

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)  
30 January 1992 \*

In Case T-25/90,

**Richard Schönherr**, an official of the Economic and Social Committee, residing in Brussels, represented by Marcel Slusny and Olivier Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 Avenue Marie-Thérèse,

applicant,

v

**Economic and Social Committee of the European Communities**, originally represented by Detlef Brüggemann, Legal Adviser, and subsequently by Moisés Bermejo Garde, acting as Agent, assisted by Jean-François Bellis, of the Brussels Bar, with an address for service in Luxembourg at the office of Roberto Hayder, a national civil servant seconded to the Commission's Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for the annulment of Decision No 259/89 A of the President of the Economic and Social Committee of 1 August 1989 appointing Mr Giovanni Di Carlo to a post of Principal Translator,

\* Language of the case: French.

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

composed of: C. P. Briët, President of the Chamber, H. Kirschner and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the oral procedure on 12 July 1991,

gives the following

**Judgment**

**Facts**

- 1 The applicant, an official of the Economic and Social Committee (hereinafter referred to as 'the ESC'), was recruited on 15 May 1979 as a member of the auxiliary staff. On 1 May 1980 he was made a member of the temporary staff. On 1 February 1981 the applicant was appointed as a probationary official and on 1 November 1981 established in Grade LA 7. On 1 October 1984 he was promoted to Grade LA 6.
- 2 On 25 May 1989 the ESC published Vacancy Notice No 10/89 for the post of Principal Translator (LA 5/4) in the General Directorate, Directorate E 'Translation, German Language Division'. Following publication of that vacancy notice three applications were submitted, including that of the applicant.
- 3 On 12 June 1989 the Joint Committee on Promotions gave an opinion on promotions to a higher career bracket for 1988 and 1989 in which it unanimously proposed to promote Mr Thomson and, by a majority and in order, Mr Schönherr and Mr Vingborg (*ex aequo*) and Mr Anastassiadis and Mrs Weiler (*ex aequo*).

- 4 On 28 June 1989 the Secretary-General of the ESC sent to the Director of Directorate E, Mr Vermeylen, a memorandum on the subject of filling Vacancy No 10/89 in which he gave the names of the officials who had applied for promotion; he requested Mr Vermeylen to inform him which of those officials might be appointed to the vacancy.
  
- 5 By memorandum dated 7 July 1989, Mr Vermeylen informed the Secretary-General of the ESC that he recommended the appointment of Mr Di Carlo and that his opinion was shared by the immediate superior concerned.
  
- 6 On 1 August 1989 the Secretary-General of the ESC filled in the space reserved, at the foot of the aforementioned memorandum of 28 June 1989, for the appointing authority's decision on filling the vacancy, by writing in the name of Mr Di Carlo and adding his signature. On the same day, by Decision No 259/89 A of the President of the ESC, Mr Di Carlo was promoted to Grade LA 5 with effect from 1 July 1989. By letter of the same day the President of the ESC informed the applicant that his application had been unsuccessful.
  
- 7 By letter dated 26 October 1989, addressed to the Secretary-General of the ESC, the applicant submitted a complaint under Article 90(2) of the Staff Regulations of the European Communities against the aforementioned Decision No 259/89 A of the President of the ESC. By memorandum dated 12 February 1990, which was received by the applicant on 15 February 1990, the Secretary-General of the ESC rejected the complaint.

### **Procedure**

- 8 By application lodged at the Registry of the Court of First Instance on 8 May 1990 the applicant brought the present action.

- 9 The written procedure followed the normal course.
- 10 Upon hearing the Report of the Judge-Rapporteur the Court of First Instance (Fifth Chamber) decided to open the oral procedure. In addition, it requested the defendant to produce certain documents, including all the documents on the basis of which the appointing authority had taken its decision. In compliance with that request the ESC lodged the memorandum, described above, sent on 28 June 1989 by the Secretary-General of the ESC to the Director of Directorate E. The Court of First Instance also requested the ESC to reply in writing to various questions concerning any effect the memorandum of 7 July 1989 from the Director of Directorate E to the Secretary-General of the ESC might have had.
- 11 The oral procedure took place on 12 July 1991 and the President of the Chamber declared it closed at the conclusion of the sitting.

