

Accordingly, Article 7(1) of the Staff Regulations does not preclude a transfer decision involving the attribution of new duties which, although different from those previously carried out by the official and seen by him as constituting a diminution of his duties and powers, are nevertheless in conformity with the post corresponding to his grade.

2. A change in an official's assignment, which must be based primarily on the interests of the service, does not constitute a breach of the duty to have regard to the interests of officials where the admin-

istration remains within proper bounds in its use of its wide discretion in evaluating the interests of the service on the one hand and those of the official concerned on the other.

3. The absence of the latest staff report from the file of an official who has applied for a vacant post cannot vitiate the decision rejecting his candidature if, when the comparative examination of merits was carried out, the administration had at its disposal sufficient information on which it could reasonably base its decision.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)  
10 July 1992 \*

In Joined Cases T-59/91 and T-79/91,

**Franz Eppe**, an official of the Commission of the European Communities, represented by G. Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the chambers of A. Schmitt, 62 Avenue Guillaume,

applicant,

v

**Commission of the European Communities**, represented by G. Valsesia, of its Legal Service, acting as Agent, assisted by D. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of R. Hayder, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

\* Language of the case: French.

APPLICATION for the annulment of the Commission decision of 17 October 1990, in so far as it changes the organization chart of DG VI and at the same time assigns the applicant, by compulsory transfer, to the new post of EAGGF Adviser, and for the annulment of the Commission decision to publish, on 20 December 1990, Vacancy Notice No COM/164/90 for the post of Head of Unit VI. BI.4 and of the decisions rejecting the applicant's candidature for that post and appointing another candidate,

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

composed of: K. Lenaerts, President, H. Kirschner and D. Barrington, Judges,

Registrar: P. van Ypersele de Strihou, Legal Secretary,

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

gives the following

**Judgment**

**The facts**

- 1 The applicant was from 1988 Head of Unit VI. BI.4 (Matters common to several products) in the Commission's Directorate General for Agriculture ('DG VI'), in Grade A 4.
- 2 In 1990 the applicant expressed dissatisfaction about his situation and applied on several occasions for other posts as Head of Unit or Adviser for which Vacancy Notices were published for appointments at Grades A 5, A 4 and A 3, and stated that if his candidature were considered he would like the possibility of his being promoted to Grade A 3 to be examined.

3 On 9 January 1990 he had a meeting with his Director General at which he expressed his general dissatisfaction in the unit of which he was in charge and asked to be assigned to other duties more appropriate to his experience and knowledge.

4 On 12 February 1990, the applicant confirmed the views put forward at that meeting by a memorandum to his Director General in which he explained the difficulties to which his unit was subject. He concluded that:

‘After due reflection, and having regard to all the foregoing circumstances, I have arrived at the conclusion that it is impossible for me to discharge the responsibilities involved in the post of Head of Unit VI. BI.4. I therefore ask you to consider, in the context of the redeployment at present under way, the possibility of entrusting similar responsibilities to me in another department in your directorate in which I could better turn to account the experience and knowledge that I have acquired in more than 20 years in DG VI (Markets, structures, conditions of competition), having now held the Grade A 4 for more than 10 of those years.’

5 Following that memorandum, the applicant had a meeting with his Director General on 14 March 1990 during which he stated that, in principle, he was agreeable to being transferred to a post of Adviser that might be created and at the same time expressed his awareness of the fact that his Director General could give him no commitment regarding the level (Grade A 4 or A 3) at which that post — if created — would in fact be filled.

6 Three months later, on 21 June 1990, the applicant sent to his Director General, through official channels, a memorandum indicating that he withdrew his agreement in principle to a ‘transfer to the EAGGF’ unless it entailed his ‘promotion to Grade A 3’. He added that non-promotion might be ‘construed as meaning, in substance, that his superiors were not satisfied with the management capabilities displayed by him in Unit VI. BI.4, having desired the change for that reason’. He maintained that the transfer of another Head of Unit in DG VI to a post of Adviser, which occurred in the same period, had been generally seen as a disciplinary meas-

ure, as indicated by a number of articles in the press. Because at that time the applicant had not been given his staff report for the period 1987-1989 — he received it only after a considerable delay — he considered that he was not in a position to disprove the rumours that there was a parallel between his transfer and that of the other Head of Unit. In his view, the best way of dispelling those rumours would be to promote him to Grade A 3.

7 In a memorandum of 25 June 1990 to the Deputy Directors General, Directors and Heads of Unit, the Director General of DG VI set out the reasons for, and the objectives of, a reorganization of the Directorate General, together with details of how it was to be carried out. Paragraph 4 of Annex I to that memorandum proposed the creation of a post of 'Adviser' to Directorate VI. G (EAGGF), for which the following reasons were given:

'The interpretation and the consistent application of the ever more complex and numerous regulations of which account must be taken in the work of the five units responsible for budgetary, financial and monetary matters linked with the financing of common organizations of the markets and action for rural development call for a very substantial qualitative and quantitative effort. Steps must be taken to ensure that that task can be entrusted to an Adviser reporting directly to the Director in charge of Directorate VI. G'.

8 On 6 August 1990, the applicant protested to his Director General about the proposal submitted by the latter in July to the Director General for Personnel and Administration for changes to be made to the organization chart of DG VI, in so far as that proposal involved a change of assignment for the applicant whereby in the future he would be an Adviser in Directorate VI. G. He referred to the doubts as to his integrity and honour to which such a transfer might give rise. He added that if the transfer took place without consultation of the Advisory Committee on Appointments, any possibility of his being promoted to Grade A 3 would automatically be excluded.

9 On 18 September 1990, the applicant asked the Secretary General of the Commission not to make any immediate change to the organization chart as far as he was concerned, so as to avoid any comparison with the transfer of another Head of Unit 'concerning the disciplinary nature of which the public was in no doubt'.

