

- examination of the applications for an A 2 post, of which it is free to determine the composition and responsibilities.
2. The appointing authority enjoys a wide margin of discretion concerning the respective merits of candidates for promotion and the Court must restrict its review to consideration of the question whether the appointing authority has used its power in a manifestly incorrect way or for a purpose other than that for which it was granted.
 3. Whilst it is true that the appointing authority is required, by virtue of Article 90(2), to give reasons for an express decision dismissing a complaint against a promotion decision, it is not required to disclose to the unsuccessful candidate the comparative assessment made by it of him and the successful candidate for promotion. The appointing authority may confine itself to a succinct statement of reasons concerning the fulfilment of the legal conditions on which the validity of a promotion depends.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
25 February 1992 *

In Case T-11/91,

Bernhard Schloh, an official of the Council of the European Communities, residing in Tervuren, Belgium, represented by Edmund Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the chambers of Louis Schiltz, 2 Fort Rheinsheim,

applicant,

v

Council of the European Communities, represented by Philip Bentley, Barrister, of Lincoln's Inn, acting as Agent, with an address for service in Luxembourg at the

* Language of the case: French.

office of Xavier Herlin, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for the annulment of the decisions of the Secretary-General of the Council appointing Mr R. B. to the post of Director in the Council's Legal Service and rejecting the applicant's application and also the decision dismissing the latter's complaint,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

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

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing of 5 December 1991,

gives the following

Judgment

The facts

1 The applicant, who was born in 1929, joined the General Secretariat of the Council on 14 May 1964. He is a legal adviser in the Council's Legal Service. Since October 1973 he has been classified in Grade A 3.

2 On 28 June 1989, the Council published a vacancy notice for a Grade A 2 post in the Legal Service, to be filled by transfer. The vacancy notice produced no result and therefore the officials of the General Secretariat of the Council were

informed, by staff notice No 4/90 of 11 June 1990, that an appointment to the post in question might be made by promotion.

- 3 The applicant submitted an application on 21 January 1990. Seven other officials in Grade A 3 in the General Secretariat of the Council did likewise.

- 4 On 3 April 1990 the applicant had a meeting with the Secretary-General of the Council, who is the appointing authority for that institution as regards appointments of officials to Grade A 2. By letter of 21 May 1990, the Secretary-General informed the applicant that his application had been unsuccessful and that the appointing authority had 'chosen another candidate'.

- 5 That other candidate was Mr R. B., an official born in 1936 who had joined the General Secretariat of the Council in 1964 and had been promoted to Grade A 3 in 1979. Mr R. B. who, like the applicant, is of German nationality, had immediately previously been working in the Council's Directorate-General for External Relations.

- 6 On 17 August 1990, the applicant lodged a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities, claiming that the decisions contained in the letter from the Secretary-General of the Council of 21 May 1990 had been adopted in breach of the applicable legal provisions.

- 7 He complained, first, that the skills that he had acquired through his activities in Brussels and as Agent for the Council before the Court of Justice had not been taken into consideration.

Furthermore, he stated that the Secretary-General of the Council, Mr Ersbøl, had not treated him objectively. He maintained that in several cases in which the applicant had been involved Mr Ersbøl had respected 'neither the law nor the Court of Justice' and that the contested decision reflected the 'pay-off of that attitude' towards him on the part of Mr Ersbøl. In support of that statement, he refers to three events:

- in July 1988, Mr Ersbøl appointed his chef de cabinet as an official in Grade A 2 without first consulting the Mobility Committee of which the applicant was a member at that time. Despite a written approach by that committee to the Secretary-General, the latter initially maintained his decision, which left the applicant no alternative but to resign from that committee. One month later, after seeking and obtaining an opinion from the Legal Service, the Secretary-General annulled his decision and the applicant resumed his membership of the committee;
- at the end of 1989, Mr Ersbøl, on various pretexts, avoided meeting the applicant for the purpose of discussing with him the question of his promotion;
- Mr Ersbøl, he claims, unduly delayed complying with the judgment of the Court of Justice in Case 85/82 *Schloh v Council* [1983] ECR 2105 in which the applicant had secured the annulment of the appointment of a Grade A 2 official (Director of the Budget and Staff Regulations) on the ground that, in breach of the last paragraph of Article 27 of the Staff Regulations, the post had been reserved for a national of a particular Member State. After judgment was delivered by the Court of Justice, the person who had been appointed remained in the service of the Council, as a member of the temporary staff in Grade A 2, until September 1984. The post in question was not filled by the appointment of an official until 1 September 1984. According to the applicant, the timing of those events shows that Mr Ersbøl failed to comply with that judgment.

The applicant added that, in his native region (Hamburg), it would be regarded as improper ('nicht anständig') to allow an employee to work and plead before the Court of Justice on numerous occasions without recognizing the value of his work.

- 10 The complaint was dismissed by a memorandum sent to the applicant by the Secretary-General of the Council on 14 November 1990, in the following terms:

‘Your abovementioned complaint against the decisions contained in my letter of 21 May 1990 concerning the appointment of a director in the Legal Service of the Council has been studied carefully.

On completion of that examination, I would make the following comments.

Under Article 45 of the Staff Regulations, promotion is by decision of the appointing authority and is exclusively by selection from among officials who have completed a minimum period in their grade after consideration of the comparative merits of the officials eligible for promotion and the reports on them.

