

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
30 March 1993 *

In Case T-30/92,

Ulrich Klinke, an official of the Court of Justice of the European Communities, residing in Luxembourg, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

applicant,

v

Court of Justice of the European Communities, represented by Timothy Millett, Principal Administrator, acting as Agent, assisted by Aloyse May, of the Luxembourg Bar, with an address for service at Mr Millett's office at the Court of Justice, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the President of the Court of Justice of 28 June 1991 appointing the applicant as an administrator in so far as it classifies him in Grade A 7 and not in Grade A 6,

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

composed of: D. P. M. Barrington, President, K. Lenaerts and A. Kalogeropoulos, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 15 December 1992,

* Language of the case: French.

gives the following

Judgment

Facts

- 1 The applicant, Ulrich Klinke, entered the service of the Court of Justice as a lawyer-linguist in the German Translation Division on 1 April 1982. Initially recruited as a member of the temporary staff, he was appointed a probationary official on 1 January 1983. On 1 October 1983 he was established and classified in Grade L/A 6, Step 2, with seniority in step backdated to 1 April 1982.
- 2 Following the secondment of an official from the Information Service, the applicant was made available to that service as from 1 June 1985.
- 3 Since the post reserved for the official on secondment had become vacant, the applicant was appointed as an administrator in the Information Service on 1 July 1991, and classified in Grade A 7, Step 3, as he had passed an internal competition intended to fill the post which he had occupied during the six years in which he had been made available to that service.
- 4 On 9 July 1991 the applicant applied to the head of the Personnel Division asking him to request the appointing authority to go back on its decision to classify him in Grade A 7 and classify him in Grade A 6.
- 5 On 12 July 1991 the appointing authority decided to pay the applicant a differential allowance equal to the difference between the net remuneration relating to his former classification in Grade L/A 6, Step 6, and that relating to his new

classification in Grade A 7, Step 3. That allowance takes account of any automatic advancement in step and the adjustment in remuneration.

- 6 On 30 September 1991 the applicant lodged a complaint against the appointing authority's decision appointing him as an administrator in so far as it classified him in Grade A 7, and requested that he be reclassified in Grade A 6.

- 7 By letter of 21 January 1992, notified on 27 January 1992, the applicant was informed of the rejection of his complaint in the following terms:

'At its meeting on 20 January 1992, the Administrative Committee considered the complaint that you lodged on 30 September 1991 against the decision of 28 June 1991 appointing you as an administrator in the Information Service in Grade A 7 as from 1 July 1991.

I regret to inform you that the Administrative Committee has decided to reject your complaint on the ground that the classification which you dispute was adopted at the administrative meeting on 11 July 1979 in accordance with the settled practice of the Court as decided in the context of the case-law.

According to the case-law, an official may be appointed to the higher grade of the basic and intermediate career brackets only exceptionally and, in any event, this is in the discretion of the administration.

It was in the exercise of that discretion that, by its aforementioned decision of 11 July 1979 taken in the interest of complying with the principle of equal treatment in recruiting officials, the Court took the decision that it would, in principle, recruit officials from the Language Service in Grade A 7.

Having regard to the circumstances of this case, the Administrative Committee has concluded that, by applying the decision laying down that principle, the administration did not wrongly assess the facts and did not treat you unequally by comparison with other officials called upon to carry out similar duties.

That conclusion is not altered by the fact that you had been made available to the Information Service for about six years. First, you are not entitled to rely on the alleged unlawful nature of that practice, to which you consented and which corresponded with your own aspirations. Secondly, the experience which you acquired in performing those duties was taken into account, to the extent permitted by Article 32 of the Staff Regulations, in classifying you in step in your new grade.

...'

Procedure and forms of order sought

- 8 It was in those circumstances that, by application lodged at the Court Registry on 22 April 1992, the applicant brought these proceedings. The written procedure followed its normal course.
- 9 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.
- 10 The oral procedure took place on 15 December 1992. The parties presented oral argument and answered questions put by the Court.

11 The applicant claims that the Court should:

- declare the application admissible and well founded;
- as a result, annul the decision of the President of the Court of Justice, acting as the appointing authority, by which the applicant was appointed as an administrator in the Information Service in Grade A 7, Step 3, and, in so far as is necessary, the Administrative Committee's decision of 21 January 1992 confirming the appointment of the applicant in Grade A 7, Step 3;
- declare that the applicant was entitled to be appointed in Grade A 6;
- order the Court of Justice to pay the whole of the costs.

12 The defendant claims that the Court should:

- dismiss the application as unfounded;
- order the applicant to pay his own costs.

Pleas and arguments of the parties

13 The applicant relies upon four pleas in support of his action. The first plea alleges that the statement of reasons of the decision rejecting his complaint was erroneous. The second alleges that a manifest error was made in assessing the facts. The third alleges infringement of the prohibition of discrimination. The fourth alleges infringement of Article 24 of the Staff Regulations of officials of the European Communities ('the Staff Regulations').