10 On 15 October 1990 the Secretary General replied as follows:

'I entirely understand the importance of differentiating between the post of Adviser to the EAGGF and the transfer of Head of Unit ... to a post of Adviser. I have suggested to Mr Legras that he should differentiate between the two cases'.

11 On 17 October 1990 the Commission approved the new organization chart of DG VI.

12 By memorandum of 6 November 1990, the Director General of DG VI confirmed to the applicant that he had been appointed Adviser to DG VI. G, EAGGF, with effect from 1 December 1990 at the latest. The memorandum stated, in accordance with the wish expressed earlier by the Secretary General, that that appointment 'forms an integral part of the redeployment exercise referred to in the memorandum ... of 25 June 1990, the implementation of which implies no judgment concerning the manner in which you discharged the duties of Head of Unit VI. B1.4. On the contrary, it is simply a response to the legitimate concern to ensure that an experienced qualified lawyer undertakes a first analysis and legal coordination of all the very numerous measures governing the European Agricultural Guidance and Guarantee Fund'.

13 On 9 November 1990, the Director General for Personnel and Administration also confirmed to the applicant that, as part of the changes to the organization chart of DG VI, the Commission had decided on 17 October 1990 to create a post of Adviser to the Director of DG VI. G. EAGGF and to assign him to that post with effect from 1 November 1990.

- 14 On the same day, the applicant asked his Director General to suspend the re-assignment because it placed him in an embarrassing situation in so far as some people thought that he had been promoted to Grade A 3 whilst others, particularly those outside the institution, might believe that it was a disciplinary measure. He added that only a promotion to Grade A 3 would dispel any doubts.
- 15 On 27 November 1990, the Director General of DG VI replied to the applicant that there was 'absolutely no basis' for such preoccupations and that his reassignment had taken place at his own request.
- 16 In the meantime the applicant had, on 17 November 1990, submitted a complaint against the Commission decision of 17 October 1990. In it the applicant claimed in particular that the Commission had not observed, with respect to him, the principle, referred to in the memorandum from the Director General of 25 June 1990 concerning the redeployment procedure, that officials would be asked to volunteer.
- 17 On 21 May 1991, hence after the expiry of the period of four months provided for in Article 90(2) of the Staff Regulations of Officials of the European Communities but within the period for bringing an action prescribed in Article 91(3) of the Staff Regulations, the Commission rejected the applicant's complaint, stating in particular that his appointment had not been decided on in breach of the procedure envisaged in the memorandum of 25 June 1990 'in view of the fact that that procedure was intended only for the mobility of staff not holding the rank of Head of Unit'.
- 18 The applicant then brought an action on 5 August 1991, which was registered as Case T-59/91.

19 Taking the view that he had been transferred against his will and seeking to 'uphold his honour', on 14 January 1991 the applicant applied for his former post of Head of Unit VI. BI.4, which was the subject of Vacancy Notice No COM/164/90, published on 20 December 1990. Seven other applications were made for that post.

20 By memorandum of 14 February 1991, the secretary of the Advisory Committee on Appointments informed the applicant that 'at its meeting on 7 February 1991, the Advisory Committee on Appointments considered the level at which the post should be filled and the qualifications that the person assigned to it should have; it then examined all the applications and heard the views of the Director General for Agriculture.' On completion of its work, it concluded:

'that the post of Head of Unit DG VI. BI.4 (Quality policy and other matters concerning several products) should be filled at Grade A 5/4;

after examination of the applications, that your application should not be taken into consideration on the present occasion'.

21 On 25 February 1991, the applicant lodged a further complaint concerning: first, the Commission's decision to publish Vacancy Notice No Com/164/90; secondly, the appointment of Mr V. to that post; and, thirdly, the rejection of his candidature for that post.

22 By decision of 7 March 1991, Mr V. was appointed to the post of Head of Unit VI. BI.4.

- 23 On 11 March 1991, the appointing authority informed the applicant that his candidature for that post had been unsuccessful.
- 24 On 15 April 1991, the applicant sent a letter to his Director General in which he again objected to the procedure applied to him and criticized the fact that the tasks or activities for which he would be responsible had not been defined. A copy of that letter was submitted by the applicant to the Inter-services Group meeting of 5 June 1991 in order to be included in the file on his last complaint.
- 25 On 9 August 1991, hence after expiry of the period of four months provided for in Article 90(2) of the Staff Regulations of Officials of the European Communities but within the period for bringing an action prescribed in Article 91(3) of the Staff Regulations, the Commission rejected the applicant's second complaint.
- 26 In those circumstances, the applicant brought a second action on 7 November 1991, which was registered as Case T-79/91.
- 27 By order of 15 May 1992, the President of the Fifth Chamber joined Cases T-59/91 and T-79/91 for the purposes of the oral procedure and judgment.
- 28 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.



29 The hearing took place on 4 June 1992. The representatives of the parties presented oral argument and answered the questions put to them by the Court.

### Forms of order sought

30 In his first action (Case T-59/91), the applicant claims that the Court should:

- declare the present action admissible and well founded;
- consequently, annul the Commission's decision of 17 October 1990 in so far as it changes the organization chart of DG VI and at the same time assigns the applicant, by compulsory transfer, to the new post of EAGGF Adviser, as notified to the applicant by letters of 6 and 9 November 1990;
- order the defendant to pay the costs in their entirety.

In his second action (Case T-79/91), the applicant claims that the Court should:

- declare the present action admissible and well founded;
- consequently, annul the Commission decision to publish, on 20 December 1990, Vacancy Notice No COM/164/90 for the post of Head of Unit VI. BI.4;
- annul the decision of 7 March 1991 appointing Mr F. V. to that post;

- annul the rejection of the applicant's candidature for that post;
- order the defendant to pay the costs.

The Commission contends that in both cases the Court should:

- dismiss the application as unfounded;
- order the applicant to bear his own costs.

