JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
8 June 1993 *

In Case T-50/92,

Gilberto Fiorani, an official of the European Parliament, residing in Munsbach (Luxembourg), represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson, 1 Rue Glesener,

applicant,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, assisted by Jannis Pantalis of its Legal Service, acting as Agents, with an address for service at the office of Jorge Campinos, BAK building, Kirchberg,

defendant,

APPLICATION for, firstly, annulment of the memorandum of 15 October 1991 by which the applicant was 'transferred' from the 'mail sorting' department to the 'messengers' department and, in so far as is necessary, of the decision of 24 March 1992 rejecting the applicant's complaint and, secondly, compensation for the non-material damage allegedly suffered by the applicant,

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

composed of: C. W. Bellamy, President, H. Kirschner and A. Saggio, Judges,

Registrar: H. Jung,

* Language of the case: French

having regard to the written procedure and further to the hearing on 3 March 1992,

gives the following

Judgment

Background to the application

1 The applicant, Mr Gilberto Fiorani, has been employed by the European Parliament ('the Parliament') for more than twenty years. He is currently an official in Grade D1, Step 8. Prior to the events in issue he was assigned to the mail sorting department.

2 Following an incident, the details of which are unclear, the Director General of the Administration of the Parliament, in a memorandum of 15 October 1991 concerning the 'transfer' of the applicant, informed him as follows: 'On account of your unspeakable conduct towards your superiors and the difficulties which the mail sorting department has with you, it has been decided to transfer you with immediate effect to the messengers department. This transfer does not necessarily entail missions outside Luxembourg.'

3 The applicant considers that measure to be a covert disciplinary sanction. Following the 'transfer' memorandum of 15 October 1991 and after attempting without success to obtain an interview with his superiors, he referred the matter to the Staff Committee. Memoranda were exchanged by the Chairman of the Staff Committee with the Director General for Administration and the Secretary-General of the Parliament. At this point the Staff Committee criticized the emergency procedure followed by the administration and requested an interview which was not, however, granted. In the course of the correspondence the Director General for Administration stated, firstly, that the applicant had been 'transferred for reasons inherent in the operation of the department' (letter of 15 November 1991) and, secondly, that the applicant had 'on several occasions behaved unacceptably towards his superiors and [has] been reprimanded. This decision is therefore the logical consequence of a series of warnings' (letter of 18 October 1991).

4 After receiving the 'transfer' memorandum of 15 October 1991, the applicant fell ill. For over 15 months he was on leave on grounds of (psychosomatic) sickness and had to be hospitalized on several occasions. According to the applicant, the deterioration in his health is a direct result of his superiors' conduct towards him and, in particular, of the contested 'transfer'.

5 On 27 November 1991 the applicant submitted a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') against the memorandum of 15 October 1991, asking the appointing authority to withdraw the decision and compensate him for the non-material harm suffered by reason of his superiors' conduct and the adoption of the contested decision. He contended, essentially, that he had been transferred by the contested decision on disciplinary grounds although no such disciplinary measure is provided for by the relevant provisions of the Staff Regulations, and that the decision had been taken in breach of the fundamental right to a fair hearing, as he was not given a hearing and was not able to put forward his defence before the decision was taken.

6 With regard to the effect of the applicant's 'transfer', in a memorandum of 19 December 1991 to the Jurisconsult of the Parliament in the pre-contentious procedure, the Director General for Administration pointed out that the 'mail sorting sector was separated in the ring-book from the messengers department for organizational and staff policy reasons', although administratively it still formed part of the messengers department. The 'transfer' in question was therefore, according to the Director General, an organizational measure concerning the messengers department.

7 By letter of 14 March 1992, the Secretary-General of the Parliament rejected the complaint on the grounds that the decision concerning the applicant's 'reassignment' to the messengers department had been taken in order to put an end to a deterioration in working relations, particularly with the applicant's superiors, and that it was therefore justified by the interest of the service.

8 The applicant contends that that letter was 'notified by memorandum of 24 March 1992 addressed to the "messengers" department', although he had been on sick leave for more than five months, and that it came to his notice only on 30 March 1992.

