

In Case 2/80

HUBERT DAUTZENBERG, an official of the Court of Justice of the European Communities, of 1 Rue Jean-Pierre Brasseur, Luxembourg-Ville, Grand Duchy of Luxembourg, with an address for service in Luxembourg at his home, represented by José Saelens of the Brussels Bar.

applicant,

v

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, represented by F.-X. Zwickert, its Director of Administration, residing in Luxembourg, assisted by Alex Bonn of the Luxembourg Bar, with an address for service at his Chambers in Luxembourg at 22 Côte d'Eich,

defendant,

APPLICATION for annulment of the Court's decision of 21 March 1979 promoting Mr Fetler to the only A 3 post vacant at that time and for the promotion of Mr Dautzenberg to that grade,

THE COURT (Third Chamber)

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart, Judges,

Advocate General: J.-P. Warner
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

The applicant, Hubert Dautzenberg, an official of the Court of Justice of the European Communities since 1963, was appointed Deputy Head of the Library and Documentation Directorate by a Decision dated 9 March 1966. Since 1974 his grade has been Grade A 4.

The applicant's superiors, who were in turn Mr Sperl and Mr Daig, have since 1976 recommended to the Court his promotion to Grade A 3. However, as a result of the budget proposals for 1978 put forward at the time by Mr Sperl on behalf of the Library and Documentation Directorate, which, as far as A 3 posts were concerned, provided for the applicant's promotion to Grade A 3, one A 3 post was allocated to the Documentation Branch and given to Miss Maggioni.

In its budget proposals for 1979 the appointing authority asked the budgetary authority of the Communities for the "conversion" of three A 4 posts into A 3 posts. These conversions related, in addition to the post of Head of the Library, to the posts of Head of the Finance Branch and Head of the Personnel Branch. The budgetary authority, however, only granted one

conversion. The appointing authority by a decision dated 21 March 1979 and published on 30 March 1979 appointed Joseph Fetler, Head of the Finance Branch, to be Head of Division as from 1 April 1979 and promoted him from Grade A 4 Step 6 to Grade A 3.

The applicant, who does not dispute Mr Fetler's personal merits, considers that this decision is unfair to him. He therefore submitted a complaint to the appointing authority on 25 June 1979 against the said decision under Article 90 of the Staff Regulations of Officials of the European Communities.

The applicant in his complaint laid special emphasis on the fact that in July 1978 (when Miss Maggioni was promoted) Mr Sperl informed him that he had been given an assurance by the Registrar that the next available A 3 post would be awarded to Mr Dautzenberg. The disputed decision, he claims, amounts to a breach of that promise and is therefore in breach of the acknowledged principle of "the protection of the trust which an official must legitimately have in his administration".

The applicant also complained of the "continuous and systematic deflection of the A 3 post to branches other than the Library", which is unjustified having regard both to the importance of that branch and to the way in which the applicant has organized it for sixteen years past.

Finally the applicant is convinced "that the contested decision was not taken

with full knowledge of the facts, that is to say after having taken into consideration *all* the arguments militating in favour both of Mr Fetler and of myself". The decision therefore did not have a legal basis.

The Court, as appointing authority, by a reasoned decision dated 5 October 1979, rejected the complaint. Drawing attention to the fact that Article 45 of the Staff Regulations provides that promotion shall be by decision of the appointing authority the Court points out that even if assurances as to promotion prospects had been given, such assurances could not bind the appointing authority when it makes its selection at a future time. When the appointing authority promotes an official its choice is determined after consideration of the comparative merits of each candidate and his periodic reports. In the present case the appointing authority made its selection in accordance with these principles, account being taken of the careers of the officials concerned as a whole, of the requirements of the different branches and of every aspect of the selection to be made.

The applicant on 8 January 1980 brought an action in which he asks the Court *inter alia* to annul the decision of 21 March 1979 published on 30 March 1979 promoting Mr Fetler "to the only A 3 post vacant at that time and to promote the applicant to that grade".

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties.