### Substance

<sup>31</sup> In support of his first action, the applicant relies on seven pleas in law. The first alleges non-compliance with the redeployment procedure, as defined by the memorandum from the Director General of 25 June 1990, in that, in particular, the Commission infringed the principle of voluntary transfer. The second alleges infringement of Article 7(1) of the Staff Regulations, in that the contested transfer decision was not adopted solely in the interests of the service and did not observe the equivalence of posts. The third alleges a misuse of powers, in that the Commission's reference to the redeployment exercise to explain its decision conceals other reasons. The fourth alleges infringement of the duty to have regard to the interests of officials, in that the Commission wholly failed to take account of the personal interests of the applicant. The fifth alleges breach of the principle of the protection of legitimate expectations, in that the Commission did not fulfil its implied commitment that it would not consider the applicant's application for the post of EAGGF Adviser if the transfer were not accompanied by a promotion to Grade A 3. The sixth alleges breach of the principle of non-discrimination, in that another newly created executive post was, by contrast with that of the applicant, filled on a voluntary basis. The last alleges infringement of Article 25 of the Staff Regulations, in that the contested decision does not contain a sufficient or correct statement of reasons.

- 32 In support of his second action, the applicant refers to the consequences of the illegality of his transfer as alleged in his first action and claims that, first, a manifest error of assessment was made concerning the rejection of his application for his old post and, secondly, Article 25(2) of the Staff Regulations was infringed as regards the statement of the reasons on which that rejection was based.

## The first action

### *Non-compliance with the redeployment procedure*

- 33 The applicant states that the letter of 6 November 1990 informing him of his transfer stated: 'the appointment to the abovementioned post forms an integral part of the redeployment exercise referred to in my memorandum VI/00666 of 25 June 1990'. Under the procedure defined by that memorandum, the contested decision could be accounted for only by the fact that, since the first — voluntary — stage of the redeployment procedure had been unsuccessful, the Director General was forced to resort to compulsory transfer of the applicant, as provided for in paragraph III(5) of his memorandum of 25 June 1990. That paragraph provides that, in the event of its not being possible to accept any candidature, the Director General would — solely in the interests of the service — have to propose the reassignment of an official to be designated by him, at the appropriate time, after hearing the views of the 'Selection Group'.
- 34 According to the applicant, it is clear from the facts of the case that the redeployment procedure was not observed, or even initiated, with respect to him, since he was transferred compulsorily and against his will.
- 35 The applicant maintains that there is no basis for the Commission's claim, in its reply to his complaint, that the redeployment procedure described in paragraph III of the memorandum of 25 June 1990 was not applicable to him by virtue of his being a Head of Unit. He draws attention to the fact that Annex I to that memorandum, dealing with the changes to the organization chart, expressly refers to the creation of a post of 'Adviser' to DG VI. G, EAGGF, to which his superiors intended assigning him.

- 36 He concedes that, in relation to the redeployment procedure, two types of transfers were carried out (paragraph II.3 of the memorandum concerned): (a) 'those which are the result of changes to be made to the organization chart and the transfer of fields of competence', those changes being set out in Annex I to the memorandum, paragraph 4 of which provides for the creation of a post of Adviser in Directorate VI. G, EAGGF; and (b) 'those relating to redeployment properly so called', which are set out in Annex II to the same memorandum. But he considers that paragraph III of the memorandum, entitled 'The procedure envisaged for transfers', covers all transfers where no specific details are given. He therefore considers that that procedure should thus have been followed, even though his assignment to the post of Adviser to Directorate VI. G, EAGGF, took place following the changes made to the organization chart. In his view, the Commission has no reason to say that that procedure was applicable only to 'redemption properly so called', namely the second category of transfers.
- 37 In reply, the Commission states that the decentralized powers of the appointing authority are exercised independently by the Director General solely for the internal transfer of officials other than Heads of Unit. For the latter, the new assignment is conditional upon approval by three members of the Commission, namely the member responsible for the sector concerned, the member responsible for personnel and administration and the President of the Commission. The Director General thus has no power to determine on his own the procedure to be followed in reassigning Heads of Unit. The statement that the procedure provided for in paragraph III of the memorandum of 25 June 1990 in fact relates only to 'redemption properly so called' (Annex II to the memorandum) is thus wholly logical since no procedure for the reassignment of Heads of Unit can be adopted by the Director General alone.
- 38 This Court finds that there can be no question in the present case of breach of the redeployment procedure, as defined in the memorandum from the Director General for Agriculture of 25 June 1990, with particular regard to the emphasis placed on voluntary transfer, since that procedure was not in any event applicable to the applicant. That procedure was in fact laid down by the Director General of DG VI. However, for Heads of Unit, like the applicant, the powers of the appointing authority were not delegated to the Director General but to the relevant member of the Commission, the member responsible for personnel and administration and the President of the Commission, as is apparent from the notice published in *Staff Courier* No 597 concerning decentralization of the exercise of certain powers relat-

ing to personnel management (appointing authority), the content of which is not contested by the parties, as they stated at the hearing. Since the Director General cannot lay down a procedure limiting the discretionary powers of the three members of the Commission exercising the powers of the appointing authority vis-à-vis the applicant, the redeployment procedure cannot be applied to the applicant.

- 39 Consequently, the contested decision cannot constitute a breach of the redeployment procedure.
- 40 The applicant stated at the hearing that his action was based, as regards the procedure, solely on the failure to observe the redeployment procedure and that he did not intend alleging infringement of any other procedure, such as that provided for in Article 29 of the Staff Regulations. Therefore, the present plea in law must be dismissed.