Procedure

9 Those were the circumstances in which the applicant brought the present action by application lodged at the Court Registry on 26 June 1992.

10 The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. However, the Court put certain questions to the parties, who replied to them at the hearing.

11 The applicant claims that the Court should:

— annul the Parliament's decision of 15 October 1991 transferring the applicant from the mail sorting department to the messengers department;

— order the defendant to pay compensation of ECU 15 000 for the non-material harm suffered by the applicant;

— order the defendant to pay the costs.

12 The Parliament contends that the Court should:

— dismiss the action as unfounded in its entirety;

— make an order as to costs in accordance with the applicable provisions.

Application for annulment

13 The applicant puts forward three pleas in law in support of his application for annulment. Firstly, he submits that the absence in his personal file of written observations concerning the accusations and arguments of his superiors in order to justify the contested decision and the rejection of his complaint is contrary to Article 26 of the Staff Regulations; he adds that the appointing authority ought to have heard his arguments in defence before taking the decision in question, which he describes as a transfer. His second plea alleges breach of the duty under Article 25(2) of the Staff Regulations to state the reasons on which a decision is based, in that the reasons given for the decision to transfer him, taken against his will, are incomplete. His third plea alleges infringement breach of Article 86(2) of the Staff Regulations because the compulsory transfer which was intended as a penalty for his so-called unspeakable conduct is not among the disciplinary sanctions which that article lists exhaustively.

14 Before considering the merits of the claim for annulment, and although the Parliament has only raised certain formal objections to its admissibility, namely inconsistency between the two please relies on support of the claim and the single plea put forward in the complaint, the Court must, in the light of the documents in the case, consider of its own motion two questions concerning the admissibility of the application. Since the rules laid down in Articles 90 and 91 of the Staff Regulations are a matter of public policy, it is necessary to determine, firstly, whether the action was brought in good time and, secondly, whether the contested measure does in fact adversely affect the applicant (see, for example, the judgment in Case T-15/91 *Bollendorff* v *Parliament* [1992] ECR II-1679, paragraph 22, and the order in Case T-34/91 *Whitehead* v *Commission* [1992] ECR II-1723, paragraph 19).

Admissibility

Time-limit for initiating the proceedings

15 It is clear from the documents before the Court that the decision rejecting the applicant's complaint is dated 24 March 1992. As regards the date of notification of the decision, it must be observed that the Parliament has remained silent on this point, although the applicant stated (p. 5 of the application) that it was 'notified by memorandum of 24 March 1992 addressed to the "messengers" department although the applicant had been on sick leave for more than five months', adding that the decision came to his notice on 30 March 1992 after being sent in the meantime to his wife.

16 The Court observes that, as the Court of Justice has held, the notification must enable the addressee to have effective knowledge of the existence of the decision in issue (Case 5/76 *Jänsch* v *Commission* [1976] ECR 1027, paragraph 10). However, since in the present case the decision arrived in the messengers department while the applicant was on sick leave, as the appointing authority was aware, he did not have knowledge of it. Consequently, as the Parliament is silent on this point, the Court has no alternative but to accept the applicant's statement to the effect that he was able to obtain knowledge of the decision only on 30 March 1992 (Case T-16/90 *Panagiotopoulou* v *Parliament* [1992] ECR II-89, paragraph 20). Accordingly, the time-limit for initiating proceedings was observed in the present case.

Existence of an act adversely affecting the applicant

Arguments of the parties

17 During the written procedure the Parliament, while stating in its defence that it did not wish to make any observations contesting the admissibility of the application, pointed out in its arguments on the merits that the contested act was not in principle such as to prejudice the applicant's position under the Staff Regulations (pp. 4 and 6 of the defence).

18 The applicant, referring to the judgment of the Court of Justice in Case 35/72 *Kley* v *Commission* [1973] ECR 679, paragraphs 4 and 8, asserted that the contested

decision by which he was transferred against his wishes was an act which may adversely affect an official within the meaning of Article 91 of the Staff Regulations. Even though such a decision does not affect the material interests or the rank of an official it may, having regard to the nature of the duties in question, and to the circumstances, adversely affect the non-material interests and the future prospects of the employee concerned (p. 6 of the application).