Allow me to point out in that regard that, in the evaluation of merits and of the staff reports to be taken into consideration for promotion purposes, the appointing authority enjoys a wide discretion, which indeed has been expressly recognized by the Court of Justice of the European Communities and I must assure you that, in matters of promotion, the appointing authority abides scrupulously by the rules laid down in Article 45 of the Staff Regulations.

Accordingly, I regret that I am unable to uphold your complaint of 17 August 1990.’

Procedure

- 11 In those circumstances, on 15 February 1991 the applicant commenced the present proceedings. The written procedure followed the normal course.

- 12 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. At the Court's request, the defendant produced a file containing the documents relating to the procedure for filling the post in question and the personal files of the applicant and of the successful candidate.
- 13 The administrative file on the procedure for filling the post contained a memorandum from the Secretary-General dated 23 May 1990 for inclusion in the file of the Directorate of Personnel and Administration, describing the procedure followed by the appointing authority. According to that memorandum, the Secretary-General had appointed a selection committee comprising three people: the Director-General of the Legal Service, the Director of Personnel and Administration and an adviser from his own cabinet. The Secretary-General stated that, after hearing the views of the selection committee, he had interviewed each of the candidates individually. At the interviews he had asked each candidate if he had anything to add to the matters already dealt with at the earlier interview with the Director-General of the Legal Service. In the memorandum, the Secretary-General also emphasized that, for the appointing authority and the Director-General of the Legal Service, 'one of the essential conditions to be satisfied by the successful candidate, apart, of course, from legal qualifications, is the ability to manage a team of lawyers'. The memorandum was accompanied by summaries of the Secretary-General's interviews with the candidates, including that with the applicant on 3 April 1990. A copy of the administrative file was forwarded to the applicant.
- 14 Mr R. B.'s file contained only his most recent staff report. Counsel for the applicant was granted an opportunity to consult that document at the Registry of the Court of First Instance.
- 15 The parties presented oral argument and answered questions put to them by the Court on 5 December 1991. Counsel for the defendant institution answered, *inter alia*, a number of questions concerning the documents produced by that institution which had been put to him earlier. The President declared the oral procedure closed at the end of the hearing.

16 The applicant claims that the Court should:

(i) annul the decisions of the Secretary-General of the Council appointing Mr R. B. to the post of Director in the Legal Service and rejecting his application for that post (which were notified by letter from the Secretary-General of 21 May 1990) and the decision dismissing his complaint (which was notified to him by memorandum from the Secretary-General dated 14 November 1990);

(ii) order the Council to pay the costs.

17 The Council contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicant to pay the costs to the extent to which they are not payable by the Council under Article 70 of the Rules of Procedure of the Court of Justice.

The substance

18 In the written procedure, the applicant's submissions concerning the contested decisions were set out in a single plea in law. The Court considers, however, that it is appropriate to distinguish three pleas: first, infringement of Article 5(3) of the Staff Regulations and of general principles of law, in particular those of equal treatment and of distributive justice; secondly, infringement of Article 45(1) of the Staff Regulations; and, thirdly, misuse of powers. At the hearing, the applicant also put forward a fourth plea, namely that no adequate statement of reasons was given for the decision dismissing his complaint.

Infringement of Article 5(3) of the Staff Regulations and of general principles of law

Despite specifically alleging infringement of Article 5(3) of the Staff Regulations and of general principles of law in his application, the applicant put forward no supporting arguments.

With respect to the alleged infringement of Article 5(3) of the Staff Regulations, the Council contends that the applications of the applicant and of Mr R. B. were examined on exactly the same basis and that the applicant has not explained how the factual matters set out in his application prove the contrary. As regards the principles of equal treatment and distributive justice, the defendant institution considers that they are reflected in Articles 5(3) and 45(1) and that their scope, in the present case, is no greater than that of those provisions. In its rejoinder, it observes that the applicant did not revert to the alleged infringement of those principles in his reply and concludes that the applicant has thereby ceased to pursue that allegation.

Since the applicant has provided no support for his allegation as to an infringement of Article 5(3) of the Staff Regulations and of general principles of law, with the result that its merits cannot be examined, that plea must be dismissed.

Infringement of Article 45(1) of the Staff Regulations

Whilst acknowledging that the appointing authority enjoys a wide discretion, the applicant claims, in the first place, that such discretion must be exercised in a wholly objective manner. He considers that he has not been treated in an objective manner. In support of that assertion, he refers to the criticisms made in his complaint, in particular those concerning the appointment of the chef de cabinet of the Secretary-General to a Grade A 2 post in 1988 and his fruitless efforts to meet the Secretary-General in the latter part of 1989 to discuss his promotion.