The *applicant* in his application originating proceedings claims that the Court should:

"1. Order the defendant to produce the comparable files of the applicant, Miss Maggioni and Mr Fetler which were produced in 1978 and 1979 for the purpose of promoting the latter two officials to Grade A 3 instead of the applicant;

2. Annul the decision of 21 March 1979, published on 30 March 1979, promoting Mr Fetler to the only A 3 post vacant at that time;

3. Promote the applicant to that grade;

4. Order the defendant to pay the costs."

The *defendant* contends in its defence that the Court should:

"1. Take note that the defendant does not dispute the admissibility of the application;

2. However, dismiss as inadmissible the applicant's claim that the files of the two other officials be produced for the Court's file and also his claim to be promoted to Grade A 3;

3. Dismiss the remainder of the application as unfounded;

4. Make an order as to costs in accordance with the provisions applicable."

The *applicant* in his reply maintains the claims put forward in his application and claims in the alternative that the Court should:

"1. Allow the applicant to prove, if necessary by the hearing of witnesses, that the Registrar did in fact make a promise to Mr Sperl to promote the

applicant to the next A 3 post which became vacant in 1979;

2. Refer the case to the Court to be decided in plenary session."

The *defendant* contends in its rejoinder that the Court should:

- "1. Reject the applicant's claims and his offer to adduce evidence;
2. Grant the defendant the benefit of the contentions pleaded in its defence."

III — Submissions and arguments of the parties

The *applicant* complains first of all in his application originating the proceedings, as he did in his complaint, of a breach of the principle of the trust which an official must legitimately have in his administration.

He contends that it follows from Article 45 of the Staff Regulations, which provides that promotion shall be by decision of the appointing authority, that assurances which may have been given as to promotion prospects by an officer's immediate superior or the Registrar can under no circumstances bind the appointing authority when it makes its choice at a future time. Nevertheless, when the Court stated in its decision rejecting his complaint that the applicant could not be unaware of that principle, it made an interpretation restricting the principle of legitimate trust. Supposing that the immediate superior is aware of this restrictive interpretation the trust which the official should legitimately have in him no longer has any meaning.

The applicant states that he does not intend to cast any doubts on the unquestionable merits of Miss Maggioni and Mr Fetler. He nevertheless wonders in what respect their qualities ought to

have been considered superior to his own for the purpose of being promoted to Grade A 3. Whilst admitting that the appointing authority has a very wide discretion in this field, he submits that by virtue of that same principle of legitimate trust this discretion presupposes both considerable freedom of decision and at the same time the scrupulous consideration of comparable files. This consideration should comprise an evaluation of merits on a basis of equality in the light of comparable sources of information and particulars (cf. judgment of the Court of 19 March 1964 in Case 27/63, *Raponi v Commission of the European Economic Community* [1964] ECR 129).

Moreover the chronology of the events which took place from the time when the applicant was recommended for promotion to Grade A 3, that is to say since 1976, proves that the A 3 post to which he might be promoted was continually and systematically deflected to branches other than the Library.

As far as concerns the *purpose of the action* the *defendant* submits that the claims for the promotion of the applicant to Grade A 3 are inadmissible since the Court of Justice is not entitled to interfere in actual administration. It also asserts that the files of other officials who are not parties to the dispute cannot be produced whatever the applicant had in mind when he applied for their production. The submissions put forward to that end should be declared inadmissible.

On the other hand the defendant does not challenge the *admissibility of the application* as such.

With regard to the *basis of the case* the defendant's main submission concerning the argument relating to the principle of the trust which an official must legitimately have in his superior is that a distinction must be drawn between the powers of immediate superiors and those

of the appointing authority. It is to be expected that an official's superior officer, with knowledge of his merits, should take action to secure his promotion and should even inform him that he is doing so. The same is true in respect of other recommendations for the possible promotion of other subordinates. The appointing authority is in a different position. It has to make the selection required of it by Article 45 of the Staff Regulations. The limited number of possible promotions inevitably causes it to prefer one or more candidates to others. Thus only some of the recommendations are followed up. In so far as the principle of the protection of legitimate trust is at issue it can apply only to the action of an immediate superior and this is outside the control of the appointing authority.

With reference to the applicant's assertion that the wide discretion allowed to the appointing authority presupposes a scrupulous consideration of comparable files the defendant points out that the applicant is convinced that the appointing authority did not have complete files at its disposal and that the contested decision as to promotion was not taken with full knowledge of all the facts. But this submission is factually incorrect. As the administrative decision of 5 October 1979 stated, the appointing authority made a selection in accordance with the principles applicable, taking into account the careers of the persons concerned, the needs of the various branches and all aspects of the selection to be made.

That is all the more apparent because owing to the limited size of the institution the appointing authority has at its disposal, in addition to the files

relating to the officials concerned, important supplementary information resulting from a personal knowledge of the candidates for promotion. The latter, who, being in a high grade, were not very many and had been in office for many years. The defendant was able therefore to assess the services they had rendered, their work, the importance of their responsibilities and consequently their merits.

