

cannot relieve the Court of its obligation to check whether the time-limits laid down in the Staff Regulations have been complied with.

2. Since the express rejection of a request after an implied decision rejecting that request is merely a confirmatory measure, it cannot, in the absence of any provision in the Staff Regulations to that

effect, enable an official who has not challenged the implied decision rejecting his request within the time-limits to pursue the pre-litigation procedure by giving him a fresh period for lodging a complaint, without endangering legal certainty, which requires that the means of redress of officials and other servants should be governed by precise rules strictly interpreted.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

10 April 1992 *

In Case T-15/91,

Josée Bollendorff, an official of the European Parliament, residing in Bertrange (Luxembourg), represented by Laurent Mosar, of the Luxembourg Bar, with an address for service in Luxembourg at his Chambers, 8 Rue Notre-Dame,

applicant,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, and Manfred Peter and Jannis Pantis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for the annulment of the implied decision of the Parliament rejecting the applicant's complaint of 10 August 1990, for an order that the applicant be regraded or, in the alternative, for an internal competition procedure

* Language of the case: French.

to be initiated, and for an order that the Parliament make good the material and non-material damage allegedly sustained by the applicant,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

composed of: K. Lenaerts, President of the Chamber, H. Kirschner and D. Barrington, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 9 January 1992,

gives the following

Judgment

Facts and procedure

- 1 The applicant entered the service of the European Parliament on 24 October 1977 as a member of the auxiliary staff assigned to the Directorate-General for Information and Public Relations. After being successful in Internal Competition No C/246, she was established in grade C 3 on 1 April 1980 and assigned to the Parliament's offices in Luxembourg. On 1 April 1982 she was promoted to grade C 2.

- 2 Notice of Internal Competition No C/246 of 7 January 1980 described the nature of the duties involved as follows:

‘Work of an administrative nature, relating in particular to:

- receiving visitors, especially Latin American visitors;

- office work, including typing.

This work requires experience and judgment, a feeling for public relations and aptitude for making contacts.

The post may require some travelling, in particular to Strasbourg and Brussels.'

- 3 The applicant compared this description with that in her various periodic reports drawn up since she had become established in 1980, and concluded that there had been a continual increase in the volume of work entailed by the tasks entrusted to her. In the applicant's opinion, this was confirmed by the fact that Vacancy Notice No 5363 of 21 September 1987, relating to a post in the same division but based in Brussels, classified the vacancy in grade B 3/B 2, although the duties attached to it were in the applicant's view similar, indeed identical to the duties performed by her, even though at the time she was still classified in grade C 2.

- 4 The passage from Vacancy Notice No 5363 dealing with the nature of the duties involved reads as follows:

'Official to perform, on the basis of general directives and under supervision of Head of Secretariat, difficult and complex executive and supervision duties relating to implementation of joint Parliament-Commission invitation programme for citizens of certain non-member states, in particular:

- preparation of individual programmes for visitors (travel itineraries, hotel and ticket reservations, liaison with external information offices, etc.);

- accountancy and financial duties (estimates, payments, monthly accounts, etc);

- administrative duties (preparation of Steering Committee meetings, annual report, statistics and drafting notes, letters, etc.);
- secretarial duties (shorthand-typing, filing, etc.).

These duties call for an aptitude for public relations, a sense of responsibility and initiative, and an organized and methodical approach which is essential to the smooth functioning of a small team.'

- 5 The applicant consequently submitted a first request within the meaning of Article 90(1) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), dated 10 November 1987, in which she sought 'upgrading to B 3/B 2 of the post currently occupied by me in Luxembourg, which was classified as C 3/C 2 following Internal Competition No C/246'. She stated that if there was no positive response from the administration, she would be 'obliged to submit an administrative complaint within the meaning of Article 90(2) of the Staff Regulations'.
- 6 On 5 January 1988, the Secretary-General of the Parliament rejected the request, on the grounds that upgrading a post did not automatically and necessarily imply the promotion of the official occupying the post in question. He also stated that there was in any event no prospect of the post in question being upgraded and that a transfer from one category to another was possible only by means of a competition.
- 7 The applicant later found that her periodic report for the period 1985-1986, definitively drawn up on 22 February 1988, and her periodic report for 1987-1988, drawn up on 16 November 1989, confirmed that her duties had increased.