#### *Infringement of Article 7(1) of the Staff Regulations*

- 41 The applicant maintains that the contested decision is based on Article 7(1) of the Staff Regulations and should therefore have been taken solely in the interests of the service and in compliance with the principle of equivalence between grade and post.
- 42 He sets out, with respect to his new post, the reasons invoked by the Commission to justify the creation of the function of Adviser in Directorate VI. G. In a spirit of good will, the applicant insisted, as soon as he arrived in Directorate VI. G, on the need for his duties to be defined. Despite his formal request to that effect in January 1991, the duties and activities required of him were determined only by memoranda of 17 May and 12 June 1991, over six months after his reassignment.

- 43 The applicant infers that the post of Adviser to the EAGGF certainly cannot be regarded as equivalent to his previous post as Head of Unit VI. BI.4, the importance of which is clear from the tasks entrusted to that unit. Accordingly, the conditions laid down in Article 7(1) of the Staff Regulations allowing a compulsory transfer were not fulfilled in the present case. According to the applicant, the redeployment measure undermines his rights under the Staff Regulations not only because it reduces his responsibilities but also because his remaining responsibilities, in view of their nature, importance and scope, fall far short of those corresponding to his grade and his post. That decision should therefore be annulled (Case 263/81 *List v Commission* [1983] ECR 103).
- 44 The Commission states in reply that 'the appraisal of an official's ability to undertake a particular duty falls within the competence of the administration' (order in Case 23/74 *Küster v Parliament* [1974] ECR 331) and also that the doubts expressed by the applicant concerning the equivalence of his new duties with those that he exercised before appear to be without foundation.
- 45 It states that, for a measure to undermine the right of all officials under Articles 5 and 7 of the Staff Regulations to have duties assigned to them which, in their entirety, are consonant with the post corresponding to their grade, it is not sufficient for it to entail a change in or even any diminution of their duties; the new duties must, in their entirety, fall far short, as regards their nature, importance and scope, of those corresponding to his grade and post.
- 46 The Commission emphasizes that, in the present case, as indicated by the information given by the Director General and the internal instructions issued by his Director, the new duties entrusted to the applicant appear to be appropriate to his grade, whatever the importance of the Unit VI. BI.4 which the applicant managed previously. The applicant has not therefore, in its opinion, proved any error of appraisal on the part of the institution.

- 47 It concludes that the appointment of the applicant as an Adviser derives from a simple reassignment measure forming part of a reorganization of its departments decided upon by the administration in the exercise of its discretionary power (Case 176/82 *Nebe v Commission* [1983] ECR 2475 and Case 198/87 *Kerzman v Court of Auditors* [1989] ECR 2085).
- 48 This Court observes that Article 7(1) of the Staff Regulations provides that every official must be assigned by the appointing authority, by appointment or transfer, solely in the interests of the service and without regard to nationality, to a post in his category which corresponds to his grade (see in particular Case 176/82 *Nebe*, paragraph 17).
- 49 In the present case, the applicant maintains in substance that the new duties entrusted to him following his transfer are not in conformity with the post corresponding to the grade that he occupies within the hierarchy and that, for that reason alone, his transfer is not in the interests of the service. In that regard, it should be borne in mind that the principle of equivalence of grade and post calls, in the event of a change in an official's duties, not for a comparison between his present and previous duties but for a comparison between his present duties and the grade which he occupies within the scale of posts (Case 19/87 *Hecq v Commission* [1988] ECR 1681, paragraph 7). In the present case, the new duties assigned to the applicant correspond perfectly to his grade, as is apparent in particular from the explanation given for the creation of that post in the organization chart set out in the memorandum of 25 June 1990 from the Director General of DG VI (see paragraph 7 above).
- 50 Moreover, whilst it might be regrettable that the applicant had to wait several months before receiving more detailed information regarding the specific scope of his new duties, it must nevertheless be observed that the very nature of the duties assigned to the applicant — the function of Adviser to the Director responsible for legal coordination of the work of several units — makes it difficult for them to be very precisely defined in advance and implies that the person concerned should determine the outlines of those duties on the basis of his experience in his new function and of the requirements of the service.

- 51 It follows that the applicant's new duties, although different from those which he discharged earlier, are in conformity with the post corresponding to his grade. It must therefore be concluded that the contested decision was not adopted in breach of Article 7(1) of the Staff Regulations.
- 52 Consequently, this plea in law cannot be upheld.

*The existence of a misuse of powers*

- 53 The applicant does not contest the usefulness of a properly conducted policy of staff mobility. However, he submits that in the present case that policy was applied for a purpose alien to the general interest and in a manner remote from both the spirit and letter and from the purpose of the redeployment exercise.
- 54 He claims that the Commission cannot base its decision on his alleged request to be transferred since, in due time, he withdrew his agreement to the possibility of a transfer for specific and serious reasons that were outside his control, namely the existence of numerous rumours as to the grounds on which the transfer was envisaged. The transfer was in fact wrongly associated with that of another Head of Unit, whose move to a post of Adviser had without any doubt been of a disciplinary nature, as evidenced by various articles in the press.
- 55 The applicant adds that the reason for his request was the shortage of qualified staff in his unit resulting from the transfer of the best customs expert from that unit to another. However, that shortage of qualified staff had been remedied in 1990 so that the unit was able to deal in due time with the tasks for which it was responsible, to the entire satisfaction of his superiors. The applicant emphasizes that that unexpected change had largely come about through his personal efforts. It was also for those reasons that he had withdrawn his request for a transfer.



- 56 The Commission states in reply that the applicant has not put forward any objective, relevant or consistent factual considerations to show that the contested decision was adopted for the purpose of achieving ends other than those stated (Case C-248/89 *Cargill v Commission* [1991] ECR I-2987) and that, far from having used its powers for a purpose other than that for which they were conferred, the appointing authority decided upon the applicant's new assignment solely in the interests of the service and in connection with the reorganization of its departments, without exceeding the wide margin of discretion available to the institutions in such matters.
- 57 This Court observes that it has been consistently held that, provided that a decision has not been judged to be contrary to the interests of the service, there can be no question of any misuse of power (judgment in *Nebe*, paragraph 25).
- 58 It must also be pointed out that the applicant has not produced any evidence to show that the contested decision was taken for purposes other than those invoked in support of it.
- 59 This plea in law must therefore be rejected.