### **Forms of order sought**

- 12 The applicant claims that the Court of First Instance should:

(i) declare null and void the appointment of Mr Di Carlo to the post of principal translator, a post which was the subject of Decision No 259/89 A of the President of the ESC;

Alternatively:

(ii) order the defendant to produce:

(a) the memorandum from the Director of Directorate E of 14 March 1989 concerning the applications submitted in response to Vacancy Notice No 4/89;

- (b) the opinion of the Joint Committee on Promotions of 12 June 1989;
- (c) all documents, and in particular the Rules of the Joint Committee on Promotions, which, in general, served as a basis and justification for the opinion of the Joint Committee on Promotions of 12 June 1989;
- (d) the memorandum from the Director of Directorate E to the Secretary-General of 7 July 1989;

(iii) order the defendant to pay the costs'.

13 In his reply the applicant requested the Court to call upon the defendant to produce, in addition, the Promotions Committee's file on Vacancy Notice No 10/89 and in particular the minutes kept by the committee.

14 The ESC contends that the Court of First Instance should:

(i) dismiss the application as unfounded;

(ii) make an order for costs in accordance with law.

15 The applicant puts forward seven pleas in law in support of the claims in his application. The first plea is to the effect that the decision of 12 February 1990 rejecting his complaint did not issue from the competent appointing authority. The second plea alleges that the appointing authority did not take account of the opinion of the Joint Committee on Promotions. The third plea is based on the fact that the Director of Directorate E sent to the Secretary-General of the ESC a memorandum on 7 July 1989 in which he recommended the appointment of

Mr Di Carlo but the memorandum was not communicated to the Joint Committee on Promotions, which would have been able to give its opinion on the recommendation. The fourth plea relates to the fact that no evidence has been adduced of the correctness of the assertion by the Director of Directorate E in the memorandum that his opinion was shared by the applicant's immediate superior and that assertion was such as to influence decisively the appointing authority's decision. By his fifth plea the applicant claims to have discovered a contradiction between the reference, in the memorandum of 7 July 1989, to the concurring view of his immediate superior and a statement made by the latter to the applicant. The applicant's sixth plea is to the effect that the appointing authority did not compare the merits of the officials who applied for the vacancy. In the seventh plea the applicant claims that the appointing authority did not check whether the applicants satisfied the requirements of Vacancy Notice No 10/89.

### Substance

*The second, sixth and seventh pleas and the statement of the reasons for the contested decision*

- 16 The applicant alleges in his second plea that the appointing authority did not take account of the opinion of the Joint Committee on Promotions of 12 June 1989 in which it had been unanimously proposed to promote Mr Thomson and, by a majority and in order, to promote Messrs Schönherr and Vingborg (*ex aequo*) as well as Mr Anastassiadis and Mrs Weiler (*ex aequo*). In his sixth plea the applicant claims that the ESC did not observe the provisions of Article 45 of the Staff Regulations. In that respect the applicant maintains that it is not established that the appointing authority compared the merits of the officials; he observes moreover that he is older and has a greater length of service and more seniority in grade than Mr Di Carlo. The applicant points out, furthermore, that he translates from four languages into German, has a training in banking, holds a State diploma as a qualified interpreter and translator and has completed a full course of study in economic science at the University of Cologne. In his seventh plea the applicant alleges that the appointing authority did not check whether the candidates had the qualifications required by Vacancy Notice No 10/89.
- 17 In response to the applicant's second plea, the ESC contends that the Staff Regulations do not require any consultation procedure to be established in matters of

promotion. The decision to establish such a procedure is optional. The ESC considers that where the appointing authority proposes not to follow the opinion of the Joint Committee on Promotions it is under no obligation to state specific reasons in its decisions on promotion and that such decisions, like those appointing an official to a new post, do not have to be reasoned. The ESC states that the appointing authority has a discretion in that respect. It contends that the applicant has adduced no evidence in support of his sixth plea. It further maintains that the appointing authority has a discretion in assessing the suitability of applicants. As regards the applicant's seventh plea, the ESC maintains that he has adduced no evidence which could support it.

