

3. Article 7(2) of the Staff Regulations confers a power on the appointing authority to call upon an official to occupy temporarily a post in a higher career bracket, but does not impose on it any obligation to exercise such power. Where it takes a decision in the matter, the appointing authority enjoys a wide discretionary power which it exercises in the light of the circumstances of the case.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
25 September 1991 *

In Case T-163/89,

Elfriede Sebastiani, an official of the European Parliament, residing in Itzig (Luxembourg), represented by Paul Greinert, of the Trier Bar, with an address for service in Luxembourg at the applicant's office in the General Secretariat of the European Parliament, Kirchberg,

applicant,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, and Manfred Peter, Head of Division, acting as Agents, assisted by Alex Bonn, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 22 Côte d'Eich,

defendant,

APPLICATION for the annulment of the decision of the Secretary-General of the European Parliament of 6 September 1989 refusing to promote the applicant retroactively to Grade B 3,

* Language of the case: German.

THE COURT OF FIRST INSTANCE (Fifth Chamber),

composed of: C. P. Briët, President, D. Barrington and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 24 January 1991,

gives the following

Judgment

Facts

- 1 By a decision dated 27 February 1984, taking effect on 1 January 1984, the applicant, who had been employed as an official of the European Parliament (hereinafter referred to as 'the Parliament') since 1981, was appointed to Grade B 5 in the career bracket of administrative assistant (Grade B 5/4) and transferred from Directorate-General V for Research and Documentation to Directorate-General I for Sessional and General Services. She was responsible within Directorate-General I for the organization and management of the typing pool in the German translation division. By a decision dated 30 October 1985, taking effect on 1 October 1985, she was promoted to Grade B 4 in her career bracket.

- 2 Before the applicant took charge of the organization and management of the typing pool in the German translation division, the official who had been working as head of that pool, and who occupied in that capacity a Grade B 3 post under the organization plan for the pool in question, had been transferred to another department, whilst retaining her post. Since that date there had no longer been any Grade B 3 post available in the applicant's language section.

- 3 On 14 December 1988 the applicant applied to the Secretary-General of the Parliament for a decision under Article 90(1) of the Staff Regulations of officials of the European Communities (hereinafter referred to as 'the Staff Regulations'). She applied for retroactive promotion to Grade 3 in Category B, with effect from a date not later than that on which a similar promotion had occurred in the typing pool of the French translation division.

- 4 Having received no reply, the applicant on 14 July 1989 lodged a complaint under Article 90(2) of the Staff Regulations. In that complaint the applicant contended first that she had been the victim of discrimination by comparison with her colleague in a comparable position in the French pool and her predecessor in the German pool, owing to manipulation of the organization plan relating to the Parliament's departmental structure and poor management on the part of the administration. Secondly, she claimed that there had been an infringement of Article 45 of the Staff Regulations, which provides that all officials in the same category are to enjoy equal opportunities and fair treatment with regard to promotions, and of Article 7(2) of the Staff Regulations, relating to temporary promotions.

- 5 On 6 September 1989 the Secretary-General of the Parliament replied to the request which the applicant had made on 14 December 1988. He informed her that he had invited the Director-General of Directorate-General I to submit to him a proposal for the reorganization of the translation divisions and that a Grade B 3 post had already been proposed in the 1990 budget in respect of the typing pool of the German translation division.

- 6 With effect from 1 January 1990, a Grade B 3 post was allocated to the typing pool of the German translation division. By a decision of the Secretary-General of the Parliament of 18 May 1990, the applicant was promoted to Grade B 3 with effect from 1 April 1990.

Procedure

- 7 By application lodged at the Registry of the Court of First Instance on 4 December 1989, the applicant brought this action.

- 8 The written procedure followed the normal course.
- 9 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry. However, it asked the parties to lodge certain documents.
- 10 The oral procedure took place on 24 January 1991. At the end of the hearing the President declared the oral procedure closed.
- 11 The applicant claims that the Court of First Instance should:
- (i) award the applicant compensation for the financial loss suffered by her as a result of the refusal to award her temporary promotion, together with interest at the usual bank rate;
 - (ii) award her compensation, by means of an appropriate retroactive promotion or promotion to a higher level commensurate with the B 3 Grade corresponding to her post, for the financial loss suffered by the applicant as a result of discrimination with regard to her promotion in comparison with her colleague in the French division occupying a comparable post (head of the French pool), together with interest at the usual bank rate;
 - (iii) further, order the appointing authority to rectify the discriminatory staff policy exercised by it against certain Member States of the Community by reason of the inequitable allocation of posts in contravention of Article 27 of the Staff Regulations, and accordingly order it to establish the basic conditions for an equitable staff policy as provided for in Articles 27 and 45 by undertaking a fair allocation of posts and promotions within the General Secretariat of the European Parliament;
 - (iv) order the defendant to pay the costs.