19 In reply to the Court's questions, the applicant stated, referring to the case-law of the Court of Justice (Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraph 17), that whilst the Community institutions have a broad discretion in organizing their departments and in assigning their staff to them, assignment of staff must none the less be in the interests of the service and in conformity with the principle of assignment to an equivalent post. The applicant added that in the present case he did not dispute that the principle of assignment to an equivalent post had been observed. The essential question for determining whether the action was admissible was therefore whether the contested decision was taken solely in the interest of the service or, on the other hand, to punish him. However, in view of the serious accusations made against him in the contested decision, it was clear that it must be regarded as a sanction.

20 As regards what happened in the original incident, which the applicant described as 'extremely serious' and for which he accepted no responsibility, he claimed that it had occurred during a stormy telephone conversation with his superior who in the end 'slammed down' the receiver.

21 Furthermore, the applicant indicated on several occasions that it was not the final decision, that is to say the fact of being transferred from one department to another, as such, — he himself expressly described it in that context as a reassignment and not a transfer — which adversely affected him, but primarily the statement of reasons, which contains extremely serious, unjustified criticism, and the procedure used, which enabled him neither to know what, precisely, were the allegations against him nor to defend himself. The applicant stressed that if he had been reassigned following a procedure in the sole interest of the proper organization of the Parliament's departments, he would not have been able to complain and would therefore never have brought an action. He stated that the second matter adversely affecting him was the final sentence of the contested memorandum, which stated that 'this transfer does not necessarily entail missions outside Luxembourg'.

Although the question whether or not there are missions is a purely factual matter depending on the particular post, missions do have significant financial consequences because the reimbursements relating to them are relatively high and constitute an undoubted financial benefit. The financial repercussions are of exactly the same kind as those in issue in the judgment of the Court of Justice in Case 167/86 *Rousseau* v *Court of Auditors* [1988] ECR 2705, which concerned the payment of a flat-rate allowance for overtime.

22 The Parliament stated at the hearing that the applicant's 'transfer' to the 'messengers' department could not properly be described as a transfer because there had been no notice of a vacant post. It was rather a matter of reassignment in connection with the reorganization of the departments. The Parliament stressed that it found it preferable, in order to resolve the problems caused by the applicant in his working relations, to take this step, which was more humane and more flexible than disciplinary proceedings. The reassignment was not an act adversely affecting the applicant and the grounds for it did not, in principle, have to be stated.

23 With regard to the contested decision, the Parliament adds that the statement of the measures for that decision, far from announcing a covert sanction, notified the applicant of the facts which had led the administration to decide to reassign him in order to resolve the problems created by him in his department. Since being transferred, the applicant has been in a much quieter place than before, when he was daily in direct contact with persons with whom he was not on good terms.

24 As regards missions outside Luxembourg, the Parliament pointed out that the holders of certain posts in the Parliament were required to be available to travel. That was not a right, but rather a duty for the officials in question. The reimbursement of travel and subsistence expenses constitutes indemnification for travelling. Contrary to the applicant's assertions, such reimbursement is not of the same kind as the flat-rate payment for overtime which was in point in the *Rousseau* case and which had been made in consideration of specific tasks and not for being generally on call as such.

25 In reply to the question how an official can properly defend himself against an act which, although not adversely affecting him in the strict sense, is considered by him to be unjustified and embarrassing, such as a negative value-judgment of the kind contained in the statement of reasons in the contested memorandum, the Parliament acknowledged that it was precisely that problem which, in this case, had prompted it not to take a 'hard' line during the written procedure by insisting that the action was inadmissible.

26 With regard to the applicant's denial that he had an opportunity to defend himself, the Parliament referred to the pre-litigation procedure prescribed in the Staff Regulations, in which the official concerned can make his point of view known by submitting a complaint. The Parliament pointed out that in the present case, in spite of the doubt as to whether there was an act adversely affecting the applicant, the appointing authority had examined all the circumstances of the case and had dealt with it on the merits.