The first plea alleging that the statement of reasons of the decision rejecting the complaint was erroneous

Arguments of the parties

14 The applicant considers that the interpretation given by the Administrative Committee of the Court of Justice to the latter's decision of 11 July 1979, described as a 'decision that [the Court] would, in principle, recruit officials from the Language Service in Grade A 7' is without foundation, with the result that the statement of reasons of the decision rejecting the complaint is erroneous.

15 In the applicant's view, a 'decision ..., in principle, to recruit officials from the Language Service in Grade A 7' means that L/A 6 officials will move automatically to Grade A 7. He maintains that that interpretation is irreconcilable with both the spirit and letter of the decision of 11 July 1979, which does not debar officials moving from Grade L/A 6 to Grade A 6, but merely provides that a career cannot automatically take that course.

16 The defendant considers for its part that the decision rejecting the complaint accurately takes account of the purport of the decision of 11 July 1979. In particular, the expression 'decision ... in principle' clearly signifies that the Court of Justice laid down a general rule to which exceptions remain possible in appropriate cases. That interpretation is, moreover, confirmed by the fifth paragraph of the decision rejecting the complaint, from which it is clear that the appointing authority took account of the specific situation of the applicant, but considered that the circumstances of the case did not justify making an exception to the general rule.

Assessment of the Court

17 It is common ground as between the parties that, at its administrative meeting on 11 July 1979, the Court of Justice took the following decision:

'Officials in the L/A category who are already in Grade L/A 6 in their category cannot claim to be automatically appointed in Grade A 6. Article 31 of the Staff

Regulations provides that officials are to be appointed to the starting grade in their career bracket. Moreover, having regard to the limited number of posts available in the higher grade of the career bracket A 7/A 6, if L/A 6 officials were transposed to A 6, this would cause Grade A 7 officials to be blocked in that grade, thereby considerably reducing their chances of promotion to the higher grade in the career bracket'.

18 The Court considers that the phrase 'decision ..., in principle, to recruit officials from the Language Service in Grade A 7' cannot be interpreted as meaning that it implies that officials in Grade L/A 6 will automatically move to Grade A 7.

19 As the defendant has argued, the use of the words 'decision ... in principle' expresses the idea of a general rule to which exceptions remain possible. On the one hand, such an interpretation of those words is consonant with their ordinary meaning and, on the other, only that interpretation is compatible with the structure of the decision rejecting the complaint, since the fifth and sixth paragraphs of that decision would be redundant if the defendant had used the words 'decision ... in principle' in order to exclude any exception to the general rule.

20 That interpretation of the decision of 11 July 1979 is, moreover, in accordance with the consistent case-law of the Court of Justice and the Court of First Instance to the effect that only exceptionally may recruitment be made to the higher grade in the basic career bracket under Article 31(2) of the Staff Regulations (see, most recently, Case T-18/90 *Jongen v Commission* [1991] ECR II-187, paragraph 12).

21 Accordingly the first plea must be dismissed.

The second plea alleging that a manifest error was made in assessing the facts

Arguments of the parties

- 22 The applicant argues that, having regard to his long experience in the Information Service and his competence, which was highly appreciated by his immediate superior, the appointing authority could not have considered that his personal situation justified recruiting him in Grade A 7 without committing a manifest error of assessment.
- 23 The defendant replies that it took account of the six years' service in question by appointing the applicant to the third step in Grade A 7 and by granting him a differential allowance to make up the difference between his former salary and his new one. It had thereby exercised its discretion reasonably. It points out in that respect that, as the Court of Justice has consistently held, 'the appointing authority has a wide discretion, within the limits laid down by Article 31 and the second paragraph of Article 32 of the Staff Regulations or by the internal decisions implementing those articles, in assessing the previous experience of a person recruited as an official, both as regards the nature and length of that experience and as regards the extent to which it meets the requirements of the post to be filled' (Joined Cases 314 and 315/86 *De Szy-Tarisse v Commission* [1988] ECR 6013).

Assessment of the Court

- 24 The Court finds that the arguments put forward by the applicant assume that the appointing authority's assessment of his qualifications is relevant with a view to whether or not Article 31(2) of the Staff Regulations applies.
- 25 In that respect the Court points out that it appears from the case-law of the Court of Justice that it is not permissible to recruit staff to the higher grade of a career bracket save in exceptional cases where the application of Article 31(2) is justified by the specific needs of the service, which call for the recruitment of a specially qualified official (judgment in Case 146/84 *De Santis v Court of Auditors* [1985] ECR 1723, paragraph 9).

