

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
12 July 1990 *

In Case T-108/89,

Hans Scheuer, an official of the Commission of the European Communities, residing at Tervuren (Belgium), represented by Edmond Lebrun of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 83 boulevard Grande-Duchesse Charlotte,

applicant,

v

Commission of the European Communities, represented by Sean Van Raepenbusch, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of (a) the Commission's decision of 28 June 1988 to transfer Mr García Burgués to another department of Directorate-General XI, and, in the alternative, the refusal to replace him; (b) the refusal to replace Mrs Bastrup-Birk, who was transferred with effect from 1 October 1987 to another department of Directorate-General XI; (c) the refusal to provide the applicant with proper working conditions; (d) the decision rejecting the complaint submitted by the applicant on the matter,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

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

Registrar: H. Jung

* Language of the case: French.

having regard to the written procedure and further to the hearing on 3 May 1990, gives the following

Judgment

Facts

- 1 The applicant, Hans Scheuer, a German national, after being a senior official in the German administration, has been an official in Grade A 4 in the Commission of the European Communities since 1960. Since 1977 he has been assigned to Directorate-General XI (Environment, Consumer Protection and Nuclear Safety) in which in 1985 he was appointed Head of the Special Department of Liaison with Other Policies and Information.
- 2 By decision of the appointing authority of 16 June 1987 the applicant was assigned to Division XI 03 as Head of Education in the field of Environment and Relations with the Economic and Social Committee. He was also made responsible for public access to information in relation to the environment. By a memorandum dated 17 July 1987 Mr Brinkhorst, the Director-General of Directorate-General XI, informed him that his appointment did not include the duties of a Deputy Head of Division.
- 3 At first he was assisted by two officials in category A, Mrs Bastrup-Birk and Mr García Burgués, and a secretary.
- 4 As part of an internal reorganization of Directorate-General XI Mrs Bastrup-Birk was assigned with effect from 1 October 1987 to Division XI B 3, Agriculture, Nature Conservation, and Relations with Other Policies.

- 5 Following that measure Mr Scheuer sent Mr Brinkhorst a memorandum on 24 September 1987 in which he requested that Mrs Bastrup-Birk's departure should be postponed until she was effectively replaced. There was no reply to that memorandum and Mrs Brinkhorst was posted away without being replaced.
- 6 By decision of the appointing authority of 28 June 1988, Mr García Burgués was assigned with effect from 1 August 1988 to the Special Department of International Affairs in Directorate XI. Following that second measure only a secretary remained with the applicant.
- 7 On 4 October 1988 the applicant lodged a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities. The complaint, to which there was no reply, sought the annulment of:
- (a) The decision to transfer Mr García Burgués of 28 June 1988 and alternatively the failure to replace him by a qualified official of the same grade;
 - (b) The failure to replace Mrs Bastrup-Birk, transferred with effect from 1 October 1987 to Division XI B 3, by a qualified official of the same grade.
- 8 In reply to a request for information sent by the Directorate-General for Personnel following Mr Scheuer's complaint, Mr Jankowsky, an assistant to the Director-General in Directorate-General XI, stated in a memorandum of 21 December 1988, which was marked for the attention of Mr Pincherle, Head of the Staff Regulations Division, that the applicant was responsible for two matters. Mr Scheuer fulfilled his duties with regard to relations with the Economic and Social Committee to the complete satisfaction of Directorate-General XI. He added that the other matter for which Mr Scheuer was responsible, namely education in the field of environment, had been transferred to Directorate-General V. In the same memorandum he stated that:

'Mr García Burgués's internal transfer was necessary in view of the increasing importance of international affairs in Directorate-General XI. Work connected with international conventions, for instance, has expanded enormously and can no longer be dealt with by a staff of two As and a national expert . . . it was therefore necessary to strengthen the unit with an official in Grade A, preferably Spanish or Portuguese.

The internal transfer of Mrs Bastrup-Birk was essential in order to satisfy the political commitment that had been made to create a legal instrument for the purpose of the general protection of biotopes. Mrs Bastrup-Birk had to draw up a draft directive for that purpose, which she did, and the Commission's proposal was adopted. Mrs Bastrup-Birk will continue to be responsible for the follow-up and for the general issue of protected areas.'