- 23 Secondly, the applicant claims that his merits were not recognized when the contested decision was adopted. The applicant refers to his personal file, and the marks and comments which it contains, with regard to the work done by him in Brussels.
- 24 As regards his activities as Agent before the Court of Justice, the applicant criticizes the Secretary-General for treating them as 'unproductive'. The applicant states that he has represented the Council before the Court of Justice in more than 30 cases, which were conducted in five different languages and covered a wide diversity of subject-matter. The performance of those duties, over a period of 15 years, had never been taken into account and on occasion had not even been mentioned in his staff report. The applicant also refers to the fact that although he was granted permission to attend certain courses at the Universities of Brussels and Saarbrücken, he was only once granted paid leave in order to teach Community law in the United States and had to use his normal leave entitlement in order to undertake other teaching assignments there. He also mentions that he has never attended a FIDE Congress even though one or more directors or directors general of the Council always attend. According to the applicant, the 'lack of appreciation' of his activities before the Court of Justice, which he regards as 'bordering upon disrespect for the Court of Justice', was also manifested by the Council's belated compliance with the judgment of the Court of Justice in another case involving him and the Council (*Schloh v Council*, cited above).
- 25 In his reply, the applicant adds that the Council itself provided proof that its Secretary-General treats the activities of the applicant before the Court of Justice as 'unproductive' by stating in its defence that a Grade A 2 post 'does not necessarily call only for specialized training in a specific area — it also requires, above all, the ability to undertake management and coordination tasks and contacts at a very high level...'. The applicant considers that it is unjustified to describe the activities of agents of the institutions before the Court of Justice as calling 'only for specialized training in a specific area'.
- 26 Thirdly, the applicant contends that no comparative examination was made in accordance with Article 45(1) of the Staff Regulations. In support of that claim, he refers, in his reply, to the circumstances surrounding the appointment of Mr R. B.

to the post in question. According to the applicant, Mr R. B. was in fact transferred, with his post, from the Directorate-General for External Relations to the Legal Service and that transfer was accompanied by an upgrading of his post, and thus a promotion of Mr R. B.. According to the applicant, in those circumstances the comparative examination of merits purportedly carried out was rendered meaningless, and Article 45(1) of the Staff Regulations must therefore have been infringed. The applicant draws attention to the fact that the vacancy notice did not give precise details of the nature of the functions of the post 'allegedly yet to be filled'.

27 In the written procedure, the applicant also claimed that the defendant had produced no document concerning a comparative examination of merits. At the hearing, he maintained that the documents produced by the Council at the request of the Court confirm that there was no comparative examination of merits. He asserted that the offer to produce his personal file and that of Mr R. B. is not sufficient to prove that any such examination took place. As regards the note from the Secretary-General of 23 May 1990, he observed that it post-dated the contested appointment and was not produced until after the close of the written procedure in the present case. He also claims that, at the material time, he never heard any mention of the existence of a selection committee and that the candidates had not been interviewed by any committee, whereas in another procedure for the filling of a post the candidates had been informed at the outset of the constitution of a selection committee and the latter had interviewed them.

28 As regards the 'management' qualities referred to in the abovementioned memorandum, the applicant claims that the appointing authority wrongly resorted to a concept which cannot be evaluated. He claims that in his previous post Mr R. B. was more concerned with diplomatic issues and that he has not genuinely practised law for 25 years, whereas he, the applicant, had pleaded about 50 cases before the Court of Justice. He states that Mr R. B. is therefore 'only a manager' whereas in his own case, Mr Fornasier, the former Director-General of the Legal Service, who knew him personally, had vouched for his suitability as a team manager. The applicant claims that the Secretary-General, who did not know him, is not entitled to contradict that statement without informing the Court of his reasons for doing so.

- 29 In answer to a question put by the Court, counsel for the applicant drew attention to the fact that it is not apparent from the Council's answers that the personal files of the candidates were forwarded to the selection committee and the appointing authority. Moreover, he contended that the Court did not have before it the information needed to establish whether the appointing authority complied with Article 45(1) of the Staff Regulations. He emphasized in particular that, according to the memorandum of 23 May 1990, the selection committee made only an oral report, which impedes any review of legality. According to the applicant, those circumstances, in which review of legality by the Community judicature is impossible, suffice to justify annulment of the contested decision.
- 30 In his reply, the applicant also suggested that the Court of First Instance should order the Secretary-General of the Council and the applicant to appear at the hearing. At the hearing he stated that he did not intend that the Secretary-General of the Council should be heard as a witness but that he should be present in order to answer any questions that might be put to him by the Court, although without taking an oath.
- 31 In response to the allegation of infringement of Article 45(1) of the Staff Regulations, the Council states that the matters raised by the applicant prove that he is a lawyer who is scrupulously attentive to observance of the law in the appointment of officials of the General Secretariat of the Council but that none of the facts to which he refers proves any lack of objectivity towards him on the part of the appointing authority.
- 32 In the Council's view, the applicant has produced no evidence to show that his merits were not taken into account. It contends that the facts alleged by the applicant concerning his university activities do not prove any lack of recognition of his work as an agent before the Court of Justice. The defendant observes that teaching work undertaken by an official during his leave is not relevant to appraisal of his competence, the volume of his work or his conduct in the service for the purposes of Article 43 of the Staff Regulations. It also states that an institution is under no obligation to grant leave on personal grounds to enable an official to undertake teaching work.

33 In its rejoinder, the Council adds that it did not intend to devalue the applicant's activities before the Court of Justice by using in its defence the expression 'only.. specialized training in a specific area'. It considers, however, that the best advocate in the world is not necessarily the base candidate for the post of Director in the Legal Service. It emphasizes that account must be taken not only of abilities as a lawyer and advocate but also of the ability to undertake management, coordination and contacts at a very high level. It invites the Court to compare the personal files of the applicant and of Mr R. B. in order to determine whether the appointing authority acted within the limits of its discretionary power in taking account of all those factors, including the activities of the applicant before the Court of Justice. The Council also states emphatically that it accords all due respect to the Court of Justice and its judgments. It adds that even if a lack of respect were nevertheless established, that would still not prove that it had lacked objectivity towards the applicant.

