

It follows that the fact that it is impossible for an official in the Language Service to be transferred to a post in Category A other than on the basis of a competition does not constitute discrimination against officials in the Language Service

2. An official has no legitimate interest in securing the annulment of a decision for a procedural defect where the administration has no discretion and is bound to act as it did.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
9 October 1992 *

In Case T-50/91,

Elsa De Persio, an official of the Commission of the European Communities, resident in Brussels, represented initially by Jean-Noël Louis, then by Jean van Rossum, of the Brussels Bar, with an address for service in Luxembourg at Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

v

Commission of the European Communities, represented by G. Valsesia, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision rejecting the applicant's application for vacancies COM/1786/90 and COM/1890/90 issued by the head of the 'General Co-ordination' sector and dated 17 August 1990 and also the implied decision rejecting the complaint submitted by the applicant on 20 November 1990,

* Language of the case: French.

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

composed of: R. García-Valdecasas, President, R. Schintgen and C. W. Bellamy,
Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 4 June 1992,

gives the following

Judgment

The facts of the case

1 Mrs Elsa De Persio is an official in the Language Service (L/A 5) attached to the translation service (DG IX/I/3) of the Commission of the European Communities at Brussels. She has a university and postgraduate education in law and also several years' experience as a national official in a non-language capacity.

2 On 31 July 1990 the Commission published, in *Vacances d'emplois* No 54, vacancy notices Nos COM/1786/90 and COM/1890/90, each concerning a post as administrator at level A 7/A 4. Among the 'minimum qualifications required to apply for transfer' it was specified that a candidate had to 'belong to the same category/service/career bracket' as that within which the vacancy had arisen. The applicant submitted two applications for these posts within the time specified.

3 On 17 August 1990 a letter bearing the signature 'by order of Mr Mateo, head of "General Co-ordination"' sector, from an official in the Directorate-General for

Personnel and Administration, 'careers' directorate, was sent to the applicant informing her of the outcome of her application for the vacancies COM/1786/90 and COM/1890/90 in the following terms:

'I regret to inform you that at the stage in the procedure for filling the vacancy referred to where it is considered whether it can be filled by transfer or promotion (Article 29(1)(a) of the Staff Regulations) your application cannot be considered for the following reason:

...

You do not belong to the category of the vacancy advertised.'

The applicant learned of the rejection decision on 17 September 1990.

- 4 By a note of 16 November 1990, lodged at the Secretariat-General of the Commission on 20 November 1990 (No 303/90), the applicant submitted a complaint against this decision within the time-limit prescribed in Article 90(2), first subparagraph, first indent, of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations'), a complaint against that decision. In her complaint she raised two arguments based, first, on the fact that the official who had rejected her application had had no power to do so and, secondly, on the fact that the Staff Regulations neither expressly nor impliedly prevent officials from transferring other than on the basis of competitions from the Language Service to posts in Category A, for which she considers she has the necessary qualifications.
- 5 No decision regarding her complaint was notified to the applicant within the period of four months laid down in Article 90(2), second subparagraph, of the Staff Regulations, which expired on 21 March 1991.

Procedure

6 Under those conditions, by an application lodged on 22 June 1991 at the Registry of the Court of First Instance, the applicant brought these proceedings for the annulment of the decision of 17 August 1990 and the implied decision rejecting her complaint. The written procedure followed the normal course.

7 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry and to ask the defendant to produce the two vacancy notices in question, which were lodged on 15 May 1992.

8 The hearing took place on 4 June 1992. The parties' representatives made their submissions to the Court and gave their replies to the questions put by the Court.

Forms of order sought by the parties

9 The applicant claims that the Court should:

— declare the application admissible and well founded;

— declare that the decision of 17 August 1990 signed by order of the head of the 'General Co-ordination' sector and also the implied decision rejecting the complaint lodged on 20 November 1990 under No 303/90 are unlawful;

— accordingly, annul those decisions;

— order the defendant to pay the costs.

