irregular.

58 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

59 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 88 of those Rules, in proceedings between the Communities and their servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;
2. Orders the parties to bear their own costs.

Bellamy

Kirschner

Briët

Delivered in open court in Luxembourg on 6 July 1993.

H. Jung

C. W. Bellamy

Registrar

President