- 9 Apart from the duties referred to in that memorandum the applicant was still responsible for education in the field of the environment and remained in charge of coordinating the work of Directorate-General XI and Directorate-General V on that subject. Another matter, public access to information on environmental matters, which was originally to be transferred to the Legal Aspects Unit of Directorate-General XI, ultimately remained, following a decision to that effect by the Director-General, the responsibility of the applicant, who had vigorously protested against the transfer.
- 10 In view of the applicant's persistent discontent the Director-General of Directorate-General XI on various occasions urged him, in view of his age, to retire and offered his assistance in finding a university post.

Procedure

- 11 In those circumstances Mr Scheuer, by an application lodged at the Court Registry on 3 May 1989, brought the present action against the Commission under Article 91 of the Staff Regulations.
- 12 The written procedure took place entirely before the Court. It followed the normal course.

- 13 Pursuant to Article 14 of the Council's decision of 24 October 1988 establishing a Court of First Instance of the European Communities the Court (Third Chamber), by order of 15 November 1989, referred the case to the Court of First Instance.
- 14 Upon hearing the report of the Judge-Rapporteur the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry.
- 15 The hearing took place on 3 May 1990. The representatives of the parties presented oral argument and answered questions put by the Court of First Instance.
- 16 The applicant claims that the Court of First Instance should:
- (i) annul:
 - (a) the decision adopted on 28 June 1988 by the Director- General for Personnel and Administration to transfer Mr García Burgués to Department XI/2 with effect from 1 August 1988 and, in the alternative, the refusal to replace him with an official in the same grade;
 - (b) the refusal to replace Mrs Bastrup-Birk, who was transferred with effect from 1 October 1987 to Department XI B 3, with an official in the same grade;
 - (c) the refusal to provide the applicant with proper working conditions which are in conformity with the defendant's staff policy;
 - (d) the decision rejecting the complaint submitted by the applicant on 4 October 1988;
 - (ii) order the defendant to pay the costs.

The defendant contends that the Court of First Instance should:

- (i) dismiss the application as inadmissible and in any event unfounded;
- (ii) make an appropriate order as to costs.

Admissibility

- 17 The defendant puts forward two submissions in support of its claim that the application is inadmissible.

First submission: no legally protected interest

- 18 The defendant contends that the Court has held that ‘the purpose of the appeals provided for under Articles 90 and 91 of the Staff Regulations is to arrange for the review by the Court of acts and omissions by the “appointing authority” liable to affect the position under the Staff Regulations of officials and servants of the Community’ (judgment in Case 129/75 *Hirschberg v Commission* [1976] ECR 1259, paragraph 17). However, the grievances expressed in the complaint and in this application do not concern the applicant’s position under the Staff Regulations, ‘but exclusively internal relationships within the service and, more particularly, questions of administrative and working organization’ (*ibid.*, paragraph 18).
- 19 The defendant infers from that that the measures which are the subject of the present action are not acts adversely affecting the applicant and therefore capable of being annulled pursuant to Article 91 of the Staff Regulations: they do not affect the applicant’s rights, in particular those derived from Articles 5 and 7 of the Staff Regulations, because they do not require him to perform duties which do not correspond to his post and grade. The defendant considers that the contested measures appertain to the organization of its departments, a matter in respect of which it has a wide discretion.
- 20 The applicant replies that for a head of section to have no staff is necessarily prejudicial to his post, in view of the fact that prejudicing the means for performing the duties entrusted to him necessarily prejudices those duties. The

nature of a post is not constituted solely by the responsibilities attaching to it but also by the means, *inter alia* staff, permitting their fulfilment.