- 12 The Parliament contends that the Court of First Instance should dismiss the application and order the applicant to pay the costs.

Admissibility

- 13 The Parliament raises an objection to the effect that the applicant's claims are inadmissible.

The first head of claim

- 14 The Parliament contends that this head of claim is inadmissible, by reason of the fact that the applicant has suffered no financial loss and that she cannot claim to have suffered such loss as a result of the refusal to grant her temporary promotion. Consideration of the situation shows that no Grade B 3 post was available in the applicant's department and that consequently the appointing authority was not in a position to promote the applicant to Grade B 3 even after she became eligible for promotion.
- 15 The applicant claims that she should have been promoted pursuant to Articles 7, 27 and 45 of the Staff Regulations some years ago, as were her colleagues in comparable posts in the other language sections.
- 16 The Court observes *in limine* that in her application for a decision under Article 90(1) of the Staff Regulations, as contained in her letter of 14 December 1988, the applicant maintains that she suffered 'flagrant and indefensible' prejudice on account of the unfounded refusal on the part of the administration to promote her and that she reserved the right to bring proceedings through official channels and to institute proceedings for compensation. In her complaint, contained in her letter of 14 July 1989, the applicant relied upon an infringement of Article 7(2) of the Staff Regulations, by reason of the fact that she had still not received, after several years, the differential allowance due in respect of the Grade B 3 post occupied by her. The Court considers that this head of claim must be interpreted in the light of those arguments.

- 17 The first and second sentences of Article 7(2) of the Staff Regulations provide as follows:

‘An official may be called upon to occupy temporarily a post in a career bracket in his category or service which is higher than his substantive career bracket. From the beginning of the fourth month of such temporary posting, he shall receive a differential allowance equal to the difference between the remuneration carried by his substantive grade and step, and the remuneration he would receive in respect of the step at which he would be classified in the starting grade if he were appointed to the career bracket of his temporary posting.’

This provision does not therefore refer to a ‘temporary promotion’ but to temporary assignment to a vacant post. Since the applicant relies in her application on Article 7(2) of the Staff Regulations, the Court considers that this head of claim cannot reasonably be heard save in that the applicant claims that the Court should award her compensation for the financial loss caused to her by virtue of the refusal to assign her temporarily to the post, corresponding to a Grade B 3 post, of head of the typing pool of the German translation division, together with interest at the usual bank rate. It should be noted, moreover, that the Parliament did not interpret this head of claim in any other way.

- 18 The Court considers that it was the applicant’s intention to contest a refusal by the appointing authority which might directly affect her position under the Staff Regulations, and in view of the fact that the purpose of the administrative appeals provided for under Articles 90 and 91 of the Staff Regulations is to arrange for the review by the Community Court of such an act (see in particular the judgment of the Court of Justice in Case 129/75 *Hirschberg v Commission* [1976] ECR 1259), this head of claim is admissible.

The second head of claim

- 19 The Parliament contends, as it does in relation to the first head of claim, that there was no Grade B 3 post available in the applicant’s department at the material time and that consequently the administration was not in a position to promote the applicant to Grade B 3 even after she became eligible for promotion. The

Parliament maintains that the applicant's claims for compensation for the financial loss allegedly suffered by her because she was not promoted to Grade B 3 at the same time as her colleague in charge of the typing pool of the French translation division, when they were both performing similar duties, are inadmissible, since there is no financial loss which either exists or can be relied on.

- 20 The applicant has not expressly commented in her written observations on this aspect of the objection of inadmissibility raised by the Parliament.
- 21 The Court notes that the second head of claim is intended solely to procure the award to the applicant by the Community Court of promotion to Grade 3 of Category B. It points out that, as the Court has consistently held, the Community Court has no jurisdiction, without encroaching upon the prerogatives of the appointing authority, to make injunctive orders to a Community institution in relation to an official's position under the Staff Regulations or with regard to the general organization of its departments. This principle is also applicable to an application for compensation. It follows that the applicant is not entitled to an order requiring the Parliament to award her a promotion by way of compensation for the damage allegedly suffered by her. This head of claim is therefore inadmissible.