34 As regards the applicant's claim that no comparative examination was carried out in accordance with Article 45(1) of the Staff Regulations, the Council contends that it is for the applicant to prove that claim. It refers to the judgment of the Court of Justice in Case 34/77 *Oslizlok v Commission* [1978] ECR 1099, at p. 1113, in support of its view that the appointing authority has a wide discretion regarding the recruitment and retirement of Grade A 1 and A 2 officials, which gives rise to considerable freedom of decision regarding not only the objective requirements of the service but also appraisal of the individual qualities of the officials concerned. It infers from that judgment that the applicant must set out facts which clearly show that the appointing authority did not undertake a comparative examination of the candidates' merits and of their reports. According to the Council, that is the case for example if the facts show that the appointing authority was influenced by a Member State or by the nationality of the candidate selected, as in the first *Schloh v Council* case, cited above. However, in the present case the applicant and the successful candidate are of the same nationality and it has not been suggested that a Member State influenced the decision of the appointing authority. The Council also refers to the qualifications of the successful candidate and to his staff reports, which were consistently of an exceptionally high standard.

35 In its rejoinder, the Council denies that Mr R. B.'s post or functions were transferred from the Directorate-General for External Relations to the Legal Service. It states that Mr R. B. has discharged entirely new functions since he was assigned to

the Legal Service. Initially, he was entrusted with tasks concerning German unification, a process which necessitated urgent measures on the part of the Community. At present he is responsible for assisting the Director-General as legal adviser for two continuing inter-governmental conferences concerning Economic and Monetary Union and Political Union, and dealing with the legal aspects of the free movement of persons. According to the Council, those functions have nothing to do with those previously carried out by Mr R. B. in the Directorate-General for External Relations, where he was concerned with relations with Eastern Europe and China, commercial regulations, including anti-dumping matters, international economic organizations, north-south issues, and so forth.

36 The Council considers that there 'was a genuine competition for the post to be filled': a vacancy notice was published, eight candidates, including the applicant submitted applications, the files of the eight candidates were scrupulously examined and they were all interviewed individually; the candidate who, in the judgment of the appointing authority, presented the best qualifications, seen as a whole, was the one selected.

37 As regards the charge that it had produced no document concerning examination of the applications, the Council states that the personal files of the applicant and of Mr R. B. will enable the Court to decide whether the appointing authority exceeded the limits of its discretion in taking the view that Mr R. B.'s application was better suited than that of the applicant to the requirements of the post to be filled, having regard in particular to the reports made on the two candidates by their successive immediate superiors since their respective promotions to Grade A 3.

38 In response to the questions put to the defendant institution by the Court, the Council's representative stated that the personnel division had forwarded to the appointing authority on 30 January 1990 files on the staff reports of the eight candidates for the post in question, administrative records of their careers within the institution and their applications. It added that the selection committee mentioned in the memorandum of 23 May 1990 had been set up on the basis of

an *ad hoc* decision of the Secretary-General and that that committee had proposed that the appointing authority appoint Mr R. B.. Both the selection committee and the appointing authority had at their disposal parts of the candidates' personal files which contained their staff reports.

39 With respect to the charge that the vacancy notice did not specify the nature of the functions of the post to be filled, the Council contends that the functions of the new Director had not been defined when the vacancy notice was published and that the definition of them was a matter not for the appointing authority but for the Director-General of the Service. The Council adds that it is not the practice to include in vacancy notices for Grade A 2 posts in the Legal Service requirements as to particular skills in specified fields since the duties of 'heads of section' in that department can, and do, change according to the circumstances, by decision of the Director-General of the Service. As evidence of this, the Council refers to the vacancy notices for those posts published in the course of the last ten years, appended to its rejoinder.

40 As regards the applicant's suggestion that the Secretary-General and the applicant be ordered to appear in person at the hearing, the Council contends that the matters referred to by the applicant do not amount even to prima facie evidence of an infringement of Article 45(1) of the Staff Regulations or any misuse of powers and that it would be pointless to take evidence from the appointing authority.

41 Before examining the parties' arguments, it is appropriate first to clarify the legal nature of the recruitment procedure followed in this case by the Council in filling the vacant post of Director in the Legal Service (Grade A 2).

42 Article 29(1) of the Staff Regulations provides that, before filling a vacant post in an institution, the appointing authority must first consider: (a) whether the post

can be filled by promotion or transfer within the institution; (b) whether to hold competitions internal to the institution; and (c) what applications for transfer have been made by officials of other institutions of the three European Communities and then follow the procedure for competitions on the basis either of qualifications or of tests or of both qualifications and tests. Article 29(2) provides that a procedure other than the competition procedure may be adopted by the appointing authority for the recruitment of Grade A 1 or A 2 officials and, in exceptional cases, also for recruitment to posts which require special qualifications.