- 18 The Court points out that those three pleas are essentially based on infringement of Article 45 of the Staff Regulations and, in consequence, considers it expedient to examine them together, in conjunction with the statement of reasons for the contested decision, since it is required to determine of its own motion whether the ESC has satisfied the requirement to state reasons for its decision (see judgment of the Court of First Instance in Case T-37/89 *Hanning v European Parliament* [1990] ECR II-463, paragraph 38).
- 19 The Court points out that according to Article 45(1) of the Staff Regulations promotion is exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.
- 20 In order to evaluate the interest of the service and the merits to be taken into account in connection with the decision on promotion provided for in Article 45 of the Staff Regulations, the appointing authority has a wide discretion, and in that respect review by the Community judicature must be confined to the question whether, having regard to the bases and procedures available to the administration for its assessment, it has remained within the proper bounds and has not used its authority in a manifestly incorrect manner (see judgment of the Court of Justice in Case 280/80 *d'Aloja, née Bakke v Council* [1981] ECR 2887).

- 21 Although the appointing authority is not required under Article 45 of the Staff Regulations to state reasons for its promotion decisions, especially as regards candidates who have not been promoted (see the judgments of the Court of Justice in Case 90/71 *Benardi v Parliament* [1972] ECR 603; Case 188/73 *Grassi v Council* [1974] ECR 1099; Case 233/75 *Bonino v Commission* [1987] ECR 739 and Case 111/86 *Delancke v Commission* [1987] ECR 5345), it is nevertheless required under Article 90(2) of the Staff Regulations to state reasons for a decision rejecting a complaint challenging a promotion. However, since, under Article 45 of the Staff Regulations, promotions are 'by selection', the reasons need be concerned only with the fulfilment of the legal conditions on which, under the Staff Regulations, the validity of the promotion depends. That does not mean that the institution concerned must set out in detail in what way it considered that the appointed candidate fulfilled the conditions in the vacancy notice (see the judgments of the Court of Justice in *Grassi*, above, paragraphs 13 and 14 and in Case 151/80 *De Hoe v Commission* [1981] ECR 3161, paragraph 13).
- 22 The purpose of that obligation to state the reasons, at least at the stage of the decision rejecting the complaint, for a contested decision on promotion is to enable the Community judicature to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by an error which will allow its legality to be contested. The obligation to state reasons therefore constitutes an essential principle of Community law which may be derogated from only for compelling reasons (see most recently the judgment of the Court of First Instance in Case T-1/90 *Perez — Minguez Casariego v Commission* [1991] ECR II-143, paragraph 73, and the judgment of the Court of Justice in Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469, paragraph 26).
- 23 In the present case the Court observes that there is no statement of reasons in the letter of 1 August 1989 by which the President of the ESC informed the applicant that his application had been unsuccessful and that the memorandum of 12 February 1990 by which the Secretary-General of the ESC rejected the applicant's complaint merely contains a general confirmation that all the applications, including that of the applicant, submitted following the publication of Vacancy Notice No 10/89 had been carefully compared in accordance with Article 45 of the Staff Regulations and that the appointing authority had decided that it could not accept the advice of the Joint Committee on Promotions, which was not binding, and had given preference to one of the applicant's colleagues whom it considered the most deserving of promotion to the vacant post. That memorandum therefore also contains no statement of reasons with respect to the applicant.

- 24 When asked at the hearing about the manner in which the consideration of the comparative merits of the officials eligible for promotion and their reports had taken place, the representative of the ESC stated that the appointing authority had based its decision on all the information in the administration's possession, including the candidates' staff reports, and had asked Mr Vermeylen to compare the various staff reports of the candidates. However, Mr Vermeylen gave the Secretary-General only his conclusions without making a detailed and careful comparison of the staff reports; in consequence, they were the only documents in the file on which the appointing authority based its decision. Pointing out that the ESC is a small institution with, to use the very term employed by the ESC, a 'one-man appointing authority' able to take its own decisions without pointless formalities, the representative of the ESC further explained that before taking its decision the appointing authority had taken numerous opinions, had had several discussions and had consulted the competent director.
- 25 It should be pointed out that, although in matters of promotion the appointing authority has a wide discretion, the exercise of that discretion presupposes careful consideration of the files that must be the subject of a comparative examination. However, faced with a body of sufficiently consistent evidence that supports the applicant's arguments regarding the lack of any real consideration of the candidates' comparative merits, it is for the defendant institution to show, by objective evidence amenable to judicial review, that it observed the guarantees given by Article 45 of the Staff Regulations to officials eligible for promotion and considered the comparative merits.
- 26 The Court is of the opinion that the factual particulars supplied by the defendant and the single assertion, expressed in a purely abstract manner and unsupported by any document in the file produced to the Court, according to which the file relating to Vacancy Notice No 10/89 enabled the appointing authority to consider the comparative merits of the candidates and that the appointing authority did so, cannot be regarded as sufficient to show that in this case the appointing authority in fact considered the candidates' comparative merits.