The third head of claim

- 22 The Parliament contends that this head of claim is inadmissible, by reason of the fact that Articles 90(1) and 91(1) of the Staff Regulations expressly provide that the complaints procedure and the right to appeal to the Court are open to an official only in relation to decisions which concern him personally and acts which adversely affect him. It argues that in the present case the applicant is going beyond her own particular circumstances and is seeking to criticize the general staff policy followed by the administration. It contends that her arguments on this issue should be disregarded as being extraneous to the application.

- 23 The applicant counters this by saying that the poor management of staff posts, the consequences of which she has personally had to suffer, have been due to the fact that the appointing authority practises in relation to nationals of certain Member States (including her own) an unfair policy as regards the allocation of posts to officials, contrary to Article 27 of the Staff Regulations. She says that those measures adversely affect her as a national of one of the allegedly disadvantaged Member States. She contends that in all comparable departments in which posts are occupied by nationals of other Member States and in which the structures of jobs and of Grade B 3 posts are identical those structures have been maintained, save in the case of the German division. She therefore considers herself entitled to rely upon an infringement of Article 27 of the Staff Regulations and to ask the Community Court to find against that unfair policy, since the steps taken by her under Article 90 of the Staff Regulations have not produced any outcome.
- 24 In the opinion of the Court, regard should be had to the fact that the Court of Justice, in its judgment in Case 85/82 *Schlob v Council* [1983] ECR 2105, held that 'even though . . . the duty of the institutions to comply with the provisions relating to recruitment corresponds to a public interest, the applicant is not entitled to act in the interests of the law or of the institutions and may put forward, in support of an action for annulment . . . only such claims as relate to him personally'.
- 25 The claims put forward in the complaint and in this application, in the context of the head of claim in question, relate not to the applicant's personal position under the Staff Regulations but to the allegedly discriminatory general staff policy within the various departments of the Parliament of which the applicant claims to have been a victim. Those claims are thus not personal to the applicant and this head of claim must consequently be dismissed as inadmissible.
- 26 The Court further finds that this head of claim must be dismissed as inadmissible on the ground that it is not open to the applicant, in the context of this application for compensation, to apply for an order requiring the defendant institution to adopt specific measures and imposing upon it any injunctions.

Substance

The first head of claim

- 27 As noted by the Court above, this head of claim is to be interpreted as meaning that the applicant claims that the Court should award her compensation, together with interest at the usual bank rate, for the financial loss caused to her by the unlawful refusal to assign her temporarily to a position, corresponding to a Grade B 3 post, as the head of the typing pool of the German translation division.
- 28 In support of the form of order sought, the applicant puts forward the following pleas: infringement of the principle of equal treatment, infringement of the principle of legitimate expectations, infringement of Article 45 of the Staff Regulations and infringement of Article 7(2) of the Staff Regulations.
- 29 Consideration should at this point be given to each of these four pleas, in order to determine whether one or more of them may result in a finding that the alleged illegality vitiating the decision of the administration was such as to render that party liable and thus to vindicate the applicant's financial claims.

The plea of infringement of the principle of equal treatment

- 30 The applicant claims that she has been disadvantaged and financially prejudiced by the allegedly discriminatory staff policy pursued by the Parliament against certain Member States and certain Community officials. She contends that this discrimination derives from the appointing authority's general inability to ensure the equitable distribution of posts for officials between the Member States and, more specifically in the case of the applicant, to set up a fair staff policy and where necessary to maintain that policy by means of an appropriate allocation of posts and promotions pursuant to Articles 27, 45(1) and 7(1) of the Staff Regulations.

31 The applicant considers that the difference between the grade structures existing in the various typing pools of the translation divisions, which according to the Parliament prevented her promotion, is the result of acts and omissions on the part of the appointing authority, whose inability to fulfil its duties and maintain a fair grade structure ought not to place her at a disadvantage. She claims that solely on account of such 'manipulation' on the part of the appointing authority, running counter to a fair allocation of posts, Article 45 of the Staff Regulations has not been able to be applied to her, despite the fact that she fulfilled the criteria laid down by that article. She maintains that Article 45 presupposes, as a condition *sine qua non* for its application, the 'capacity' of the appointing authority to ensure that the allocation of posts is fairly structured, and consequently that that article cannot be relied on in a legal argument as 'justifying' the discrimination suffered by the applicant in relation to her rights to promotion. The Staff Regulations do not justify the way in which the appointing authority has acted, which has taken the form of interference with the fair allocation of existing posts to the detriment of one Member State whilst ensuring that it continues for the benefit of the other Member States. According to her, this results in discrimination against officials from a Member State affected by this measure, who are financially prejudiced by this disregard of Article 45(1) of the Staff Regulations.