- 43 In the present case, it is apparent from the file produced by the Council and the statements made by the Council's representative at the hearing that the appointing authority of the Council decided to fill the vacant A 2 post in the Legal Service by promotion under Article 45(1) of the Staff Regulations. Consequently, Article 29(2) of the Staff Regulations, which allows the appointing authority to resort to a different procedure in order to fill posts in Grade A 2, is not relevant to consideration of the propriety of the contested decision. It is therefore necessary to decide whether the appointing authority of the Council complied with Article 45(1) in deciding to promote Mr R. B. to the post in question.
- 44 It is appropriate first to analyse the applicant's charge that no comparative examination of the merits of the candidates was carried out.
- 45 The Council stated that the Secretary-General carried out such an examination. According to the memorandum of 23 May 1990, the appointing authority, before taking its decision, obtained the opinion of the selection committee, which included in particular the head of the department concerned and had interviewed each of the candidates. The Secretary-General then personally interviewed the candidates. In reply to the questions put by the Court, the defendant institution's representative stated, without being challenged by the applicant, that the selection committee and the appointing authority had at their disposal the staff reports of the candidates, records prepared by the personnel division concerning the administrative position of the candidates and their careers within the institution, and also their applications.

The applicant expressed certain doubts concerning the memorandum of 23 May 1990, mentioned above. However, he did not expressly challenge the truth of its contents. Although the names of the members of the selection committee, whose oral testimony could have been taken on this point, appear in that memorandum, the applicant did not offer to produce any evidence to show that that memorandum and its annexes do not correctly describe the procedure followed. On the contrary, he acknowledged that the interviews with the Director-General of the Legal Service to which the memorandum refers did take place. In those circumstances, the imprecise objections raised by the applicant are not sufficient to cast doubt on the description given in that memorandum of the procedure that was followed in filling the post in question.

The procedure followed by the appointing authority in the present case, as evidenced by the file produced by the Council and the answers of its representative to the question put by the Court, was conscientiously prepared with a view to ensuring a thorough examination of the applications submitted. Recourse to a selection committee shows the appointing authority's concern to take its decision only on completion of as wide-ranging and objective a consultation as possible. The fact that the Staff Regulations make no provision for the *ad hoc* constitution of such a committee does not, in any case, call in question the regularity of the procedure followed by the appointing authority. Whilst promotion decisions and the comparative examination of merits provided for in Article 45 of the Staff Regulations are the exclusive responsibility of the appointing authority, the latter may, during the phase preparatory to such decisions, bring in an advisory body of which it is free to determine the composition and responsibilities (see for example the judgment of the Court of Justice in Case 325/85 *Bouteiller v Commission* [1987] ECR 529, at p. 547). It should also be observed that the selection committee was entitled to base the recommendations made by it to the appointing authority on the staff reports of the candidates, to which it had access, and on the results of interviews of them by the Director-General of the Legal Service, who was a member of that committee.

The fact that the Secretary-General not only had at his disposal the staff reports of the candidates but also held individual interviews with each of them also shows that the appointing authority took care to obtain all the pertinent information concerning the candidates and to form a personal opinion as to their personality and their merits on which a comparative examination might be based. It is apparent from the report on the interview of the applicant by the Secretary-General on 3 April 1990 that the applicant thus had an opportunity to bring to the attention of the appointing authority his merits as an official in the Council's Legal Service.

- 49 All these factors confirm the defendant institution's assertion that the candidates' merits were the subject of a comparative examination.
- 50 As regards the applicant's charge that the comparative examination of merits allegedly carried out was rendered meaningless by the fact that in reality the appointment of Mr R. B. was a transfer of that official together with his post, followed by an upgrading of that post and promotion of Mr R. B., it must be observed that that contention is incompatible with the course of the procedure for the filling of the post, as evidenced by the documents produced and the defendant's statements, concerning which the applicant has made no specific allegations. The applicant has produced no evidence to explain why the appointing authority should have included so many stages in the procedure, in particular by involving an *ad hoc* selection committee even though not required to do so by the Staff Regulations, if the result of that procedure had already been determined in advance. As to the applicant's argument in that regard concerning the fact that the vacancy notice did not adequately specify the functions involved in the post to be filled, it should be observed that the vacancy notice described sufficiently precisely the essential tasks to be undertaken by a director in the legal service of a Community institution, namely running an administrative unit, advising the Director-General, maintaining contacts and carrying out specialized studies of a high level. The fact that that description corresponds to the one usually given in vacancy notices for posts of director in the Legal Service also shows that that argument can but be rejected.
- 51 As regards the applicant's submission in the alternative that any comparative examination of merits was vitiated by defects, it must be pointed out that the appointing authority enjoys a wide margin of discretion concerning promotion and the Court must restrict its review to consideration of the question whether the appointing authority has used its power in a manifestly incorrect way (see, for example, the judgment of the Court of Justice in Case 111/86 *Delauche v Commission* [1987] ECR 5345, at p. 5362).
- 52 The applicant claims in that regard that the personal files of the candidates were not submitted to the selection committee or the appointing authority in their

entirety. However, pursuant to Article 45(1) of the Staff Regulations, the only documents which must be taken into account in the comparative examination are the officials' staff reports. Accordingly, the absence of the other parts of the candidates' personal files does not indicate that the basis of the comparative examination of their merits was incomplete or insufficient. Moreover, the appraisal of the candidates' individual merits is based on numerous factors which are not necessarily recorded in the candidates' personal files.