*Breach of the duty to have regard to the interests of officials*

- 60 The applicant claims that by virtue of the duty to have regard to the interests of officials, the administration must, in particular, when giving a decision concerning an official's situation, take account of all matters capable of affecting its decision and, in so doing, it must take account not only of the interests of the service but also of those of the official concerned (Joined Cases C-116 and 149/88 *Hecq v Commission* [1990] ECR I-599, paragraph 15).

- 61 He maintains that in the present case the administration took no account of his personal interests since those interests were seriously injured by the contested measure, which was adopted in disregard of the reservations that he had put forward. The Commission failed to draw any distinction between the various preoccupations of the applicant and merely interpreted his initial request for a transfer as a desire to obtain a transfer as soon as possible, whereas, although he informed his superiors of the problems affecting his unit, he did so out of concern to ensure the proper execution of the tasks entrusted to him in Unit VI. BI.4. The applicant repeats that a transfer had, at one time, seemed to him to provide a possible solution to the problems of his unit but that about six months later, despite his initial pessimism, which was shared by his superiors, he had himself succeeded in resolving most of those problems.
- 62 The applicant adds that it was following events beyond his control that he found it necessary to call on his superiors to have regard to his welfare. Those events had placed him in a position in which a transfer could not have failed to affect his reputation and his honour and, consequentially, his future career development. Moreover, the letter from his Director General of 6 November 1990, which refers to the non-disciplinary nature of the measure and the true appraisal by the Commission of his very many qualities, in no way restored his good reputation, particularly in the administrative and professional circles outside the Commission.
- 63 The Commission states in reply that the Court of Justice has consistently held that the requirements of the duty to have regard to the interests of officials cannot prevent the appointing authority from adopting the measures it believes necessary in the interests of the service (Case 111/86 *Delauche v Commission* [1987] ECR 5345). Moreover 'in evaluating the interests of the service and of the [employees] concerned, the appointing authority has a wide discretion and the review ... must be confined to the question whether the appointing authority remained within the bounds of that discretion and did not use it in a manifestly wrong way' (judgment of the Court of First Instance in Case T-20/89 *Moritz v Commission* [1990] ECR II-769).
- 64 In the present case, according to the Commission, the attention drawn by the appointing authority to the applicant's situation and the many assurances given to

him throughout the assignment procedure show that the appointing authority did not fail in its duty to have regard to his interests. All the matters liable to affect its decision, including the reservations expressed by the applicant, were duly considered. In the Commission's view, the letter from the Director General to the applicant of 6 November 1990 sufficiently indicated the non-disciplinary nature of the measure and the Commission's true appraisal of the applicant's very numerous qualities which justified his being assigned to his new duties of Adviser, for which all those qualities are needed.

- 65 The Commission concludes that if the applicant's argument were taken to its conclusion the administration would have had no choice but to decline to assign him to his new duties or to promote him to the next higher grade, which would limit the institutions' freedom regarding internal organization in a manner that was hardly acceptable.
- 66 This Court observes that it has been consistently held that the administration's duty to have regard to the interests of officials reflects a balance between reciprocal rights and obligations created by the Staff Regulations for relations between the public authority and public service employees and that the requirements of the duty to have regard to the interests of officials cannot prevent the appointing authority from adopting the measures it believes necessary in the interests of the service (Case 111/86 *Delauche*, cited above) since 'the filling of each post must be based primarily on the interests of the service' (Case T-20/89 *Moritz*, cited above).
- 67 In the present case, the Commission satisfied the requirements imposed on it by the duty to have regard to the interests of officials by clearly indicating to the applicant, by the letter from the Secretary General of 15 October 1990 and the letter of 6 November 1990 from the Director General, that the decision concerning him involved no judgment as to the manner in which he had discharged the duties of Head of Unit VI. BI.4 and that, on the contrary, it was simply a response to the legitimate concern to ensure that an experienced qualified lawyer undertook a first analysis and legal coordination of all the very numerous measures governing the EAGGF. By so doing, the Commission provided the applicant with a document enabling him to counteract, as far as possible, any rumours about him. Thus, the Commission's use of its wide discretion in evaluating the interests of the service on the one hand and those of the applicant on the other remained within proper bounds.

68 This plea in law must therefore be rejected.

*Breach of the principle of the protection of legitimate expectations*

69 The applicant maintains that the Commission did not fulfil its implied commitment that it would not treat him as a candidate for the post of EAGGF Adviser unless he was promoted to Grade A 3 and thus infringed the principle of the protection of legitimate expectations. The lack of response to the memoranda he sent to his superiors explaining his reasons for withdrawing his agreement in principle to be transferred entitled him to expect that the transfer would not take place as part of the redeployment exercise unless it was decided on by the Director General after the redeployment procedure had been duly completed and therefore in observance, *inter alia*, of the principle of voluntary transfer.

70 He adds that the annex to the memorandum of 25 June 1990, in so far as it gives no name, itself reinforced his legitimate expectation that his transfer would be contemplated only if the redeployment procedure was duly observed or the principle of voluntary transfer was applied.

71 Finally, the applicant states that, in view of his past career, he was entitled to expect that he would be promoted to Grade A 3 in the near future. However, as matters now stand, that hope has been severely curtailed.

72 In reply, the Commission states that there could be no question of any breach of a commitment by the administration and that the applicant could not therefore rely on any specific assurances from the administration. Moreover, it finds it difficult to see why the applicant's reassignment should affect his career prospects. A specific procedure for 'promotion' to Grade A 3 is laid down for officials who, like the applicant, hold an intermediate executive position.