Findings of the Court

27 As a preliminary point, it must be observed that the fact that the parties describe a measure as a transfer or reassignment cannot bind the Court of First Instance (judgment of the Court of Justice in Case 56/72 *Goeth-Van der Schueren* v *Commission* [1973] ECR 181, paragraphs 8 to 10). With regard to the legal characterization of the contested measure in the present case, it is clear from the general scheme of the Staff Regulations that there is a transfer in the strict sense of the term only where an official is transferred to a vacant post. It follows that any transfer, properly so-called, is subject to the formalities prescribed by Articles 4 and 29 of the Staff Regulations. However, those formalities do not apply when an official is reassigned with his post because such a transfer does not give rise to a vacant post (judgment of the Court of Justice in Joined Cases 161/80 and 162/80 *Carbognani and Coda Zabetta* v *Commission* [1981] ECR 543, paragraph 19).

28 In the present case the Parliament stated, without being contradicted on this point by the applicant, that the transfer in issue did not give rise to a vacant post. At the hearing the applicant himself, moreover, admitted that his transfer from the 'mail sorting' department to the 'messengers' department constituted a reassignment. In

those circumstances, the Court considers that the contested act cannot on any view be classified as a transfer which, having been effected contrary to the applicant's wishes, would in principle be capable of adversely affecting him (judgment in *Kley*, cited above, paragraph 8), but that it is a reassignment.

29 Secondly, the existence of an act adversely affecting an official within the meaning of Articles 90(2) and 91(1) of the Staff Regulations is an indispensable condition for the admissibility of an action for annulment brought by an official against the institution which employs him. According to the settled case-law of the Court of Justice and the Court of First Instance, an official is adversely affected by an act only where it is such as to have a direct effect on his position in law and thus goes beyond measures which, concerning only the internal organization of departments, do not adversely affect the position of the official concerned under the Staff Regulations (see, for example, the judgment of the Court of Justice in Case 32/68 *Grasselli* v *Commission* [1969] ECR 505, paragraphs 4 and 7, and the order of the Court of First Instance in Case T-47/90 *Herremans* v *Commission* [1991] ECR II-467, paragraphs 21 and 22).

30 As regards the reassignment in issue, it is common ground that it in no way affected the applicant's rights under the Staff Regulations. It entailed no change in his rank or in his substantive rights under the Staff Regulations.

31 Although the applicant's new duties in the 'messengers' department are not the same as his former duties in the 'mail sorting' department, it must be pointed out that even a change in the administrative duties of an official does not constitute an act adversely affecting him, in so far as the altered duties continue to correspond to his grade (see, for example, the judgment of the Court of Justice in Cases C-116/88 and C-149/88 *Hecq* v *Commission* [1990] ECR I-599, paragraphs 11 to 14, and the order in *Herremans* v *Commission* cited above, paragraph 25). In the present case the applicant expressly stated at the hearing that he did not dispute that the principle of equivalence between his new duties and his grade had been observed.

32 As regards the final sentence of the memorandum of 15 October 1991, announcing future restrictions on possible missions for the applicant, it must be observed that, as the applicant himself admitted at the hearing, the prospects of missions are a purely factual matter depending on the post held by the official concerned. That situation cannot, of itself, produce legal effects.

33 In so far as the applicant refers on this point to the judgment in *Rousseau*, cited above, as a basis for the admissibility of his action, inasmuch as it is directed against a 'decision affecting his future financial position', the Court finds that the *Rousseau* case differs fundamentally from the present case. The applicant Rousseau had been appointed as a probationary official and subsequently established as a driver of a Member of the Court of Auditors which, at the time of his appointment, had established a system of flat-rate overtime allowances for drivers; the allowances were therefore part of his salary. In those circumstances, the decision changing his assignment in such a way that he would be entitled to the flat-rate allowance only for the period for which he was actually at the disposal of a Member was found by the Court of Justice to render the applicant's entitlement to the allowance uncertain and for that reason the Court of Justice annulled the decision. However, the position of the applicant in the present case cannot be assimilated to that of Rousseau because the reimbursement of travel and subsistence expenses does not form part of the salary attaching to a particular post.