As regards the alleged lack of objectivity of the appointing authority with respect to the applicant, it must be observed that the matters referred to by the applicant relate above all to differences of view, in particular from the legal standpoint, which have arisen in the past between him and the appointing authority and to fruitless efforts on the part of the applicant to obtain an interview with the Secretary-General. Even though the possibility cannot be excluded that differences such as those referred to by the applicant may cause a degree of irritation on the part of an immediate superior towards his subordinate, that possibility does not as such imply that the immediate superior is not in a position to assess objectively the merits of the official concerned. The circumstances referred to by the applicant do not amount to specific factors from which it might be inferred that the Secretary-General of the Council lacked objectivity towards him. Moreover, the involvement of the selection committee in the promotion procedure at issue and the fact that the appointing authority adopted the proposal of that committee are not consistent with the view that the rejection of the applicant's application was the result of bias against him on the part of the appointing authority.

The applicant also alleges that his merits, in particular as an agent of the institution before the Court of Justice, were not recognized and not accorded their true value. The matters to which he refers, relating, on the one hand, to his study and teaching activities, for which the Council did not grant him the facilities that he wished, and, on the other, the measures taken by the Council to comply with the judgment of the Court in Case 85/82, do not support the conclusion that his activities were treated as 'unproductive'. The fact that the superiors of a senior official consider that it is not in the interests of the service for him to be granted special leave to teach abroad is certainly not inconsistent with a very favourable assessment of the competence and work of the person concerned. Moreover, there is no link between the institution's response to the judgment in Case 85/82, to which the applicant was a party, and the evaluation of his professional

performance as a representative of the institution. Thus, the matters relied on by the applicant do not show that his merits as an agent of the Council before the Court of Justice were not taken into account in the comparative examination.

- 55 Furthermore, the expression 'specialized training in a specific area' used in the Council's defence likewise does not mean that the applicant's activity as an agent before the Court of Justice was undervalued by the appointing authority. It was intended, rather, to draw attention to the fact that the appointing authority attached more importance, in the comparative examination of merits, to qualifications other than those required for the efficient conduct of the tasks of agent of an institution before the Community judicature. It should be observed that such weighting of the prescribed qualifications is a matter within the discretion enjoyed by the appointing authority when comparing the merits of the candidates for promotion.
- 56 Finally, it should be observed that, although counsel for the applicant was given an opportunity to examine Mr R. B.'s most recent staff report, which was produced to the Court, he did not put forward any argument at the hearing to challenge the regularity of the comparative examination.
- 57 It follows from the foregoing considerations that the applicant's allegations do not indicate that the comparative examination of the candidates' merits was in any way flawed.
- 58 The applicant also maintained that the contested appointment should be annulled because the Court does not have sufficient information at its disposal to review its legality. However, at the Court's request, the Council produced documents which, together with the answers given to the questions put by the Court at the hearing, show that the appointing authority complied with the requirements of Article 45(1) of the Staff Regulations. The applicant has not produced any specific evidence to challenge the content of those documents or the truth of the statements made by the Council's representative at the hearing. In the absence of any objection

supported by precise allegations or specific evidence, the facts before the Court are sufficient to enable it to review the legality of the contested decision. It is not therefore appropriate to annul the contested decision for that reason.

Nor was there any reason to grant the applicant's request that the Secretary-General be ordered to attend the hearing in person. It would only be necessary to order preparatory inquiries if the applicant had made specific and precise factual allegations contradicting the contentions of the defendant.

Misuse of power

The applicant maintains that the Secretary-General of the Council had decided, in 1989 or 1990, 'never to promote Schloh' and that he acted accordingly thereafter. According to the applicant, the contested decision was therefore motivated not by the interests of the service but by the intention of the Secretary-General not to promote him because he had 'unpleasant memories of him' as a result of the two cases mentioned above (the one involving the appointment of the chef de cabinet as an official in Grade A 2, which was subsequently withdrawn, and Case 85/82), in which the applicant had been involved and in which the Secretary-General had lost 'from the legal point of view'.

In his application, the applicant emphasized that the decision dismissing his complaint in fact consisted of two lines and therefore contained a statement of reasons that which 'lacked detail'. He refers to the abovementioned judgment in Case 85/82 *Schloh v Council* in support of his claim that the brevity of that response, which does not answer his comments concerning lack of respect for the law and for the Court of Justice, or his criticism that the conduct of the appointing authority could be described as 'nicht anständig' (improper), is indicative of misuse of powers.

The applicant goes on to describe the circumstances surrounding Mr R. B.'s appointment, seeking to show that it was attributable to an aim not consistent with

the interests of the service. He states that when it became apparent in July 1989 that there were no candidates for a transfer to a Grade A 2 post which had become vacant in the Legal Service, the Director-General, Mr Fornasier, decided temporarily to reorganize the service into three teams (each under the direction of a Grade A 2 official) instead of four. The team led by Mr Dashwood was then entrusted with agricultural and institutional matters. Mr Fornasier decided that the applicant should deal with legal issues relating to agriculture within that team. According to the applicant, that measure was acceptable on a transitional basis but was contrary to the interests of the service as a permanent arrangement in view of the fact that the workload in those two areas which, for the previous 25 years, had never been dealt with by one head of section alone, prevented the latter from dealing with numerous important cases.

