

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 23 April 1986*

*Mr President,
Members of the Court,*

1. Are the members of the Staff Committee of a Community body entitled to serve out their term of office where, having been elected to represent staff in a particular category or service or covered by certain conditions of employment, they are, during their term of office, appointed to another category, or service or become subject to a different set of conditions of employment? That is the problem to be resolved by the Court in these proceedings if it holds the applicant's action to be admissible.

Mrs Licata was recruited by the Economic and Social Committee (hereinafter referred to as 'the ESC') on 1 March 1977 as a member of the local staff and on 21 April 1983 she was elected to the Staff Committee of the ESC as the sole representative of the employees governed by the Conditions of Employment of Other Servants of the European Communities.

She later passed the tests for a recruitment competition and on 22 December 1983 was appointed as an official in Category D. She was thus no longer covered by the Conditions of Employment of Other Servants but by the Staff Regulations of Officials of the Communities and that new situation led the Staff Committee to raise the problem, in March 1984, of her representative capacity.

By letter of 2 May 1984, the Staff Committee, following the opinion given by the Legal Department of the ESC which had been consulted on that matter by the

administration, requested the Secretary General of the ESC to amend Decision No 1896/75 A of 28 July 1975 on 'Provisions governing the composition and procedure of the Staff Committee'. It also gave notice to the Secretary General of its intention to hold an *ad hoc* election for the purpose of replacing Mrs Licata.

In conformity with the requirements of the first paragraph of Article 1 of Annex II to the Staff Regulations, the second paragraph of Article 5 of Decision No 1896/75 A provides that the term of office of the members of the Staff Committee normally expires two years from the date of their election; that term may be reduced by the institution, but not to less than one year. In the terms of the same paragraph,

'The term of office of a member of the Committee shall also end on resignation or on termination of service.'

Either of those supervening events is therefore sufficient to curtail the member's term of office, irrespective of the length of the period served.

Referring specifically to 'the amendments proposed by the Staff Committee' and invoking 'the interests of clarity and legal certainty', the President of the ESC, by Decision No 173/84 A of 7 May 1984, amended the second paragraph of Article 5 to read as follows:

'The term of office of a member of the Committee shall also end on resignation, termination of service or *transfer to another*

* Translated from the French.

category, service or conditions of employment where conditions of representativity of the Staff Committee set out in Article 3 are no longer met.'

However, following a consultative meeting with the representatives of the European Public Service Union on 16 May 1984, the administration, having regard to the criticisms made by that union, decided to suspend the operation of that decision pending fresh advice from its Legal Department. By note of 19 June 1984, the Legal Department confirmed its first opinion.

Unwilling to wait any longer, on 25 June the Staff Committee, for its part, decided to apply Decision No 173/84 A and refused to take account of the applicant's vote. It gave notice of that fact to the Secretary General on 27 June.

In his reply dated 31 July 1984, the Secretary General expressly confirmed that the operation of Decision No 173/84 A had been suspended until September.

On 9 October 1984, the Staff Committee convened a general meeting for the purpose of organizing *ad hoc* elections. By a letter sent on 11 October 1984 to the Staff Committee (concerning the 'representativity of the Staff Committee'), the Secretary General of the ESC stated that 'Decision No 173/84 A of 7 May (was) operative again'.

2. In those circumstances, on 6 November 1984 Mrs Licata submitted a complaint to the ESC against:

- (i) Decision No 173/84 A, and
- (ii) 'the administration's implied decision to exclude the complainant from the Staff Committee', thus preventing her from discharging her duties.

Relying upon Article 91 (4) of the Staff Regulations, on 14 November 1984, she brought an action asking the Court

- (i) to annul:
 - (a) the measure adopted by the administration preventing her from discharging her duties by 'excluding her from the Staff Committee pursuant to Decision No 173/84 A', and
 - (b) 'the decision of the Economic and Social Committee to organize *ad hoc* elections' for the purpose of replacing the applicant on the Staff Committee.
- (ii) She also made an application for the adoption of interim measures, requesting suspension of the operation of Decision No 173/84 A.

By order of 11 December 1984, the President of the First Chamber adopted the following decision:

'Pending delivery of judgment in the main proceedings, Decision No 173/84 A of the Chairman of the Economic and Social Committee is suspended in so far as it introduces as a cause of cessation of a term of office as a member of the Staff Committee transfer to another category, or service or scheme of employment. The *ad hoc* elections organized in pursuance of that decision are likewise suspended.

3. Before the lawfulness of Decision No 173/84 A can be considered, it is necessary to examine the admissibility of the application, which is contested by the ESC. In support of its objection, the ESC puts forward, in particular, the following arguments.

In the first place, it considers that, as a result of the Order dated 11 December 1984 made in response to an application for interim relief, the action brought by Mrs

Licata became devoid of any purpose, since the holding of the *ad hoc* elections was deferred and, far from depriving her of her office, that enabled her to serve out the normal term. Accordingly, she has no interest in bringing an action.