The defendant formally rejects the submission that the A 3 post under consideration for the applicant's promotion was continually and systematically deflected to branches other than the Library. Such an assertion is not in accordance with the facts and is not supported by any evidence.

The *applicant* points out in his reply that in this case the Court is acting in a dual capacity as the judicial and the appointing authority. Every appointing authority may go back on its own decisions provided that rights acquired by persons under a previous decision are respected. It is not only entitled to involve itself in its own administration but it also has the duty to involve itself in the functioning thereof.

The applicant also complains that this case has been assigned to a Chamber, that is to say to a branch of the full Court which has in particular all the powers of the appointing authority. A judgment of the Court in this case in other than plenary session would, in the light of the fact that in these proceedings the Court is acting in a dual capacity at one and the same time, rule out the possibility of the applicant's obtaining a re-examination of the contested decision. Therefore the applicant asks, in the alternative, for the case to be assigned to the Court for a decision in plenary session.

As far as concerns the *production of documents* which the applicant has requested, he submits that what is to be adjudicated upon is not the knowledge of the particulars of persons who are not parties to the action but the knowledge of the material factors which were brought before the appointing authority and culminated in the decision of 21 March 1979. In fact it is necessary to be able to establish whether the examination prior to the decision of 21 March was conducted in accordance with the Staff Regulations. The request for production which the applicant claims that the Court should grant is based in particular on the same principle as that which requires, as provided for in Article 50 of the Rules on the Internal Organization of the Court, that minutes and their annexes must be kept in the archives.

Finally the applicant, on the basis of *Raponi*, cited above, submits that his application for production of documents cannot be rejected because such a rejection would make a legal action based on Article 45 of the Staff Regulations illusory.

The applicant maintains all the basic arguments set out in his application including the legal foundations referred to therein.

The applicant, in answer to the defendant's arguments put forward in its defence points out in the first place that, in the defendant's arguments concerning the principle of the protection of legitimate expectation, it is not denied that promises were made to him. The defendant merely states that these promises cannot bind the appointing authority when it makes its selection at a future time and that assurances given to a candidate relate to the good faith with which the immediate superior will support the recommendation for promotion. But, according to the

applicant, in this case what is questioned is whether the discussion which must have preceded the decision of 21 March 1979 took place with full knowledge of all the documents which must in the ordinary course make up a file for comparison including the opinions of him formulated by his superior officers.

The applicant expatiates on the facts and law relating to the role of the Registrar of the Court and offers to adduce full legal evidence of the promises which he states the Registrar made to Mr Sperl and of their content.

The applicant then asserts that the arguments in the administrative decision rejecting his complaint have an indicative and not a conclusive effect. That decision may perhaps be well founded but only the Court can say whether that is so after argument on both sides which offers the applicant all legal guarantees recognized by the relevant legislation.

With reference to the defendant's statement that the appointing authority had at its disposal important supplementary information resulting from personal knowledge of the candidates for promotion the applicant submits that this statement is an actual admission before the Court that subjective factors prevailed when Mr Fetler and Miss Maggioni were appointed in lieu of him. It is the specific aim of the procedure provided for in Articles 45 and 46 of the Staff Regulations to eliminate subjectivity. The requirement to carry out a comparative, that is to say, an objective, examination of the files is absolutely necessary in order to permit a possible review by the Court at a later date in the event of a dispute. The defendant by acknowledging that subjective factors played a part in the appointment has admitted that it was improper and therefore that the action is well founded.

As far as concerns the interests of the service the applicant submits that the onus is not on him to prove that the considerations leading to the appointment of another candidate were correct. It is for the defendant to prove by factors which can be objectively established not only which interest of the service the authority had in mind at the time of the appointment which is the subject of the contested decision but also what was the reason for its selection.

The *defendant* in its rejoinder stresses as a matter of fact that the appointing authority had asked the budgetary authority for three conversions of Grade A 4 posts into Grade A 3 posts for the 1979 financial year. They covered, in addition to the post of Head of the Library, the posts of Head of the Finance Branch and Head of the Personnel Branch. However, the budgetary authority granted only one conversion. That being the case the appointing authority had to choose not so much between the three officials as between their branches. In fact only one branch could be raised to the level of a division and placed under a head of division in Grade A 3. Priority was given to the Finance Branch. The contested decision therefore had a dual purpose: the setting up of a division and the appointment of the head of that division by promotion. When the appointing authority took that decision it was only furthering the interests of the service.