63 According to the applicant, the idea at that time was that the appointment of a fourth A 2 official would again make it possible to distribute the work of the Legal Service among four teams, and agricultural and institutional matters would again be separated. However, that did not happen. Only questions of immigration and certain other matters were entrusted to Mr R. B., who was mainly responsible for legal questions arising from German unification. According to the applicant, those duties corresponded to those already entrusted to him when he was in the Directorate-General for External Relations, where he worked, *inter alia*, on the problems of Eastern Europe. The applicant claims that matters concerning the legislation needed following the geographical enlargement of the Community had not been entrusted to the Legal Service at the time of the previous enlargement. Similarly, work concerning intergovernmental conferences on Economic and Monetary Union and Political Union, entrusted to Mr R. B., had previously been within the purview of the Director-General for External Relations.

64 In his view, it is apparent from the foregoing that the Secretary-General 'used German unification' to allocate Mr R. B., together with his previous duties, to the Legal Service, so that he could say that there was no longer an A 2 post vacant and that the applicant could not therefore be promoted. The applicant infers that the Secretary-General used the wide decision-making powers available to him for a purpose other than that for which they were granted, so that the appointment of Mr R. B. involved a misuse of power.

In response, the Council states that the matters referred to by the applicant do not prove that the appointing authority pursued an aim alien to the interests of the service and that those matters have no bearing on the issues to be considered by the Court.

More specifically, the defendant considers that the brevity of the reply to the applicant's complaint is not indicative of any misuse of power. It considers that the circumstances of the present case differ from those of Case 85/82 where the absence, in the statement dismissing the complaints of several officials, of any specific reference to the complaint made by them, according to which the A 2 post in question had been 'filled by the parachuting of a Luxembourg official', had been held to be indicative of a misuse of power. In that case both the applicant and another official had referred, in their complaints, to breach of a principle of law relating to the contested appointment, but there was no such reference in the applicant's complaint in the present case.

As regards the interests of the service, the defendant contends that the applicant misinterpreted the internal reorganization of the Legal Service carried out by its Director-General in 1989. The Council stresses that that decision was taken by the Director-General in the normal exercise of his management powers and not by the appointing authority of the Council. It states that the question of German unification was not on the agenda in 1989 when the decision to reorganize the Legal Service was taken. However, while the recruitment procedure was being conducted, German unification became a possibility and questions of economic and monetary union and political union emerged as important. After the appointment of Mr R. B., the Director-General took the view that it was appropriate to set up a small team to monitor those extremely important and delicate questions from the legal point of view, in close cooperation with him.

In the Council's opinion, the applicant misinterprets the facts in claiming that, in July 1989, the appointing authority reduced from four to three the number of teams within the Legal Service with a view to the subsequent creation of a team responsible for the legislation which would become necessary following the

geographical enlargement of the Community, a task for which he did not have the requisite experience.

- 69 In its rejoinder, the Council offered to produce to the Court memoranda drawn up by Mr R. B. to show that the latter is in fact entrusted with legal work which would not have been given to him if he had remained in his previous department.
- 70 In order to determine whether the present plea in law, alleging misuse of power, is well founded, it is necessary to consider whether the appointing authority used its discretion, in its comparative examination of the candidates for promotion, for a purpose other than that for which such discretion was conferred on it, which was in order to fill the vacant post by appointing the candidate best qualified to discharge the duties associated with it.
- 71 According to the applicant, the aim actually pursued by the appointing authority was to prevent promotion of the applicant to Grade A 2. In support of that view the applicant produces, first, factual evidence showing that differences of view on legal matters existed between the applicant and the Secretary-General in a number of cases in which the applicant's view finally prevailed. Even though the possibility cannot be ruled out that such circumstances may give rise to some irritation on the part of a superior towards an official subordinate to him, that possibility is not alone sufficient to establish that, in the present case, the Secretary-General was motivated by personal resentment towards the applicant and was thus prompted to take a decision which was contrary to the interests of the service and to the applicable provisions. The applicant has not referred to any specific manifestation of bias against him on the part of the Secretary-General from which it could be inferred that the contested decision was taken with a view to preventing his promotion.
- 72 As regards the brevity of the reply to the applicant's complaint, it must be observed that there is no general rule that a succinct reply or even the absence of a reply to a complaint is indicative of impropriety.

3 In the first place, it is apparent from Article 90(2) of the Staff Regulations that the appointing authority may lawfully decline to answer a complaint. Secondly, whilst it is true that the appointing authority is required, by virtue of Article 90(2), to give reasons for an express decision dismissing a complaint against a promotion decision (see, for example, the judgments of the Court of Justice in Case 188/73 *Grassi v Council* [1974] ECR 1099 and in Case 343/87 *Culin v Commission* [1990] ECR I-225), it is not required to disclose to the unsuccessful candidate the comparative assessment made by it of him and the successful candidate for promotion. The appointing authority may confine itself to a statement of reasons concerning the fulfilment of the legal conditions on which the validity of a promotion depends (see the judgment in *Grassi v Council*, cited above, at page 1108, and, as regards the statement of reasons for a decision taken under Article 50 of the Staff Regulations, the judgment of the Court of Justice in Case *Oslizlok v Commission*, cited above, at page 1113).

4 In his abovementioned memorandum of 14 November 1990 dismissing the applicant's complaint, the Secretary-General of the Council, after stating that the complaint had been studied in detail, referred to Article 45(1) of the Staff Regulations. Going on to draw attention to the wide discretion of the appointing authority in matters of promotion, the Secretary-General declared that he had scrupulously observed the rules laid down by Article 45 of the Staff Regulations. Relying on those general considerations, he concluded that he could not uphold the applicant's complaint.