34 The Court considers that the reimbursement of such expenses is, in this respect, comparable to the allowance for standby duty which is intended to compensate officials for being obliged to remain at the disposal of the institution and which has been expressly held by the Court of Justice not to form part of the salary attaching to an official's grade and step (Case 19/87 *Hecq* v *Commission* [1988] ECR 1681, paragraph 25).

35 As regards the question, raised by the applicant, whether his reassignment was in the sole interest of the service — a question which, as he pointed out at the hearing, determined the admissibility of the action —, it must be observed that this is one of the conditions which, according to the case-law of the Court of Justice, must

be complied with by the Community institutions, although it is acknowledged in that case-law that they have in this respect a broad discretion in organizing their departments (see, for example, the judgment in *Lux*, cited above, paragraph 17). In the present case it is common ground that there was an incident involving the applicant and his superior which the applicant himself has described as 'extremely serious'. However, as the Court of Justice held in the judgment in *Hecq*, cited above, paragraph 22, the transfer of an official in order to put an end to an administrative situation which has become intolerable must be regarded as having been taken in the interest of the service. In the circumstances of the present case the Parliament was justified in taking the view that it was in the interest of the service to remove the applicant from the 'mail sorting' department and reassign him, within the same administrative unit, to the 'messengers' department in order to avoid the tensions which had arisen in the mail sorting department. It must be added that, at the hearing, the applicant did not contest his transfer, as such, to the 'messengers' department. His reassignment cannot therefore be regarded as having adversely affected him by reason of its not being in the interest of the service.

36 In so far as the applicant criticizes the Parliament for not having heard his explanations and defence before adopting the contested measure, it should be observed, firstly, that the fact that the applicant was not given a hearing before the measure was adopted is irrelevant to the question whether the operative part of the measure should be categorized as an act adversely affecting him. Secondly, the Staff Regulations have not set up, in every field, a hearings procedure under which the opinion of every official must be obtained by the administration before a measure which concerns him is adopted, and, in the absence of an express provision in the Staff Regulations, there is no such duty on the part of the administration (judgment of the Court of Justice in Case 125/80 *Arning* v *Commission* [1981] ECR 2539, paragraph 17). The safeguards prescribed by Article 90 of the Staff Regulations for protecting the interests of staff must therefore, in principle, be regarded as sufficient. Furthermore, the Court of Justice held in the judgments of 14 December 1988 in Case 280/87 *Hecq* v *Commission* [1988] ECR 6433, paragraph 11, and of 7 March 1990 *Hecq* v *Commission*, cited above, paragraph 14, with regard to internal organization measures, that the administration is not obliged to state the grounds on which such a decision is based or to hear the official concerned beforehand.

37 It should however be added that according to the case-law of the Court of Justice and the Court of First Instance certain acts may be regarded as adversely affecting

an official, even though they do not affect his material interests or his rank, if they adversely affect the non-material interests or future prospects of the employee concerned (see, for example, the judgment in *Kley*, cited above, paragraphs 4 and 8, and the order in *Herremans*, cited above, paragraph 26).

38 The applicant has not, however, disputed his transfer as such and in fact has criticized the statement of the reasons for the reassignment only in so far as it contains, in his opinion, some extremely serious and unjustified criticism. However, according to the Court's judgment in Case T-138/89 *NBV&NVB* v *Commission* [1992] ECR II-2181, paragraph 31, only the operative part of an act is capable of producing legal effects and, as a consequence, of causing harm.

39 Accordingly, even if the appointing authority had adopted a measure adversely affecting the applicant, which is not the position in this case, it would not be possible to bring an action for annulment directed only against the reasons stated for that measure. It follows that, since the present action for annulment is directed, according to the applicant's own statement, solely against the statement of the reasons for the reassignment in issue, it cannot be regarded as admissible.

40 It follows from all the foregoing considerations that the contested memorandum of 15 October 1991 does not constitute an act adversely affecting the applicant.