- 21 He points out that the second submission in the application is of misuse of powers. It is not possible to conclude that an application is inadmissible simply because the contested measures fall within the administration's very wide discretionary power to organize its departments, since such a power is still subject to review as to its lawfulness.
- 22 In conclusion the applicant maintains that the first submission put forward by the Commission in support of its objection of inadmissibility is unfounded, or alternatively that consideration of it cannot be separated from the substance of the case.
- 23 It is to be borne in mind that according to Article 90(2) of the Staff Regulations 'any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations'. In order to determine whether or not the measures which are the subject of the application adversely affect the applicant it is necessary to consider, as the applicant claims, whether the Commission's failure to replace the officials assigned to other posts constitutes in the present case a failure on the part of the institution to fulfil its duty to procure the applicant adequate working conditions in which to perform the duties entrusted to him, which is an obligation imposed by the Staff Regulations and the principles on which they are based.
- 24 The Court of Justice has held that although the higher authority alone is responsible for the organization of departments, which it must be able to determine and modify according to the exigencies of the service, withdrawing from an official one or more of the departments for which he was previously responsible may in certain circumstances adversely affect his rights under the Staff Regulations and thus constitute a measure adversely affecting him (see the judgments in Case 16/67 *Labeyrie v Commission* [1968] ECR 293, at p. 302 and Case 17/68 *Reinarz v Commission* [1969] ECR 61, at p. 69), which could mean in the present case that the applicant has a legally protected interest.

25 It follows that consideration of the merits of the Commission's first submission in support of its objection of inadmissibility cannot be dissociated from consideration of the grounds of the application and that the answer to be given must be considered later together with the questions of substance at issue in the proceedings.

Second submission: no request within the meaning of Article 90(1) of the Staff Regulations

26 The defendant contends that the application is inadmissible in so far as it seeks annulment of the failure to replace the officials in question because it was not preceded by a request under Article 90(1) of the Staff Regulations, following the implied or express rejection of which he ought to have lodged an administrative complaint within a period of three months.

27 It argues that an application for the 'annulment of a failure' amounts in civil service staff cases to an action for the annulment of the implied or express rejection of a request, in the present case the request for the replacement of the two officials transferred.

28 The defendant contends that the only 'request' made with regard to the failure to replace Mrs Bastrup-Birk is contained in the memorandum of 24 September 1987 from the applicant to Mr Brinkhorst, Director-General of Directorate-General XI. Even if that may be regarded as a request within the meaning of Article 90(1), the application is inadmissible in that regard because it was not preceded by a complaint made within three months of the implied rejection of the request, which is deemed to have occurred on 24 January 1988, that is to say, before 24 April 1988, pursuant to Article 91(2) of the Staff Regulations.

29 As regards the failure to replace Mr García Burgués, the defendant contends that no request under Article 90(1) was ever made to the appointing authority in that respect unless the complaint of 4 October 1988 may be regarded as a request, in which case the application must also be declared inadmissible because it was not preceded by a complaint, within the meaning of Article 90(2) of the Staff Regulations, against the implied rejection of the request.

30 The applicant claims that Articles 5 and 7 of the Staff Regulations, and also the principles and duties to which he refers in his first submission in support of his claims in respect of the substance, require that the two officials be replaced. In that case Article 90(2) of the Staff Regulations applies. He states that a complaint against the failure to replace the officials was admissible without its being necessary to first make a request under Article 90(1) of the Staff Regulations. He considers that the Commission's second submission in support of its objection of inadmissibility is unfounded, or alternatively that it should be considered together with the substance.

31 In that respect it is to be observed that, just as with the previous submission, the answer to the question whether it was necessary in this case first to make a request under Article 90(1) of the Staff Regulations depends on whether there was a measure adversely affecting the applicant as a result of the administration's failure to adopt a measure required by the Staff Regulations. In that respect it is necessary to consider whether the fact that the Commission did not replace the officials transferred amounted to a breach of its duty to procure the applicant adequate working conditions for fulfilment of the tasks entrusted to him, which is an obligation, as already stated, imposed by the Staff Regulations and the principles on which they are based. As the defendant conceded at the hearing, consideration of that question is inseparable from the questions of substance raised by the present proceedings.