- 27 As regards the list drawn up by the Joint Committee on Promotions on 12 June 1989 pursuant to Article 4 of Decision No 2903/81 A of the ESC of 1 December 1981 determining the composition and powers of the Promotions Committee, the Court points out, on the one hand, that Article 5 of that decision requires the appointing authority to make promotions after consulting such a list and, on the other hand, that the setting up by an institution of an advisory committee not provided for by the Staff Regulations in order to obtain an opinion, regarding appointments to certain posts, in relation to the abilities and aptitudes of candidates, having regard to the qualifications required, constitutes a measure designed to ensure that the institution, as appointing authority, has a better basis for carrying out the comparative examination of the merits of the candidates, as required by Article 45 of the Staff Regulations (see the judgment of the Court of Justice in Joined Cases 44/85, 77/85, 294/85 and 295/85 *Hochbaum and Rawes v Commission* [1987] ECR 3259, paragraph 16).
- 28 It follows that a list drawn up by the Promotions Committee must be one of the factors on which the institution bases its own assessment of the candidates and that, in the present case, the appointing authority was required to take account of the list drawn up by the Promotions Committee even if it considered itself obliged not to follow it. Moreover, consultation of that list was of particular importance in so far as in its opinion the Committee had unanimously proposed that Mr Thomson should be promoted and, by a majority and in order, that Mr Schönherr and Mr Vingborg (*ex aequo*) and Mr Anastassiadis and Mrs Weiler (*ex aequo*) should also be promoted.
- 29 The Court observes that there is no mention of considering the opinion delivered by the Joint Committee on Promotions either in Decision No 259/89 A of the President of the ESC promoting Mr Di Carlo, the President's letter informing the applicant that his application had been unsuccessful or even in the memorandum of 12 February 1990 from the Secretary-General of the ESC rejecting the applicant's complaint. Furthermore the file produced to the Court at its request does not show that the appointing authority complied with its obligation to take account of that opinion. As a result, the Court can only find that it has not been established that the opinion was taken into account and that the contested decision lacks any statement of reasons, although such a statement was particularly necessary in the present case in which the appointing authority considered it had to depart entirely from the proposals in the opinion of the Joint Committee.

- 30 Furthermore, the Court finds that, as the ESC's representative admitted at the hearing, the ESC has not produced, as the Court expressly requested it to do, the whole file on the basis of which the appointing authority adopted the contested decision. By not acceding to that request the ESC failed to comply with an obligation on its part towards the Community judicature, since it did not put the Court in a position to carry out fully its review of the legality of the contested decision.
- 31 It follows from all the foregoing that, in a context such as the present one, where the applicant has made precise and substantiated allegations, where the institution has failed to comply with its obligation to produce the file on the basis of which it made its decision, where the Court cannot determine whether it was the appointing authority, namely the President, which in fact exercised its powers, or whether, as appears from the documents on the Court's file, it was an incompetent authority, namely the Secretary-General of the ESC, which apparently made the contested appointment, and where no reasoned decision was addressed to the applicant in response to his complaint, the contested decision must be annulled without its being necessary to consider the other pleas put forward by the applicant in support of his application or to order the measures of inquiry for which he has asked.

### Costs

- 32 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 if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- (1) Annuls Decision No 259/89 A of the President of the Economic and Social Committee of 1 August 1989 appointing Mr Giovanni Di Carlo to the post of Principal Translator pursuant to Vacancy Notice No 10/89;

**(2) Orders the Economic and Social Committee to pay the costs.**

**Briët**

**Kirschner**

**Biancarelli**

Delivered in open court in Luxembourg on 30 January 1992.

**H. Jung**

**Registrar**

**C. P. Briët**

**President**