41 As regards the question raised by the applicant as to the opportunities for defence available to an official against an act which, although not adversely affecting him in the strict sense of the term, is regarded by the person concerned as affecting his legitimate interests, it must be pointed out that under the system of legal remedies established by the Staff Regulations an act which does not adversely affect an official within the meaning of Article 90(2) of the Staff Regulations cannot be made the subject of a complaint. However, where an official considers that such an act or

a particular aspect of it, such as the statement of reasons for a measure relating to the internal organization of departments, is prejudicial to his interests, he may, under Article 90(1) of the Staff Regulations, submit to the appointing authority a request that it take a decision relating to him, the object of that request being the withdrawal of the act or the removal from it of the particular aspect in question. If the administration rejects the request, the applicant may submit a complaint to the appointing authority under Article 90(2), and if the complaint is rejected an action may be brought before the Court of First Instance.

42 For all those reasons the claim for annulment in this action must be dismissed as inadmissible, and it is unnecessary to consider the Parliament's plea of inadmissibility based on inconsistency between the two pleas relied on in support of that claim and the single plea put forward in the complaint.

Admissibility of claim for compensation

Arguments of the parties

43 In reply to a question put by the Court, the applicant explained at the hearing that he intended that the result of his claim for compensation should depend on that of his principal claim. Consequently, if the Court were to find his application for annulment inadmissible on the ground that there was no act adversely affecting him, the claim for compensation could not be maintained. The applicant also confirmed that his complaint to the appointing authority must be considered as it stands and that he does not ask the Court to treat it as if it were a claim for compensation.

44 The Parliament stated that, as the applicant considers that his claim for compensation is directly associated with his claim for annulment, the former claim is inadmissible in so far as it is directly linked to an infringement of Articles 25 and 26 of the Staff Regulations, since the pleas alleging infringement of those articles are inadmissible and there is no act having an adverse effect. According to the Parliament,

in so far as there is no direct connection between the two applications the claim for compensation is also inadmissible because the pre-litigation procedure did not follow the normal course.

Findings of the Court

45 The Court points out, with regard to those arguments, that a distinction must be drawn between two possible situations when the admissibility of a claim for compensation falls to be determined. The first hypothesis — in any event questionable in the absence of an act adversely affecting an official — is that the claim for compensation is closely linked to an application for annulment. If that is the case, then, if the application for annulment is admissible, so too is the application for compensation. The second hypothesis is that there is no such close link between the two applications. In that case, the admissibility of the claim for compensation must be determined independently of that of the application for annulment. It should be noted in this respect that the admissibility of such a claim is conditional upon the prior administrative procedure, as laid down in Articles 90 and 91 of the Staff Regulations, having been followed correctly (see, for example, the judgment in Case T-5/90 *Marcato* v *Commission* [1991] ECR II-731, paragraph 49, and the order in Case T-8/92 *Di Rocco* v *ESC* [1992] ECR II-2653, paragraph 34).

46 In the present case the claim for compensation must in any event be dismissed as inadmissible. In so far as the claim is, as the applicant himself stated at the hearing, closely associated with the application for annulment which has itself been dismissed as inadmissible, it must suffer the same fate. The claim for compensation must also be dismissed as inadmissible bearing in mind that the damage alleged by the applicant has its origin in a service-related fault independent of the reassignment which is the subject of the claim for annulment. Prior to bringing the action, the applicant did not follow in full the administrative procedure which is prescribed by the Staff Regulations and involves two mandatory stages, namely a request and a complaint within the meaning of Article 90(1) and (2), and in which he ought to have requested the administration to make good the damage suffered (Case T-1/91 *Della Pietra* v *Commission* [1992] ECR II-2145, paragraph 34).

47 It follows that the application must be dismissed in its entirety.

Costs

48 Pursuant to Article 87(2) of the Rules of Procedure, 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 must bear their own costs. The parties must therefore be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the parties to bear their own costs.

Bellamy Kirschner Saggio

Delivered in open court in Luxembourg on 8 June 1993.

H. Jung C. W. Bellamy

Registrar President