- 8 The fact that while on sick leave she had been replaced by an official from the same division, but in Category B, confirmed her in this belief.

- 9 The applicant therefore submitted a further request on 28 November 1989 for 'upgrading of post 2337 (to C 1 at least)' and if necessary for the initiation of 'an internal competition procedure for Category B.' The applicant submitted that request in the form of a complaint within the meaning of Article 90(2) of the Staff Regulations.

- 10 On 17 May 1990 the Secretary-General of the Parliament rejected the request — which in his opinion had been incorrectly described by the applicant as a complaint when there was no administrative act adversely affecting her — on the grounds that 'The Staff Regulations do not provide for the upgrading of posts or initiation of competitions at the request of those concerned'.

- 11 He added: 'Such decisions may be taken in appropriate cases after an objective assessment of the duties attached to the post. A thorough examination of your case has shown that the duties you have to fulfil do not correspond to a higher career bracket than that in which you currently occupy a post.'

- 12 On 10 August 1990 the applicant lodged a complaint against that decision.

- 13 On 13 February 1991 the Secretary-General of the Parliament expressly refused to upgrade the applicant's post and rejected the complaint. The complaint had been rejected by an implied decision on 10 December 1990.

- 14 By application lodged at the Registry of the Court of First Instance on 8 March 1991, the applicant brought an action against the implied rejection of her complaint of 10 August 1990.
- 15 The written procedure followed the normal course and was completed on 12 August 1991.
- 16 Upon hearing the report of the Judge-Rapporteur, the Court asked the Parliament on 28 November 1991 to provide certain information on the organization and budgetary control of the European Community Visitors Programme (ECVP) and to produce the directory of the Visits and Seminars Division in the Directorate-General for Information and Public Relations. In a letter of 16 December 1991 the Parliament replied to those questions and provided the directory requested.
- 17 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiries.

Forms of order sought by the parties

- 18 The applicant claims that the Court should:
- (i) declare that the application is admissible as regards form and was lodged in due time;
 - (ii) annul the implied decision by the appointing authority of 10 December 1990 rejecting the complaint within the meaning of Article 90(2) of the Staff Regulations lodged on 10 August 1990;

- (iii) declare primarily that the applicant is entitled, on account of her duties within the institution, to be classified in a post in grade C 1 with retrospective effect from the date of the request for upgrading, 28 November 1989, or any other date to be determined by the Court and, in the alternative, order that the procedure for an internal competition in Category B be initiated for the benefit of the applicant;
- (iv) declare that in any event the applicant is entitled to receive, with retrospective effect from the date of the request for upgrading, 28 November 1989, or any other date to be determined by the Court, the difference between the salary actually received by her from that date and the salary corresponding to classification of the applicant in a post in grade C 1;
- (v) order the European Parliament to pay default interest at an annual rate of 8% on the sums corresponding to the difference in salary to be paid from 28 November 1989, or any other date to be determined by the Court, until payment in full;
- (vi) order the European Parliament to pay to the applicant the sum of BFR 50 000 as compensation for the non-material damage suffered by her;
- (vii) reserve the applicant's right to ask for evidence to be taken at any stage of the forthcoming written procedure.

19 The Parliament contends that the Court should:

- (i) declare the application inadmissible;
- (ii) in so far as necessary, dismiss it on the merits with respect to all the claims;
- (iii) make an order for costs in accordance with the applicable provisions.