The defendant claims that the Court should:

— dismiss the application as unfounded;

— make an appropriate order as to costs.

Substance

- 10 In support of her application, the applicant has developed the two submissions already set out in her complaint, one based on the lack of authority of the official who rejected her application and the other on the misinterpretation of Article 45(2) of the Staff Regulations and discrimination against officials in the Language Service. In view of the case-law of the Court of Justice, according to which an applicant has no legitimate interest in securing the annulment of a decision for a formal defect where the administration has no discretion and is bound to act as it did (Case 117/81 *Geist v Commission* [1983] ECR 2191, paragraph 7; see also Case 9/76 *Morello v Commission* [1976] ECR 1415, paragraph 11), and as the Commission claims that such was precisely the case, the Court considers that the second submission, concerning the substance of the case, should be examined first.

The plea based on the misinterpretation of Article 45(2) of the Staff Regulations and discrimination against officials in the Language Service

- 11 It should be observed at the outset that Article 5 of the Staff Regulations provides that:

‘1. The posts covered by these Staff Regulations shall be classified, according to the nature and importance of the duties to which they relate, in four categories A, B, C and D, in descending order of rank.

...

2. Posts of translators and interpreters shall be grouped in a Language Service designated by the letters L/A, comprising six grades equivalent to Grades 3 to 8 of Category A ...'

Likewise, Article 45(2) stipulates that:

'An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition.'

12 The Court of Justice has consistently held that an official may be transferred from the Language Service to an administrative post in Category A only on the basis of a competition, having regard, in particular, to Article 45(2) of the Staff Regulations (see, most recently, Cases 269 and 292/84 *Fabbro and Others v Commission* [1986] ECR 2983, paragraph 23, and Case 279/85 *Misset v Council* [1987] ECR 3187, paragraph 13).

Arguments of the parties

13 The applicant claims, in substance, that the Staff Regulations, in particular Article 45(2), correctly interpreted, do not prevent an official in the Language Service from transferring to an administrative post in Category A. She has not denied, either in her written submissions or at the hearing, that her argument is contrary to the abovementioned case-law of the Court of Justice, but she claims that that case-law must be reversed. She considers that the Language Service is simply a part of Category A and that the decisions of the Court in the judgments cited above are contrary to the letter of Article 5(1) of the Staff Regulations, which establishes only four categories of officials, A, B, C and D. All officials, and therefore linguists, necessarily belong to one of those four categories. Language duties are, by definition, Category A duties, all the more so because the legislature could have refrained altogether from adding the letter 'A' to the term 'Language Service', since there is no Language Service 'B', 'C' or 'D'.

- 14 Furthermore, the way in which the Court of Justice interprets Article 45(2) and the second paragraph of Article 98 of the Staff Regulations is likely to lead to twofold discrimination against officials in the Language Service in so far as, first, they are obliged to take part in a second competition to obtain posts outside the Language Service in Category A and, secondly, officials in the Scientific and Technical Services are able to transfer to Category A without taking part in a competition. She claims that the Staff Regulations must be re-interpreted by the Court of First Instance in accordance with their general intention and on the basis of the principle of non-discrimination between officials. None the less, the applicant admitted at the hearing that she has no new aspects to raise which would distinguish her position from that of the officials concerned in the previous judgments of the Court of Justice on this issue.
- 15 The defendant, for its part, although stating that it sympathizes with the objective pursued by the applicant, relies on the judgments cited above to defend its contention that existing positive law requires it to reject her application for the Category A vacancies in issue. The defendant considers that although the applicant's avowed objective is to reverse the case-law of the Court of Justice, there are no new circumstances to justify overturning a broadly established line of decisions.