- 73 The Commission concludes that the real reason for the action brought by the applicant seems to be to secure access to Grade A 3.
- 74 This Court finds that there is no indication whatsoever in the documents before it of any implied commitment by the Commission not to consider him as a candidate for the post of EAGGF Adviser unless he was promoted to Grade A 3 or to apply the redeployment procedure, without being obliged to do so, in so far as the latter gives priority to voluntary transfer. Moreover, the applicant cannot infer from the silence of the administration any decision on its part not to transfer him to the post of EAGGF Adviser since the Staff Regulations, in particular Article 90(3) thereof, are based on the principle that a lack of response on the part of the administration implies an adverse decision. The Commission's silence cannot therefore be indicative of consent on the part of the administration. It must also be observed that the letter from the Secretary General of 15 October 1990 in reply to the applicant's letter of 18 September 1990 expressly shows that the Commission gave not the slightest commitment in that regard, since it states: 'I entirely understand the importance of a differentiation between the post of Adviser to the EAGGF and the transfer of the Head of Unit IV. E.4 to a post of Adviser. I have suggested to Mr Legras that he should differentiate between the two cases.'
- 75 Furthermore, the fact that the annex to the memorandum of 15 June 1990 gives no name is likewise not indicative of any implied commitment by the Commission since a draft organization chart typically does not include names.
- 76 In those circumstances, there can be no question of any breach of the principle of the protection of legitimate expectations.
- 77 It follows that this plea in law cannot be upheld.

*Breach of the principle of non-discrimination*

- 78 The applicant states that the second executive post created when the organization chart of DG VI was changed, namely that of the Head of the new Unit VI.4 (Promotion of agricultural products) was not filled on an *uno actu* basis but on the basis of the principle of voluntary transfer (vacancy notice and applications in accordance with Article 29(1) of the Staff Regulations). The candidate finally chosen for that post under that procedure is an official in Grade A 4 who, like the applicant, had carried out other duties in DG VI before being reassigned. He concludes that the flagrant difference of treatment between such comparable situations is unacceptable and that no specific statement of reason was given that might justify it.
- 79 The Commission states that, by acting as it did, it complied with Article 7 of the Staff Regulations and that the applicant can base no argument on the fact that it applied a different procedure in order to fill another post corresponding to Grade A 4 since the procedure followed with regard to him was lawful.
- 80 This Court finds that, since the procedure followed with regard to the applicant was not in any way vitiated, the applicant cannot claim that the fact that another official was the subject of the same measure under a different procedure constitutes discrimination.
- 81 This plea in law cannot therefore be upheld.

*Failure to state the reasons on which a measure is based*

- 82 The applicant maintains that the second paragraph of Article 25 of the Staff Regulations was infringed since any decision adversely affecting an official must state the grounds on which it is based and, furthermore, those grounds must be stated exactly.

- 83 He claims that the Commission cannot rely on the discretionary power enjoyed by the institutions in organizing their departments in an attempt to evade the obligation to state grounds. The Commission's decision of 17 October 1990 led to his transfer against his will as a result of a change to the organization chart of DG VI, which created the post of Adviser to the Director of DG VI. As a result, that decision is a measure adversely affecting him and the applicant criticizes the lack of an exact statement of grounds in that it refers, by way of explanation, to the redeployment exercise whereas in fact the redeployment procedure was not observed.
- 84 The applicant also states that if — in an attempt to find a statement of grounds — reference is made to the letters of 6 and 9 November 1990, which brought to his notice the decision adversely affecting him, a divergence of grounds necessarily emerges. The first letter merely indicates that his appointment to the post of Adviser forms an integral part of the redeployment exercise dealt with in memorandum VI/00666 of 25 June 1990. By contrast, the second places his assignment in the context of the changes to the organization chart of the Directorate General for Agriculture. Thus, it was after that change that the Commission decided, on 17 October 1990, to create the post of EAGGF Adviser and to assign him to it.
- 85 According to the applicant, if the transfer did in fact form part of the redeployment exercise, the decision informing him of his transfer should have set out the grounds enabling him to verify whether the redeployment procedure, as described in the memorandum of 25 June 1990 and involving, *inter alia*, the principle of voluntary transfer, had been complied with.
- 86 He adds, in his reply, that it had been agreed, at his meeting with his Director General on 14 March 1990, that the latter could promise him nothing as regards the grade, A 4 or A 3, at which the post of EAGGF Adviser would be filled. That indicates very clearly that when the applicant was proposed for that new post it was intended that the question of his possible promotion to Grade A 3 would be considered and decided in accordance with the usual procedure, that is to say after submission of an application following a Vacancy Notice for A 5, A 4 and A 3 posts in accordance with the arrangements laid down by the Commission decision of 19

July 1988 concerning the filling of intermediate executive posts. That procedure would have enabled the Advisory Committee on Appointments to formulate an opinion as to the level at which the post should be filled. In the present case, the applicant was deprived of the possibility of the Advisory Committee on Appointments being consulted, which might have led to his promotion to Grade A 3, a promotion to which, in view of his past career, he could legitimately aspire in the near future.