32 The Parliament limits its contentions to an assertion that the applicant is criticising a transfer in the context of which the person transferred retained the post in question. It maintains that that administrative operation concerned a different official, occurred on a different occasion and was thus of no concern to the applicant.

33 The Court points out that each Community institution draws up its list of posts independently and enjoys wide discretionary powers in the organization of its departments (judgment of the Court of Justice in Joined Cases 198/81 to 202/81 *Micheli v Commission* [1982] ECR 4145). It should also be borne in mind that the Court of Justice has recognized that the Community institutions have a great deal of freedom to organize the various administrative units taking account of a whole range of factors, such as the nature and scope of the tasks which are assigned to them and the budgetary possibilities; the Court of Justice has held that it follows that the administration has no obligation with regard to an official to organize the department in which he is employed so as to guarantee him an opportunity to perform certain duties and obtain promotion as a result (judgment in Case 178/80 *Bellardi-Ricci v Commission* [1981] ECR 3187).

- 34 It should be noted, having regard to the freedom thus conferred upon the Community institutions, that the applicant has failed to back up this plea with sufficiently precise factual, concrete evidence which would enable the Court to conclude that the appointing authority, either by a manifest error of assessment or by a misuse of powers, has infringed — to the detriment of her personal position under the Staff Regulations — the general principle of equal treatment of Community officials by refusing, for reasons relating to the absence of a post in the career bracket higher than the career bracket to which she belongs, to call upon her to occupy such a post on a temporary basis.
- 35 Consequently, this plea cannot be accepted.

The plea of infringement of the principle of legitimate expectations

- 36 The applicant considers that the appointing authority, completely contrary to the entire administrative practice hitherto followed in that sphere, allowed the head of the pool who previously occupied that post to 'take the B 3 post with her' when she was transferred, notwithstanding the fact that at that time the applicant had already worked in that position and had had very good staff reports. There was thus no objective justification for any such alteration to the equitable organization plan which had hitherto existed for the German division, since as regards the language divisions of the other Member States the fair allocation of Grade B 3 posts existing for that position had been maintained. Several of her superiors assured her on various occasions that once she fulfilled the seniority conditions necessary to obtain the B 3 post corresponding to her position, an exchange of posts would take place so that she would not suffer any prejudice in comparison to her colleagues of other nationalities occupying comparable positions.
- 37 The Parliament contends that the administrative measure involving the transfer of the official previously assigned to the post of head of the pool, who occupied in that capacity a Grade B 3 post and who was then transferred to another department together with her post, concerned a different person and did not concern the applicant.

38 The Court notes that the applicant was invited to submit proof of the undertaking which, according to her, the appointing authority had given her, that is to say the alleged promise by her superiors to implement an exchange of posts as soon as the applicant fulfilled the seniority conditions which she needed to meet in order to obtain the Grade B 3 post corresponding to her position. In reply to that invitation, the applicant merely asserted that her superiors never undertook in writing to implement an exchange of posts at the appropriate time. She stated in addition that written undertakings are not usually given by a single superior since the conditions for promotion are laid down in the Staff Regulations and cannot be determined by a superior's written undertaking.

39 In those circumstances, and at all events, the Court considers that the promises and assurances allegedly given by her superiors have not been substantiated and cannot therefore have given rise to any legitimate expectations on the part of the applicant. It should be added that, as previously stated, each Community institution draws up its list of posts independently and enjoys wide discretionary powers in the organization of its departments. It is not apparent from the documents before the Court that the appointing authority used those powers for any purposes other than those for which they were conferred upon it.