- 26 Consequently, unlike the second paragraph of Article 32 of the Staff Regulations, which allows the appointing authority to grant a successful candidate in a competition additional seniority in step to take account of his training and specific experience, the purpose of Article 31(2) is to enable the appointing authority to have regard to the specific needs of a particular service by offering attractive conditions in order to attract specially qualified candidates.
- 27 However, the Court notes that the applicant has not adduced any evidence, in particular from the notice of competition, of such a kind as to show that in this case the needs of the Information Service called for the recruitment of a specially qualified official.
- 28 Consequently, the applicant's qualifications were irrelevant for the purposes of determining his classification in grade at the time of his appointment and, although the applicant was eminently qualified to occupy the post to which he was appointed at A 7 and which he occupies to the general satisfaction, that does not mean for all that that exceptional qualifications were required in order to occupy that post.
- 29 The second plea must therefore be dismissed.

The third plea alleging infringement of the prohibition of discrimination

Arguments of the parties

- 30 The applicant argues that he has been discriminated against as compared with officials in Grade A 7. Whereas internal competition No CJ 115/89 was designed to appoint officials of Grades A 6 and A 7, the defendant, by deciding *a priori* that officials of Grade L/A 6 could not accede to Grade A 6, indicated that only Grade A 6 officials could hope to accede to Grade A 6 through that competition. However, since he had actually performed the duties of an administrator for more than six years and had, in fact, been an 'acting administrator' during that period, the applicant considers that he deserves the same treatment as an official of Grade A 7.

31 The defendant argues that the purpose of the competition was not to appoint administrators 'in Grade A 6 and A 7', but was only to 'recruit an administrator (career bracket A 7/A 6)'.

32 It points out, first, that it duly took account of the six years' work carried out by the applicant in the Information Service by granting him the maximum seniority in step.

33 Next, the defendant adds that the applicant wrongly attempts to compare his position with that of officials in Grade A 7. Since, at the material time, he was an official in Grade L/A 6, the applicant can only compare himself with other officials in the same grade. Since he admitted that the defendant treated him in the same way as 'any other official from the language service', he cannot claim to have been discriminated against. Citing five cases of L/A officials who had been appointed to Grade A 7 at the Court of Justice, it submits that the prohibition of discrimination, as embodied in particular in Article 5(3) of the Staff Regulations, obliged it to treat the applicant in the same manner as those other L/A officials.

Assessment of the Court

34 The Court considers that the applicant is wrong to claim that the Court of Justice had decided *a priori* that only officials in Grade A 7 could accede, through competition No CJ 115/89, to Grade A 6. The decision of 11 July 1979 provides, in fact, that officials in Grade L/A 6 cannot claim to be 'automatically appointed in Grade A 6', which leaves open the possibility of appointing them at that grade.

35 In any event, the Court considers that the discrimination of which the applicant claims to have been the victim must be considered in the light of the rationale of the provision in respect of whose application he claims to have suffered discrimination, as it has been defined in *De Santis v Court of Auditors*.

36 In this respect, it should be observed that the relevant factor for comparison is not the category or service from which the officials appointed come nor their qualifications, but rather the special requirements of the various posts to be filled.

37 However, the Court was informed at the hearing that since the decision of 11 July 1979 was notified to the members of staff concerned, no official from the L/A category moving to category A has been recruited at a grade other than Grade A 7. In those circumstances, the applicant cannot claim that posts comparable to his have been filled at Grade A 6.

38 Accordingly the third plea must be dismissed.

The fourth plea alleging infringement of Article 24 of the Staff Regulations

Arguments of the parties

39 The applicant argues that his being made available to the Information Service had no legal basis, since only secondment and temporary occupation of a post are provided for by the Staff Regulations. Having jeopardized his career by choosing an unlawful device, the appointing authority should, pursuant to its duty to afford assistance and have regard for the interests of officials enshrined in Article 24 of the Staff Regulations, remedy its wrongful conduct by classifying him in Grade A 6.

40 The defendant considers that, since the time-limits laid down by the Staff Regulations have expired, the applicant cannot now rely on the alleged unlawfulness of his having been made available to the Information Service.

Assessment of the Court

41 The Court of First Instance notes that the applicant admits that his having been made available to the Information Service lasted for about six years until it came to

an end when he was appointed as an administrator on 1 July 1991. He has, moreover, attached to his application a copy of a memorandum dated 5 June 1985, by which the Registrar of the Court of Justice informed him of the decision of the Court of Justice taken at the administrative meeting on 22 May 1985 authorizing him to be made available to the Information Service. That memorandum specified that he was to carry out the duties of an administrator in that service on a temporary basis whilst conserving his original grade.

42 In those circumstances, it should be held that the time-limit laid down by Article 90(2) of the Staff Regulations for contesting the lawfulness of his having been made available to the Information Service had long since expired.

43 Accordingly the fourth plea is inadmissible.

Costs

44 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 88 of those Rules provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

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

Barrington

Lenaerts

Kalogeropoulos

Delivered in open court in Luxembourg on 30 March 1993.

H. Jung

D. P. M. Barrington

Registrar

President