Moreover, the defendant maintains that the conclusions set out in the application differ from those set out in the complaint, in so far as the second head of claim, concerning the decision to hold *ad hoc* elections, does not appear in the complaint. The applicant did not therefore comply with the principle whereby all applications by officials must be preceded by a complaint, in accordance with Article 91 of the Staff Regulations.

Finally, the ESC observes that the applicant did not identify precisely the measure adversely affecting her, which marks the starting point of the time-limit for actions to be brought under the Staff Regulations. That measure could not be Decision No 173/84 A which is of a kind laying down general rules and cannot therefore be contested by means of an individual action. The only decision applying that general measure to her is the decision whereby on 25 June 1984 the Staff Committee refused to take account of the applicant's vote. On that basis, the complaint appears to be out of time, rendering the action inadmissible.

4. None of the allegations of inadmissibility made by the defendant can be upheld.

In the first place, the action for annulment brought by Mrs Licata is certainly not devoid of purpose since, to this day, she is still a member of the Staff Committee and the general elections which would have marked the expiry of her term of office have been deferred by an Order of 11 June 1985

made in Case 146/85 *Diezler* [1985] ECR 1805, until the Court has given judgment in that case. Her interest in bringing an action, far from being theoretical, is therefore an actual and present interest. In any event, the question of the costs of those proceedings remains outstanding and that in itself might constitute the applicant's interest in pursuing her action.

In the second place, whilst the conclusions set out in the complaint and in the action are not identical, the differences are only of form. Thus, the first head of claim in the application — for annulment of the measure which prevented the applicant from discharging her duties by 'excluding her from the Staff Committee pursuant to Decision No 173/84 A' — is a synthesis of the two heads of claim set out in the complaint. As regards the second, concerning the ESC's decision to hold *ad hoc* elections, it is a necessary complement to the first. There is, to use the phrase employed by Mr Advocate General Mancini in his opinion in Case 173/84 *Rasmussen*, a 'fundamental continuity' between the claims made in the complaint and those made in the application. The alleged differences in the way they are formulated does not appear to be decisive, in so far as the conclusions in the application 'change neither the legal basis nor the subject-matter of the complaint' (judgment of 23 January 1986 in Case 173/84 *Rasmussen* [1986] ECR 197, paragraph 12).

In fact, the question of admissibility must be considered in relation to the measure, ascribable to the ESC, applying General Decision No 173/84 A to the applicant. The ESC cannot seriously maintain that by reason of the independence of the Staff Committee, the decisions adopted by it are unreservedly binding. The Community institutions and organs are under an obligation to ensure that all decisions adopted

by elected bodies within them are lawful. That was the conclusion reached by the Court after a detailed analysis of the relevant provisions of the Staff Regulations in the judgment in the leading case of *De Dapper* (Case 54/75 [1976] ECR 1381), in which exactly the same question was raised in proceedings concerning staff committee elections; the Court emphasized that:

‘institutions are not only entitled to intervene of their own volition when they have doubts as to the legality of elections to the Staff Committee but must in addition settle complaints which may be submitted to them in this connection under the procedure laid down by Articles 90 and 91 of the Staff Regulations’ (Case 54/75, *supra*, paragraph 23).

The Court inferred that ‘such a duty’ arose by virtue of Article 9 (2) of the Staff Regulations which makes it the responsibility of each institution or body to determine the ‘composition and procedure’ of the Staff Committee and, more generally, ‘from the power of organization which each institution exercises within its own sphere of jurisdiction and from its duty to ensure that officials have complete freedom to choose their representatives in accordance with democratic rules’ (Case 54/75, *supra*, paragraph 22).

Quite apart from the dispute regarding the elections, those matters of principle are conducive to the view that each Community body is obliged to review the legality of measures relating both to the composition and to the procedure of the Staff Committee. That represents an essential safeguard for every official, since it is the basis for review by the Court.

Indeed — it was confirmed at the hearing — the ESC, by its letter of 11 October 1984, determined the specific appli-

cation of General Decision No 173/84 A to the individual situation created by Mrs Licata’s change from one scheme of employment to another. That letter was a reflection of its obligation to intervene and reactivated the General Decision to which I referred, the operation of which had until then been suspended. By that individual decision the ESC — whether rightly or wrongly will become apparent from consideration of the substance of the case — definitively established, by implication, that Mrs Licata was no longer qualified to discharge the duties which had been entrusted to her and confirmed the decision whereby the Staff Committee had on 9 October 1984 initiated the electoral process to replace the applicant, whose place on the Committee was regarded as having fallen vacant. The individual decision adopted on 11 October 1984 must therefore be seen as the measure adversely affecting the applicant, of which she seeks the annulment.

Accordingly both the complaint and the application were lodged within the periods prescribed by the Staff Regulations and must be declared admissible.

5. It is therefore only indirectly, by way of an objection, that the applicant asks the Court to declare General Decision No 173/84 A unlawful. She makes three submissions in that respect.