The claim for annulment of the contested decision

Admissibility

The time-limits

- 20 In accordance with Article 113 of its Rules of Procedure, the Court proposes first to consider whether there is an absolute bar to proceeding with the present case, independently of the parties' submissions.
- 21 It must be examined in this case whether the time-limits under Articles 90 and 91 of the Staff Regulations were in fact complied with.
- 22 The Court observes that, according to settled case-law, those time-limits are a matter of public policy and are not a plea to be raised at the discretion of the parties or the court, since they were laid down with a view to ensuring clarity and legal certainty (see, in particular, the judgments of the Court of Justice in Case 232/85 *Becker v Commission* [1986] ECR 3401 and Case 161/87 *Muyers and Tulp v Court of Auditors* [1988] ECR 3037, and the judgments of the Court of First Instance in Case T-58/89 *Williams v Court of Auditors* [1991] ECR II-77 and Case T-129/89 *Offermann v European Parliament* [1991] ECR II-855).
- 23 It is apparent that in the circumstances the applicant's request of 28 November 1989, which she had wrongly described as a complaint, was impliedly rejected on 28 March 1990 in the absence of any reply by the Parliament, in accordance with Article 90(1) of the Staff Regulations.
- 24 Under Article 90(2) of the Staff Regulations, the applicant then had a period of three months in which to lodge a complaint against that implied rejection.

- 25 It is clearly established, however, that the applicant's complaint is dated 10 August 1990, and was thus not lodged before 28 June 1990, the date on which that period expired.
- 26 Furthermore, the reply of the Secretary-General of the Parliament dated 17 May 1990, in which he expressly rejected the applicant's request of 28 November 1989, constituted an act which merely confirmed the implied rejection which had already taken place. As such, the confirmation did not reopen the time-limit for lodging a complaint, which had already expired (see, *inter alia*, the *Offermann* judgment, cited above).
- 27 While noting that, under the second indent of Article 91(3) of the Staff Regulations, the period for lodging an appeal starts to run afresh where a complaint is rejected by express decision after being rejected by implied decision, the Court points out that in the absence of any express provision in this respect such a reopening of time-limits cannot be extended by analogy to the pre-contentious stage of a request, which is the subject of Article 90(1) of the Staff Regulations, without endangering legal certainty, which requires that the means of redress of officials and other servants should be governed by precise rules strictly interpreted.
- 28 Similarly, the fact that the defendant has not in its written or oral submissions pleaded that the applicant's complaint of 10 August 1990 is out of time cannot relieve the Court of its duty to examine whether the time-limits laid down in the Staff Regulations have been complied with (see also the judgments of the Court of First Instance in Case T-130/89 *B v Commission* [1990] ECR II-761, Case T-6/90 *Petrilli v Commission* [1990] ECR II-765, Case T-19/90 *Von Hoessle v Court of Auditors* [1991] ECR II-615, and Case T-54/90 *Lacroix v Commission* [1991] ECR II-749).
- 29 The Court therefore finds that in the present case the time-limits laid down under the Staff Regulations were not complied with.

- 30 Secondly, the Court notes that, in challenging the admissibility of the application, the Parliament points out that on 10 November 1987 the applicant had lodged a first request for the upgrading of the post she occupied. Furthermore, that first request was expressly rejected on 5 January 1988 and the applicant did not bring a complaint against that rejection within the three-month period laid down by Article 90(2) of the Staff Regulations.
- 31 In the Parliament's opinion, that failure to lodge a complaint definitively extinguished the applicant's right to bring an appeal. She was no longer entitled to challenge the decision of 5 January 1988 by means of her second request of 28 November 1989, since that second request was in the Parliament's view identical to the first request, in that its object was also the upgrading of the post which she occupied or alternatively the organization of an internal competition.
- 32 The applicant does not accept that argument and emphasizes that the two requests had different objectives, in that the first request was for her to be regraded in a higher category than that which she was in at the time of the request, whereas the second was essentially concerned merely with promotion within the same category.
- 33 As an alternative argument in favour of the admissibility of her application, the applicant submits that her second request of 28 November 1989 was based on new facts.
- 34 She refers, first, to the periodic reports for the years 1985-1986 and 1987-1988 as evidence of the increase in her responsibilities compared with those recorded in her previous periodic reports. In her opinion, this increase in responsibilities confirmed that she had now left office work in the strict sense behind her, in order to deal with the planning and management of the programmes of visits to Luxembourg and Strasbourg.