40 It follows from the foregoing that this plea cannot be accepted.

The plea of infringement of Article 45 of the Staff Regulations

41 The applicant considers that she has been seriously and groundlessly prejudiced in comparison with her colleagues occupying the same position, in particular those in the French and Danish sections, in that she will not obtain her promotion to Grade B 3 until several years after them. She sees this as a serious infringement of Article 45 of the Staff Regulations, which lays down the criteria for promotion. According to the applicant, she should, on the basis of the promotion criteria set out in Article 45(1) of the Staff Regulations, have obtained her promotion to Grade B 3 no later than her colleague in the French division, since the applicant is able to rely on staff reports which are virtually as good and had even more 'merit points', as required by the aforementioned article, since she had worked for a much longer time in the position, corresponding to a Grade B 3 post, of head of pool in the German division.

- 42 The Parliament contends that it is established that the Grade B 3 post to which the applicant wished to be promoted did not exist in the applicant's department. It claims that this state of affairs meant that the application for promotion submitted by the applicant was doomed to fail, since the administration can only fill existing posts.
- 43 The Court notes that Article 4 of the Staff Regulations provides that no promotion may be made for any purpose other than that of filling a vacant post. It is consequently necessary, before any promotion is made, for a vacant post to have previously appeared in the organization plan. Given that it is common ground that until 1 January 1990 no vacant post in Grade 3 of Category B appeared in the organization plan for the German translation division typing pool, of which the applicant was a member, it was not possible to fill such a post by promotion. The appointing authority thus neither disregarded Article 45 of the Staff Regulations nor disadvantaged the applicant in comparison to her colleagues who had been promoted to vacant posts.
- 44 Consequently, this plea cannot be accepted.

The plea of infringement of Article 7(2) of the Staff Regulations

- 45 The applicant maintains that on several occasions during the period when she was not yet eligible for promotion to Grade B 3 but was already actually occupying the post of head of the German translation division typing pool, corresponding to a Grade B 3 post, she applied for 'temporary promotion' as provided for in similar cases, according to her, under Article 7 of the Staff Regulations. Each of those applications was refused, despite the fact that she fulfilled the criteria required in that regard. She considers that those refusals ran counter to the wording and the objectives of Article 7 of the Staff Regulations.
- 46 The Parliament again points out that after the official who had acted, prior to the applicant, as head of the pool had been transferred, along with her Grade B 3 post, to another department there was no longer in her department any Grade B 3 post which the applicant could have occupied on a temporary basis. The

Parliament points out that the reason why the administration decided not to award a temporary post to the applicant was that there were no posts available for temporary occupation, and it maintains that no financial prejudice therefore exists upon which the applicant is able to rely.

- 47 The applicant counters this in her reply by saying that the appointing authority, by reason of its poor management or its manipulation of posts, acted in such a way that the post which she should have occupied was no longer available even though she was carrying out the duties attaching to the corresponding post. She claims in addition to be entitled, pursuant to Articles 7, 27 and, more especially, 45 of the Staff Regulations, to the benefit of a 'fair and sound policy' as regards staff, in the form of an equitably structured organization plan, in order that the application of the aforementioned provisions of the Staff Regulations should not be circumvented to her detriment.
- 48 The Court notes that until 1 January 1990 no vacant post in Grade 3 of Category B appeared in the organization plan for the German translation division typing pool, for the organization and management of which the applicant has been responsible since her transfer to that division in 1984. Consequently, it is only since that date, which is later than that on which the application was lodged, that the appointing authority could have adopted a decision to apply Article 7(2) of the Staff Regulations by calling upon the applicant to occupy temporarily a post of that category and grade in the translation division to which she was assigned. The Parliament was therefore justified in refusing to assign the applicant to such a post on a temporary basis prior to that date. In any event, Article 7(2) of the Staff Regulations confers a power on the appointing authority and in no way imposes on it any obligation to assign staff to posts on a temporary basis. A decision to do so must be taken in the light of the circumstances of the case, having regard to the wide discretionary power enjoyed by the appointing authority in the matter.
- 49 It follows from the foregoing that the applicant has failed to put forward any plea such as to give rise to the annulment of the refusal of her application by the appointing authority.
- 50 Consequently, the applicant's claims for compensation for financial prejudice allegedly caused by that refusal must be rejected.

- 51 On the basis of all the foregoing considerations the application must be rejected, partly as being unfounded and partly as being inadmissible; it is not necessary to order the production of the documents sought by the applicant in her originating application.

Costs

- 52 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. However, Article 88 of those Rules provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs. It is therefore appropriate to order each of the parties to pay 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.

Briët

Barrington

Biancarelli

Delivered in open court in Luxembourg on 25 September 1991.

H. Jung

Registrar

C. P. Briët

President of the Fifth Chamber