- 87 The Commission observes in the first place that the Court of Justice has consistently held that a measure relating to internal reorganization which is not of such a nature as to affect an official's position under the Staff Regulations or infringe the principle that the post to which he is assigned should correspond to his grade is not covered by the obligation to state the reasons on which it is based (see in particular Case 338/82 *Albertini and Montagnani v Commission* [1984] ECR 2123).
- 88 The Commission adds that even if it were assumed that a measure of internal organization such as that at issue in this case had been subject to the obligation to state reasons, the applicant was in a position to 'apprehend the scope of the measure' adopted in relation to him as a result of his numerous contacts and the correspondence exchanged with his superiors on this matter. It is settled law that the grounds of a decision are sufficiently disclosed if the contested measure was adopted in circumstances with which the person concerned is familiar, thus enabling him to apprehend the scope of the measure taken in relation to him (Case 125/80 *Arning v Commission* [1981] ECR 2539, Joined Cases 36, 37 and 218/81 *Seton v Commission* [1983] ECR 1789 and Joined Cases C-116 and 149/88, *Hecq*, cited above).
- 89 It denies that the reasons given in its letters of 6 and 9 November 1990 are contradictory. The first was intended to deal in particular with the concerns expressed by the applicant about avoiding any confusion with the situation of another Head of Unit. That was why that memorandum made it clear that the appointment of the applicant formed an integral part of the redeployment exercise dealt with in the memorandum of 25 June 1990, without making reference to the procedure described in paragraph III of that memorandum. The second letter places the reassignment of the applicant 'in the context of the changes to the organization chart of the Directorate General for Agriculture'. The planned reorganization of DG VI, of which the 'redeployment' of resources was a manifestation, clearly implied a



'change to the organization chart' of the Directorate General. The creation of the new post of Adviser and the assignment of the applicant to it by the Commission under Article 7 of the Staff Regulations presupposed the prior modification of the organization chart. The Commission does not therefore see how the reasons given in those two letters are contradictory.

- 90 This Court observes that it is settled law that the grounds of a decision are sufficiently disclosed if the contested measure was adopted in circumstances with which the person concerned is familiar, thus enabling him to apprehend the scope of the measure taken in relation to him (Case 125/80 *Arning*, Joined Cases 36, 37 and 218/81 *Seton*, and Joined Cases C-116 and C-149/88 *Hecq*, cited above).
- 91 It is apparent from the various memoranda exchanged by the parties in 1990 that the applicant perfectly understood the scope of the measure adopted in relation to him.
- 92 However, it is necessary to consider, first, whether the letters of 6 and 9 November 1990 are inconsistent as far as the basis of that measure is concerned, since the first indicated that the measure formed an integral part of the general redeployment exercise described in the memorandum of 25 June 1990 whilst the second placed that measure in the context of the modification of the organization chart; secondly, it should be examined whether that contradiction was capable of misleading the applicant as to the procedure to be followed in relation to him.
- 93 In order to answer those questions it must be borne in mind that the redeployment procedure was not applicable to the applicant, contrary to the impression that might have been given by the letter of 6 November 1990. Any imprecision in that regard was remedied by the Commission first by its letter of 9 November 1990 and secondly by its reply to the applicant's complaint, in which it clearly indicated that 'that procedure was intended only for the mobility of staff not holding the rank of Head of Unit'.

- 94 Moreover, it is important, in appraising the various memoranda exchanged by the parties, to take account of their respective purposes. It must be stated that the memorandum of 6 November 1990 was intended, in so far as it referred to the general redeployment exercise, to distinguish between the situation of the applicant and that of another Head of Unit who was the subject of disciplinary proceedings.
- 95 It follows that since any imprecision in the letter of 6 November 1990 was remedied in the course of the administrative procedure, there can be no question of any infringement of the second paragraph of Article 25 of the Staff Regulations.
- 96 This Court also finds that the reference in the applicant's reply, in relation to the plea in law concerning infringement of Article 25, to the injury suffered by him through non-application to him of the procedure laid down in the Commission decision of 19 July 1988 constitutes a new plea in law, which is inadmissible by virtue of Article 48(2) of the Rules of Procedure (see also paragraph 40 above).
- 97 Consequently, this plea in law must be rejected.
- 98 It follows from all the foregoing that the first action must be dismissed.

### **The second action**

- 99 The second action is concerned with three matters: the annulment of Vacancy Notice No COM/164/90, the rejection of the applicant's candidature, and the appointment of Mr V. to the post thereby declared vacant.

*The illegality of Vacancy Notice No COM/164/90*

100 The applicant maintains that, since he has shown by his first application that his compulsory transfer was illegal, the Commission was not entitled to treat his post as Head of Unit VI. BI.4 as vacant and therefore to publish Vacancy Notice No COM/164/90.

101 The Commission states in reply that it showed, in relation to the first application, that the assignment of the applicant to new duties was wholly legitimate. It infers that it was therefore necessary, for organizational purposes, to implement a procedure enabling the applicant to be replaced. It was against that background that Vacancy Notice No COM/164/90 (Head of Unit VI. BI.4) was published.

102 This Court finds that the only plea in law put forward by the applicant concerning the illegality of Vacancy Notice No COM/164/90 is the illegality of the decision taken in relation to him by the Commission on 17 October 1990.

103 Since the action brought against that decision is to be dismissed, the second action must also be dismissed as regards the first matter to which it relates.

*The illegality of the rejection of the applicant's candidature for his former post*

104 The applicant states, in his reply, that the production by the Commission — as an annex to its defence — of the Advisory Committee on Appointments's opinion No 10/91, to show that that committee examined not only the application form of each candidate in accordance with Article 29(1)(a) of the Staff Regulations but also the personal file of each of them makes it apparent in fact that the applicant's abilities and aptitude for his former post could not have been validly considered by the Advisory Committee on Appointments at its meeting of 7 February 1991. The primary document for that appraisal should have been the applicant's staff report for the period 1 July 1987 to 30 June 1989. However, the applicant states, without hav-

ing been contradicted by the Commission, that the members of the Advisory Committee on Appointments could not have been acquainted with that report during their discussions of 7 February 1991 since it was not adopted in its final form until 22 January 1991 and could not have been formally prepared before 8 February 1991 at the earliest. The Commission, having been unable to appraise all his abilities and aptitude for the post which he had previously held, had therefore, wrongly and without stating its grounds, rejected his application. That flagrant difference of treatment between the applicant and the other candidates is unacceptable and constitutes discrimination.

105 The applicant likewise does not see why the fact that he previously occupied the post to be filled, which he had left against his will, could have disqualified him from submitting his candidature for it.