35 Secondly, the applicant relies on the fact that officials in higher grades had replaced her while she was absent on medical grounds.

36 The applicant claims, thirdly, that the Parliament implicitly acknowledged the existence of such new facts, in that the decision of 17 May 1990 informed her that her second request of 28 November 1989 had been rejected 'after a thorough examination'. In her view, such a thorough examination would not have been necessary if no new factors had arisen, since in that case the decision of 17 May 1990 could simply have referred back to the first decision of 5 January 1988.

37 While maintaining that the applicant's two requests were identical as regards their subject-matter, the Parliament observes first, in reply to the applicant's alternative argument, that the request of 10 November 1987 already referred to Vacancy Notice No 5363 of 21 September 1987, and secondly that the first request already emphasized the steady increase in her workload since she had been established, on the basis of a comparison between Notice of Competition No C/246 and her periodic report for 1983-1984.

38 More specifically, the Parliament does not accept that the wording of the periodic reports for 1985-1986 and 1987-1988 adds anything new compared with the reports previously relied on.

39 Nor does the Parliament accept that the replacement of the applicant by an official in a higher grade constitutes a new factor, since she was replaced during her numerous periods of sick leave by officials in grades C 3/C 2, B 4 and A 7 and even by the Head of Division himself. On this point, the Parliament adds that the replacement of the applicant, which was part of the organization of the work within a department, could not in any way be interpreted as denoting a change in its position with respect to the applicant since her first request.

- 40 Finally, the Parliament does not accept that the applicant can conclude from the fact that the decision of 17 May 1990 refers to a 'thorough examination' of her second request that the Parliament had acknowledged that some new factors had arisen. In its view, that reference related to the request for upgrading of the post and was therefore to be seen in the context of good relations between administration and staff, which require that serious consideration should be given to claims made by members of staff.
- 41 In the light of those issues of fact and of law, the Court observes that if an official or other servant considers that he is adversely affected by a decision within the meaning of Article 90(1) of the Staff Regulations, he must challenge the decision by means of a complaint lodged within the period prescribed in Article 90(2) of the Staff Regulations.
- 42 It follows that after the expiry of that period for lodging a complaint, the submission of a further request under Article 90(1) of the Staff Regulations is permissible only if new facts have arisen which justify a reconsideration of the situation.
- 43 To take the opposite view, which would amount to allowing the repeated submission of requests, would likewise have the effect of allowing an indefinite extension of the time-limit for bringing an appeal against any decision adversely affecting an applicant, and that would be incompatible with the system of remedies established by the Staff Regulations (see, *inter alia*, the judgments of the Court of Justice in Case 294/84 *Adams v Commission* [1986] ECR 977, at p. 987, and Case 302/85 *Pressler-Hoefl v Court of Auditors* [1987] ECR 513, at p. 526).
- 44 In the present case, the Court notes that the applicant did not lodge a complaint against the decision of 5 January 1988 by the Secretary-General of the Parliament rejecting her first request of 10 November 1987.

- 45 It follows that, in the absence of such a complaint, the second request of 28 November 1989 could be admissible only if new facts had arisen such as to justify a re-examination of the applicant's situation.
- 46 The Court notes, however, that the applicant has not succeeded either in her written observations or in her submissions during the oral procedure in demonstrating that her responsibilities were substantially altered during the period between the first and second requests.
- 47 The Court concludes that, in the absence of any new factors, the second request of 28 November 1989 was out of time, in that it was submitted after the expiry of the time-limit for bringing a complaint against the decision of 5 January 1988.
- 48 It follows from all the foregoing considerations that the application is inadmissible.

Substance

- 49 Having thus found the application to be inadmissible, the Court observes, *ex abundanti cautela*, that the applicant puts forward two pleas alleging breach of the principle of equality and breach of the principle of good administration, in support of the view that the application is well founded.
- 50 The Court finds that in support of her claims the applicant argues essentially that, within the same institution and moreover within the same division, she performed duties in Luxembourg which were similar or even identical to those performed in Brussels by an official in Category B, whereas she herself is in Category C, although there is no objectively justified distinction.