5 The memorandum thus contains no reference to the specific circumstances of the present case to justify dismissal of the complaint. However, it is clear that the appointing authority contends that it undertook a comparative examination of the merits and staff reports of the candidates. By implication, but nevertheless unequivocally, it is also apparent from that memorandum that that examination resulted in the choice of a candidate other than the applicant.

6 Accordingly, it must be held that the statement of reasons contained in the memorandum of 14 November 1990, although succinct, satisfied the requirements of Article 90(2) of the Staff Regulations. Accordingly, it cannot be concluded that the brevity of that statement of reasons is indicative of misuse of powers.

- 77 The fact that another conclusion was reached in Case 85/82 is accounted for by the special circumstances of that case, in which the defendant had failed to comment on precise, specific and complete allegations concerning the irregularity in question (see Case 85/82 at p. 2129 et seq.). In the present case, the issue is, on the other hand, the absence of a specific reply to value judgments made by the applicant concerning conduct of the appointing authority. However, the fact that the appointing authority failed to comment on those value judgments in its reply to the complaint is not indicative of any misuse of powers.
- 78 The circumstances of the reorganization of the Legal Service, first to make up for the absence of a fourth director and then to take account of the new duties entrusted to that department, likewise provide no grounds for concluding that that redistribution of functions was undertaken in order to preclude the possibility of promotion of the applicant rather than in the interests of the service. The first reorganization, into three teams, is accounted for by the promotion of a previous director and does not indicate any discrimination against the applicant. The second reorganization was the consequence of the contested promotion in respect of a post for which the vacancy notice made no reference to German unification. There are thus no objective factors to substantiate the applicant's allegation that the appointing authority used that measure as a means of promoting Mr R. B., at his expense.
- 79 In those circumstances, it is appropriate to point out that an allegation of misuse of powers cannot be upheld unless the applicant produces objective, relevant and consistent evidence capable of proving it (see the judgment of the Court of Justice in Case 361/87 *Caturla-Poch and De la Fuente v Parliament* [1989] ECR 2471, at p. 2489, and the judgment of the Court of First Instance in Case T-156/89 *Valverde Mordt v Court of Justice* [1991] ECR II-407, paragraph 120). It follows from the foregoing considerations that the matters raised by the applicant do not fulfil those requirements. It must therefore be held that the applicant has not sufficiently substantiated his plea as to misuse of powers.
- 80 Similarly, it must be observed that, whilst doubts concerning the aim pursued by the appointing authority in adopting the contested decision may still have existed on conclusion of the written procedure, the documents concerning the procedure

followed in the comparative examination of the candidates which the Council produced at the request of the Court, in particular the relevant staff reports, have enabled the Court to dismiss those doubts.

In view of the foregoing considerations, the plea as to misuse of powers must also be dismissed.

The statement of reasons for the contested decision

In the written procedure, the applicant merely claimed that the statement of reasons for the decision dismissing the complaint made by him concerning an alleged misuse of powers 'lacked detail'. It was not until the hearing that he also claimed that that decision lacked a statement of reasons. In that regard, the Council had already contended in the written procedure, referring to the judgment of the Court of Justice in Case 34/77 *Oslizlok*, cited above, that the memorandum dismissing the application contained a sufficient statement of reasons to meet the requirements of Article 190 of the EEC Treaty.

Article 48(2) of the Rules of Procedure of the Court of First Instance precludes the introduction of new pleas in law in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the written procedure. However, the Court is required to consider, on its own initiative, whether the Council has fulfilled its obligation to give reasons for its decision (see the judgments of the Court of First Instance in Case T-37/89 *Hanning v Parliament* [1990] ECR II-463 and Case T-115/89 *González Holguera v Parliament* [1990] ECR II-831).

It must be borne in mind that the statement of reasons contained in the memorandum of 14 November 1990, by which the applicant's complaint was dismissed, was sufficient for the purposes of Article 90(2) of the Staff Regulations (see paragraphs 73 to 76 above).

85 The Court also observes, as a secondary point, that the memorandum of 23 May 1990 produced by the defendant at the request of the Court at the end of the written procedure provided further evidence as to the statement of reasons, referring in particular to the importance attached to the management qualities of the candidates. The applicant was informed, at the hearing, of the nature of the documents on the basis of which the selection was made. He was given the result of the oral report of the selection committee, proposing that Mr R. B. be promoted. His representative also had access to Mr R. B.'s most recent staff report. The applicant was thus placed in a position to formulate his observations on the comparative examination undertaken by the appointing authority and to expound his submissions concerning it. Similarly, the information provided by the defendant enabled the Court to verify the propriety of the contested decision, to the extent compatible with the wide discretion enjoyed by the appointing authority regarding promotion.

86 In those circumstances, it must be held that, in any event, any inadequacy of the statement of reasons for the contested decision was rendered irrelevant by the explanations given by the defendant in the course of the proceedings and cannot be considered an infringement of an essential procedural requirement such as to justify, in itself, annulment of the rejection of the applicant's application (see, for example, the judgment of the Court of Justice in Joined Cases 64/86, 71 to 73/86 and 78/86 *Sergio v Commission* [1988] ECR 1399, at p. 1440).

Costs

87 Pursuant to Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. However, Article 88 of those rules provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

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

Lenaerts

Barrington

Kirschner

Delivered in open court in Luxembourg on 25 February 1992.

H. Jung
Registrar

K. Lenaerts
President