The Court's assessment

- 16 It should be pointed out that the Court of Justice held, in its judgment in Case 176/73 *Van Belle v Council* [1974] ECR 1361, paragraph 21, that Article 45(2) of the Staff Regulations formulates a fundamental rule corresponding to the organization of the Community public service into different categories requiring distinct qualifications.
- 17 In its judgment in the *Fabbro* case, the Court of Justice pointed out that the terms 'category' and 'service' as used in the Staff Regulations define two distinct concepts with specific effects under the Staff Regulations and in law. Following a detailed

analysis of the various provisions of the Staff Regulations concerning the career and situation of officials, the Court concluded that it may clearly be seen that a systematic distinction between category and service is fundamental to them. The Staff Regulations provide for certain services (the Language Service and the Scientific and Technical Services) in order to place therein officials who carry out particular duties for which specific qualifications are required and make possible a separate career structure taking account of those special features. The distinction between category and service is also to be found in Article 45(2), which shows that an official may be transferred from the Language Service to an administrative post in Category A only on the basis of a competition. That provision leaves no discretion whatsoever to the administration to proceed otherwise (paragraphs 21 to 24).

18 The Court of Justice reached the same conclusion in the *Misset* case, where it held that the duties and powers of officials in Category A are different from those of officials in the Language Service. The Court inferred therefrom that the specific ability of the latter to perform tasks relating to Category A posts must therefore be assessed, as the Staff Regulations now stand, by means of competitions organized specifically to fill Category A posts (paragraph 11). The Court went on to state that, whatever its historical background, Article 45(2) adopts the distinction between Category A and the Language Service in that transfer from the Language Service to a Category A post necessarily involves leaving a specialist service and undertaking the performance of duties and powers relating to a Category A post requiring qualifications other than linguistic expertise. The Court concluded that to that extent transfer from the Language Service to a Category A post can take place only on the basis of a competition (paragraph 13).

19 It follows from the foregoing, and in particular from the specific features of the duties performed by A and L/A officials respectively, emphasized by the Court of Justice in the *Fabbro* and *Misset* judgments, that the fact that it is impossible for an official in the Language Service to be transferred to a post in Category A other than on the basis of a competition does not constitute discrimination against officials in the Language Service.

20 As the Staff Regulations now stand, and in the absence of new factors, the Court finds that there is no reason to adopt a solution different from that clearly expressed by the Court of Justice in the judgments cited above, which settle questions of principle and the most recent of which dates only from 1987.

21 It follows that the plea based on the incorrect interpretation of Article 45(2) of the Staff Regulations and discrimination against officials in the Language Service must be dismissed.

The plea based on the lack of authority of the official who rejected the applicant's application

Arguments of the parties

22 The applicant contends that the decision of 17 August 1990 rejecting her application for vacancies COM/1786/90 and COM/1890/90 is illegal because it was not taken by a competent authority. The head of the 'General Co-ordination, establishment plan and publication of posts' sector did not have authority to reject her application and, *a fortiori*, the same applies to the official deputizing for him. It follows from decision No 597 of the Commission of 11 May 1989 that a head of sector and, *a fortiori*, his representative have no authority whatsoever in that respect.

23 The Commission claims, first, that it was simply a matter of declaring the applicant's application inadmissible, which did not involve the appointing authority, and, secondly, that an official cannot plead an irregularity in the procedure which led to the contested decision unless he is able to show that but for that irregularity he might be in a more favourable situation. However, it is clear that the applicant's application could not have been validly considered.

The Court's assessment

24 The Court considers that, as has already been pointed out (see paragraph 10), an applicant has no legitimate interest in the annulment of a decision because of a procedural defect where the administration has no discretion and is required to act as it did. It follows from the *Fabbro* judgment, paragraph 24, that Article 45(2) of the Staff Regulations allows the institutions no discretion to permit an official to transfer from the Language Service to an administrative post in Category A other than on the basis of a competition.

25 This submission must therefore be dismissed, there being no need to examine its merits, and, consequently, the application must be dismissed in its entirety.

Costs

26 Pursuant to 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 if they have been applied for in the successful party's pleadings. However, Article 88 provides that in proceedings between the Communities and their servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

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

García-Valdecasas

Schintgen

Bellamy

Delivered in open court in Luxembourg on 9 October 1992.

H. Jung

R. García-Valdecasas

Registrar

President