In her first submission, she criticizes the administration for failing to consult the Staff Committee, thus acting in breach of the obligation laid down by Article 6 of Decision No 1896/75 A, before adopting the contested General Decision. Since the Staff Committee was itself involved in the very introduction of that amendment, the applicant did not maintain that submission but substituted a new submission of a formal nature based on the failure to consult the Staff Regulations Committee, thus acting in

breach of Article 110 of the Staff Regulations. There is no need to examine the merits of that submission, it being sufficient to note that it was put forward only in the reply and must therefore be declared inadmissible pursuant to Article 42 (2) of the Rules of Procedure.

The second submission is based upon infringement of the fourth paragraph of Article 1 of Annex II to the Staff Regulations, according to which:

‘Membership of the Staff Committee ... shall be such as to ensure the representation of all categories of officials and of all services provided for in Article 5 of the Staff Regulations and also of the servants referred to in the first paragraph of Article 7 of the Conditions of Employment of Other Servants of the Communities’.

In the applicant’s view, Decision No 173/84 A conflicts with the *ratio legis* of that provision in so far as it requires the representation of all the officials of an institution, regardless of their category, conditions of employment or service, to be maintained throughout the term of office of the Staff Committee, whereas, in her opinion, that requirement applies only at the time that the Staff Committee takes office. She adds that the fact of entering a different category, scheme of employment or service does not take from the person elected either his knowledge of the specific problems of his former colleagues or his links with them.

Finally, in her last submission, the applicant maintains that by introducing and applying to her a new condition as to the cessation of office, which did not exist when she was elected as a member of the Staff Committee, the ESC has applied Decision No 173/84 A with retroactive effect.

6. Those two submissions do not show that the decision was unlawful.

As the Court held in its judgment in *De Dapper*, the requirement laid down in the fourth paragraph of Article 1 of Annex II to the Staff Regulations is intended, like the rule on the minimum number of persons who must take part in elections for them to be valid, ‘to ensure that the Staff Committee is representative’ (Case 54/75, paragraph 17). The Court stated that the Staff Committee ‘plays a very important part in the administration of the institutions’, in view of the threefold task entrusted to it:

‘to represent the general interests of the staff *vis-à-vis* their institution, maintain continuous contact between the institution and the staff and contribute to the smooth running of the service’ (Case 54/75, *supra*, paragraphs 11 and 12).

In the exercise of the power of organization conferred upon them by Article 9 (2) of the Staff Regulations, each Community body in which a Staff Committee is set up must ensure that the principle of representation thus imposed is fully observed. In my opinion, the representativity of the Staff Committee necessarily presupposes that employees in each category and service or subject to certain conditions of employment must be represented by persons elected by them respectively, who remain within that category, service or subject to those conditions of employment throughout their term of office. Regardless of the extent of the good faith of a member elected by a given group of employees, he may, if he moves to another group, be confronted with conflicts of interest between the employees of the two groups concerned. It would be unrealistic to deny that the employees of each category or service or subject to certain conditions of employment have their own interests and feelings of solidarity, which sometimes conflict. Even if the Staff Committee has a general role *vis-à-vis* the

administration, each of its members was elected to represent the employees of a particular category or service or subject to certain conditions of employment. Quite apart from the 'horizontal' questions affecting the staff of the body as a whole, with which they will have to deal as part of their official duties, sight must not be lost of the 'vertical' problems arising from difficulties specific to the category, service or conditions of employment which they represent, which they may be called upon to raise within the Staff Committee. In those circumstances, the possibility that a representative who no longer forms part of the same category or service or is no longer subject to the same conditions of employment as the persons who elected him might find himself confronted with a conflict between the interests of different groups in the widest sense is by no means purely hypothetical.

Moreover, the Staff Regulations apply the principle of representation for all categories, services and conditions of employment with respect to the 'composition' of the Staff Committee. Thus, far from being merely a condition of eligibility, plurality of representation is a guarantee of the representativity and, therefore, the very functioning of the

Staff Committee; accordingly it is a requirement which must not only be met when the Committee is constituted, but must be verified, as regards each of its members, throughout the term of office, so that the Committee's composition faithfully reflects the diversity of the groups of employees in the institution or body concerned.

Since the applicant did not resign of her own accord, the ESC was therefore under an obligation, by virtue of its duty of supervision and in compliance with the principle laid down in the Staff Regulations that the composition of the Staff Committee must be representative, to take the action called for as a result of her appointment as an official. The method chosen—general measures adding to the list of cases where a member's term of office expires early, laid down in Article 5 of the basic decision, No 1896/75 A, rather than just a letter inviting the applicant and the Staff Committee to conform with the Staff Regulations—is not, in my opinion, a matter of decisive importance. The measure adopted was of an interpretative, rather than a legislative, nature and gave effect to a principle laid down in the Staff Regulations. As such, it cannot possibly be retroactive in effect.

7. In view of all the foregoing considerations, I propose that the Court should:

- (1) Declare the action admissible;
- (2) Dismiss the action as unfounded;
- (3) Make an order as to costs, including those of the application for interim relief, in accordance with the first subparagraph of Article 69 (2) and Article 70 of the Rules of Procedure.