106 The Commission observes that the applicant does not deny that the appointing authority enjoys a wide discretion regarding the examination of candidatures for a vacant post. It states that the opinion sent to him by the secretary of the Advisory Committee on Appointments gives absolutely no indication that his application was not taken into consideration, but rather that the Advisory Committee on Appointments 'examined all the candidatures' and that it 'heard the views of Mr Legras, Director General for Agriculture' and that 'on completion of its work' it considered that, 'with regard to the examination of the candidatures submitted, and after examination thereof, your application should not be taken into consideration on the present occasion'. That opinion also clearly indicates that 'the committee examined each candidate's application form'.

107 The Commission also challenges the argument that the fact that the applicant had already held that post in the past, to the satisfaction of his superiors, is itself indicative of the existence of a manifest error on the part of the institution in appointing a candidate other than the previous holder of the post. It adds that, on the contrary, it is not surprising that a candidate who has just been reassigned, in the interests of the service, from the post in question to another function within the Directorate General should not be selected.

- 108 The Commission recognizes that the draft staff report was not forwarded to the applicant until 3 August 1990 but it states that the successive delays occurring after that date were in part due to the fact that the applicant contested that report.
- 109 It adds that the Court of Justice has consistently held that it is not necessary for all candidates to be at exactly the same stage regarding the state of their periodic reports and that the appointing authority is not required to postpone its decision if the most recent report of one or other of the candidates is not yet final because it has been referred to the appeal assessor or the Joint Committee (Case 263/81 *List*, cited above). Moreover, since the applicant's report could add nothing to the excellent appraisal in the previous reports, the absence of the latest one did not prevent the examination of merits from being carried out under the required conditions and could not be prejudicial to him (Case 25/77 *Roubaix v Commission* [1978] ECR 1081). For that reason, the Commission considers that the Advisory Committee on Appointments had sufficient information available to it in the applicant's file.
- 110 As regards the alleged inadequacy of the statement of the grounds for the decision taken, the Commission states that the circumstances in which it was taken and brought to the notice of the applicant were in any event of such a nature as to inform him clearly as to the reasons for and basis of the decision (Case 75/79 *Kuhner v Commission* [1980] ECR 1677).
- 111 This Court considers that, despite the fact that the applicant lodged his complaint against the rejection of his candidature and the appointment of Mr V. before those decisions were taken, the application must be declared admissible. By his letter of 15 April 1991, the applicant completed his initial complaint and, in those circumstances, the premature nature of the initial complaint of 25 February 1991 did not in any way frustrate the purpose of the pre-litigation administrative procedure, namely facilitating amicable settlement of the dispute, as the Commission conceded at the hearing.

- 112 As regards the substance, the Court of First Instance points out, first of all, that the Court of Justice has held that the Community institutions enjoy a wide discretion in organizing their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks (Case 19/87 *Hecq*, paragraph 6).
- 113 In the present case, the Court finds that when the Advisory Committee on Appointments undertook the comparative examination of the merits of the various candidates for the post to be filled it did not have the applicant's last staff report before it. It is therefore necessary to ask whether the absence of that report could have been prejudicial to the applicant and whether, in those circumstances and having regard to the other documents in the applicant's file, the appointing authority had reasonable grounds for rejecting his candidature for his former post.
- 114 In that regard it must be emphasized that the Advisory Committee on Appointments and the appointing authority had various sources of information before them on the basis of which to appraise the applicant's candidature and to undertake an examination of his merits in comparison with those of the other candidates: in the first place, the excellence of the applicant's previous reports, to which his latest report could add little; secondly, the fact that the applicant had on numerous occasions expressed his desire, whilst in that post, to leave it, on the one hand by applying in several instances for other posts that had been declared vacant and, on the other, by asking his Director General, on 9 January 1990, for a reassignment; thirdly, the fact that in his *curriculum vitae* accompanying his application, the applicant had stated: 'I hereby apply for post COM/164/90 with a view to securing my promotion to Grade A 3 when the appointment is made', a statement which, in itself, could justify the rejection of the applicant's candidature by the Advisory Committee on Appointments and the appointing authority, since the Advisory Committee on Appointments had decided, at an earlier stage, that the post to which the applicant's candidature related was to be filled at Grade A 5/A 4; and fourthly, the fact that the applicant was the previous holder of the post to be filled and that the appointing authority had transferred him, against his will, to another department in a manner which the Court of First Instance has found to be in conformity with the interests of the service.

- 115 It follows that the Advisory Committee on Appointments and the appointing authority had sufficient information to enable them reasonably to reject the applicant's candidature for his previous post and that the absence of his latest staff report when the Advisory Committee on Appointments carried out the comparative examination of merits could not have been prejudicial to him.
- 116 It follows that the action must be dismissed in so far as it relates to the rejection of the applicant's candidature for his former post.

*The appointment of Mr V.*

- 117 The applicant considers that because of the irregularities committed in the procedure leading to the appointment of his successor as Head of Unit VI. BI.4, that appointment must be annulled.
- 118 The Commission states that although it chose one of the three candidates whose candidatures had been approved by the Advisory Committee on Appointments, that fact cannot affect the legality of the decision which it took in the exercise of its discretion, in the absence of any prima facie evidence of the existence of a manifest error on its part and in view of the fact that the applicant did not at any time seek to call in question the abilities of Mr V. himself.
- 119 This Court finds that since no irregularity has been ascertained in the procedure leading to the appointment in question the application must be dismissed in so far as it relates to that appointment.

- 120 It follows that the second action must also be dismissed.

## Costs

- 121 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, under Article 88 of those rules, in proceedings between the Communities and their servants, the institutions are to bear their own costs.

On those grounds,

### THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

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

Lenaerts

Kirschner

Barrington

Delivered in open court in Luxembourg on 10 July 1992.

H. Jung

K. Lenaerts

Registrar

President