Substance

32 In support of his application the applicant makes two submissions: the first is 'infringement of the Staff Regulations and in particular Articles 5 and 7 thereof, disregard of the duty to assist officials and to have regard to their interests, disregard of principles of law, such as the principles of equal treatment, sound administration and administrative justice' and the second is 'disregard of the principle that power may be exercised only in the interests of the service, and misuse of powers'.

First submission

33 As regards the first submission the applicant maintains that the fact that he has no staff, apart from a secretary, is incompatible with the abovementioned legal

provisions and principles of law. He is entrusted with duties corresponding to his grade and post as Head of Section but he does not have the necessary staff to perform them. He considers that the legal rule that post and grade should correspond implies that the duties entrusted to an official should, as a whole, accord with the post corresponding to the grade which he has and that that rule also implies that the means and staff normally required for performing the duties attaching to the post corresponding to his grade should be made available to the official.

- 34 The defendant contends that the transfer with their post of the officials in question within Directorate-General XI, without the announcement of a vacancy, must be regarded as reassignments and not strictly as transfers. It states that the measures were adopted as part of a reorganization of its departments, for the purposes of which it has a wide discretion.
- 35 The applicant states that the contested measures — the description of which he does not challenge — were not part of a general reorganization of Directorate-General XI. He maintains that the arguments put forward by the Commission cannot justify a breach of the principles to which he has referred.
- 36 In view of that dispute it is necessary first to consider the circumstances in which the decision to reassign Mr García Burgués within Directorate-General XI was adopted.
- 37 As the Commission has rightly pointed out, the Court has consistently held that the Community institutions have a broad discretion to organize their departments to suit the tasks entrusted to them and to assign staff available to them in the light of such tasks, on condition, however, that the staff are assigned in the interests of the service and in conformity with the principle of assignment to an equivalent post (see the judgments of the Court of Justice in Case 19/87 *Hecq v Commission* [1988] ECR 1697, Case 69/83 *Lux v Court of Auditors* [1984] ECR 2447, Case

176/82 *Nebe v Commission* [1983] ECR 2471, Case 60/80 *Kindermann v Commission* [1981] ECR 1329 and Case 61/70 *Vistosi v Commission* [1971] ECR 535). Such discretion is indispensable in order to achieve effective organization of work and to adapt that organization to varying needs (see the judgment of the Court of 12 July 1979 in Case 124/78 *List v Commission* [1979] ECR 2499).

- 38 It is clear from consideration of the documents that in the present case the decision to reassign Mr García Burgués was adopted under the powers which the institution has and as part of a reorganization of the departments of Directorate-General XI which was intended to facilitate the performance of the tasks assigned to it. The applicant's contention to the contrary, which is based on no specific argument, is not capable of effecting that assessment.
- 39 In the second place it is necessary to enquire whether the Commission's failure to replace Mrs Bastrup-Birk and Mr García Burgués — in effect the withdrawal from the applicant of all staff apart from a secretary — constitutes an infringement of the rules and legal principles cited by the applicant.
- 40 In that respect it is first to be observed that it is impossible to find in the Staff Regulations anything to support the argument that the grade to which an official is appointed depends upon the number and status of his subordinates (see the judgment of the Court in Case 14/79 *Loebisch v Council* [1979] ECR 3679, paragraph 7).
- 41 Secondly, it is necessary to bear in mind that the conditions of service career referred to in Article 5 of the Staff Regulations cannot be considered outside the framework determined by the organization of the departments. Although that provision requires the administration to give officials equal treatment, in the various categories, it does not restrict the freedom of the institutions to organize the various administrative units taking account of a whole range of factors, such as the nature and scope of the tasks which are assigned to them and the budgetary possibilities (see the judgment of the Court in Case 178/80 *Bellardi-Ricci v Commission* [1981] ECR 3187, paragraph 19).