- 51 The Parliament concedes that the post mentioned in Vacancy Notice No 5363, to which the applicant refers, covers the same sphere of activity as the applicant's post, namely the ECVF programme; it emphasizes, however, that there are differences ° which in its view are decisive ° between the two posts, relating to accounts and financial work (estimates, payments, monthly accounts, etc). It notes that the management and central accounting control of the programme come exclusively under post No 5363. In those circumstances, the Parliament states that the interinstitutional aspect of the ECVF programme, which is implemented by the Parliament and Commission jointly, means that the holder of post No 5363, together with other officials all based in Brussels, performs important duties relating to the central organization of the programme, whereas the applicant, the only official based in Luxembourg, was at the material time responsible only for carrying out part of the programme on the occasion of visits to Strasbourg or possibly Luxembourg. In the Parliament's view, those factors demonstrate the existence of a noticeable difference in duties, thus ruling out any possible infringement of the principles relied on by the applicant.
- 52 The Court finds on this point, in the light of the documents in the case and the Parliament's replies of 16 December 1991 to the questions put to it on 28 November 1991, and after hearing the statements of the parties during the oral procedure, that the applicant's allegations are in no way borne out by the facts.
- 53 The Court thus finds that the applicant's duties and those of the official occupying the post referred to in Vacancy Notice No 5363 may appear similar in that they relate to the same sphere of activity, namely the implementation of the ECVF programme. However, it finds that the Parliament is correct in pointing to the existence of crucial differences with respect to the level of responsibilities entrusted in the context of that programme to the applicant and to the official occupying post No 5363.
- 54 The Court notes in this respect that the interinstitutional aspect of the ECVF programme, which is implemented by the Parliament and the Commission jointly, means that the holder of post No 5363, together with other officials all based in Brussels, performs important duties relating to the central organization of the

programme, whereas the applicant, the only official based in Luxembourg, deals only with the implementation of part of the programme on the occasion of visits to Strasbourg and possibly Luxembourg.

- 55 Furthermore, the officials responsible for the central organization of the programme in Brussels, in particular the holder of post No 5363, ensure that the programme is properly implemented in Strasbourg and Luxembourg on the occasion of specific visits, and in such circumstances those officials accordingly supervise the work done by the applicant.
- 56 It follows from all those considerations that the pleas alleging breach of the principles of equal treatment and good administration are unfounded and must in any event be rejected.

The claim that the Court should order the applicant to be regraded, or alternatively that an internal competition should be organized for her benefit

- 57 On this point, it suffices to note that the Community judicature cannot, without encroaching on the rights and powers of the administrative authorities, give orders to a Community institution.
- 58 In view of that principle, the conclusion must be drawn that this claim is inadmissible in the present case.

The claim for compensation in respect of the damage allegedly sustained

- 59 The applicant claims that by refusing, in disregard of the principles of good administration and equal treatment, to grant her request for upgrading of the post occupied by her, the Parliament was guilty of serious maladministration for which it is liable.
- 60 She concludes that the Parliament is obliged to make good the damage caused to her by such maladministration. In her view, the damage corresponds to the difference between the salary she would have received if her post had been upgraded and the salary she was actually paid, plus default interest at an annual rate of 8% from the various dates on which payment was due. She also seeks payment of BFR 50 000 by way of compensation for non-material damage.
- 61 The Court observes that these claims are all closely connected with the claim for annulment which it has already held to be inadmissible.
- 62 The Court also refers to its finding *ex abundanti cautela* that the applicant has not raised any plea capable of entailing the annulment of the contested decision. Consequently, the applicant has not adduced evidence of any irregularity which might constitute maladministration for which the Parliament is liable and which might justify the award of compensation.
- 63 The claims for compensation in respect of the material and non-material damage allegedly suffered must therefore be rejected in their entirety as both inadmissible and unfounded.
- 64 It follows from the above considerations that the application is dismissed.

Costs

65 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. 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.**

Lenaerts

Kirschner

Barrington

Delivered in open court in Luxembourg on 10 April 1992.

H. Jung

Registrar

K. Lenaerts

President