- 42 For a measure connected with the reorganization of a department to affect adversely the right of an official under Articles 5 and 7 of the Staff Regulations to be allocated duties compatible as a whole with the corresponding post which he has, it is not sufficient that it should bring about a change or even a reduction in responsibilities, but it is necessary that, taken together, his remaining responsibilities should fall clearly short of those corresponding to his grade and post, taking account of their character, their importance and their scope (see the judgment of the Court in Case 66/75 *Macevicius v Parliament* [1976] ECR 593, paragraph 16).
- 43 In the present case it is common ground between the parties that after his colleagues were reassigned the applicant continued to carry out duties corresponding to his grade and post. The fact that the absence of colleagues does not allow the applicant 'to take fresh initiatives' or 'to stand a little back from the mundane', as he alleges, cannot be regarded as a circumstance capable of altering the nature and category of the duties which are allocated to him and which he carries out, moreover, as the two parties agree, entirely satisfactorily. The applicant claims that his duties as Head of Section include the coordination of work which falls under a section of activity and that that task implies in itself the presence of colleagues. The applicant's argument is unfounded. The coordination of work does not necessarily require the presence of personal colleagues. In fact in the present case, as the parties agreed during the proceedings, the applicant is alone responsible for coordinating the work undertaken by Directorate-General V and Directorate-General XI in the sphere of education and the environment and for liaison with the Economic and Social Committee.
- 44 It follows from the above that the first submission cannot be accepted.

Second submission

- 45 The second submission is that there was a breach of the principle that the administration's discretion may be exercised only in the interests of the service, and misuse of powers. The applicant considers that in the present case the defendant used its

power to organize its departments not in the interests of the service but with the object of inducing the applicant to terminate his service.

- 46 The applicant draws attention to the context in which the facts have occurred and points out that he has passed from being Head of a Special Department to Head of Section first with two colleagues, then with one, and finally has been deprived of all colleagues. The applicant states that he had suffered repeated references to his age and proposals made to him to help him find a university post if he left. In the applicant's view all those factors concur in establishing the existence of pressure intended to induce him to leave the defendant's service, which shows that all the contested measures are vitiated by misuse of powers.
- 47 The defendant reiterates its contention that the internal reorganization of Directorate-General XI was justified in the interests of the service. The fact that after the measures were taken the applicant continued to carry out duties corresponding to his grade and post should suffice to disprove the allegation that the said measures amount to a disguised downgrading.
- 48 In the first place, as regards the reference to the interests of the service it is for the official to adduce evidence that the decision adopted with regard to him is contrary to the interests of the service (see the judgment of the Court in Case 60/80 *Kindermann v Commission* [1981] ECR 1329, paragraph 17).
- 49 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 in Case 817/79 *Buyl v Commission* [1982] ECR 245, paragraph 28).
- 50 In addition, the Court has consistently 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 abovementioned case of *Lux v Court of Auditors*).

- 51 In that respect it suffices to observe that the applicant has not adduced any item of proof leading to the conclusion that the measure reassigning Mr García Burgués was contrary to the interests of the service or that it amounted to a misuse of the wide discretion which the Community institutions have for the purpose of organizing their departments.
- 52 As regards the refusal to replace the officials reassigned there is also nothing in the documents contained in the case file which indicates that it was contrary to the interests of the service, the evidence adduced by the applicant being insufficient to prove that his claim is well founded. Furthermore, the distribution of staff within a directorate-general, especially where the available staff is not sufficient to cover its needs, must fall within the exclusive competence of the superior who may take account of various priorities, without an official, however high his grade, being able to challenge the expediency of his decisions.
- 53 The evidence to which the applicant refers to support his allegation of misuse of powers (reference to his age and the possibility of finding him a university post) are not sufficient in law to establish the existence of such a misuse.
- 54 It follows that the second submission must be rejected.
- 55 In those circumstances the applicant, who has not shown that his duties or grade necessarily require the presence of colleagues or that the measures reassigning his former colleagues were vitiated by a breach of the rules, has also failed to show that the contested measures adversely affect him.
- 56 Accordingly, the application must be dismissed as inadmissible.

Costs

- 57 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* to the Court of First Instance pursuant to the third paragraph of Article 11 of the Council Decision of 24 October 1988, 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) Dismisses the application;**
- (2) Orders the parties to bear their own costs.**

Edward

Schintgen

García-Valdecasas

Delivered in open court in Luxembourg on 12 July 1990.

H. Jung
Registrar

D. A. O. Edward
President of the Fourth Chamber