The present dispute does not lend itself to a discussion of breach of the principle of the protection of legitimate expectation. Even if it is assumed that this principle, which has been upheld by the case-law of the Court in fields unconnected with the civil service, can be transposed to that service, it must be admitted that the implementation by the

administration of the contested decision was not something which it was impossible for the applicant to foresee.

Likewise as far as concerns the offers to adduce evidence the applicant's arguments concerning the role of the Registrar must be rejected as being extraneous to the dispute. The offer to adduce evidence put forward in the alternative should be rejected as irrelevant.

The applicant, by means of the submission relating to the consideration of the comparative merits (set out in the complaint under the heading "Absence of any legal foundation"), intends to discuss the greater or lesser merits of one candidate as against another. However, that lies in the field of assessment which the applicant concedes is the administration's responsibility. In this respect the submission must be rejected for lack of evidence. In fact it is founded on a simple assumption based on the outcome of the promotion procedure. Because the applicant was not promoted the decision to promote a colleague must in his view be unlawful.

His application for the production of "comparable files" must be rejected because he does not state what complaint is to be proved by an examination of these files.

The defendant also denies that the appointing authority based its assessment in this case on subjective factors for evaluation.

As far as concerns the applicant's submission that there has been "continuous and systematic deflection of the post" the defendant maintains that

this submission is not borne out by the facts and is not based on any evidence. Contrary to the applicant's assertions in his reply the onus lies on the applicant to adduce evidence of the circumstances in which the interests of the service are alleged to have been disregarded in this case.

As far as concerns the purpose of the action the defendant maintains that in proceedings for annulment the Court is only bound, if it finds for the applicant, to annul the illegal decision. It does not have jurisdiction to substitute another decision for it. That is a matter for the administrative side.

These principles still apply to an action brought against the Court. In this case the defendant is the Court in its capacity

as appointing authority. The decision on the action is to be made by the Court in its capacity as the judicial organ of the Communities.

IV — Oral procedure

At the sitting held on 3 July 1980 the parties presented oral argument. On that occasion the defendant stressed that the decision to give the only vacant A 3 post to Mr Fetler was the outcome of a choice between departments and not between individuals. This assertion was disputed by the applicant.

The Advocate General delivered his opinion at the sitting on 18 September 1980.

Decision

- 1 By application lodged at the Court Registry on 8 January 1980 the applicant, the Head of the Library at the Court, brought an action for annulment of the decision of that institution dated 21 March 1979 appointing the Head of the Finance Branch to the post of Head of Division in Grade A 3.
- 2 In the applicant's view that decision is in breach of the principle of the protection of legitimate expectation, was taken without the personal files of the various candidates being comprehensively examined, is contrary to the interests of the service and constitutes "a deflection" of A 3 posts granted by the budget authority "to branches other than the Library".
- 3 An examination of the Court's file indicates that because of the increasing importance of the duties entrusted to some of the branches of the Court of Justice, this institution considered that it was necessary for such branches to be placed under the authority of officials with the rank of head of division and consequently in Grade A 3.

- 4 Such an organization of the branches may be effected either by creating additional posts of head of division or by converting A 4-A 5 posts of Principal Administrator, which are vacant or even already occupied by heads of branches, into posts of head of division in Grade A 3. Whereas application was made for the conversion of several posts, the budget authority granted for the 1979 budget only one conversion of an A 4 post into an A 3 post, without however stating which, and leaving that to the institution to decide.
- 5 By promoting the Head of the Finance Branch the contested decision assigned the one converted post which was granted to the Finance Branch which has thus been placed under the authority of a head of division. In fact the post in question, before it was converted, was already filled by the same official as a principal administrator.
- 6 The applicant has in substance called in question the compatibility of that decision with the rules of the Staff Regulations.
- 7 Amongst the various submissions put forward in support of the application it is necessary to examine first the submission that, by allotting the A 3 post in this way, the defendant has disregarded the interests of the service, a correct evaluation of which would have been bound to lead, after a comparison of all the relevant factors, to the post's being assigned to the applicant in his capacity as Head of the Library.
- 8 Article 5 (1) of the Staff Regulations states: "The posts covered by these Staff Regulations shall be classified, according to the nature and importance of the duties to which they relate, in four categories, A, B, C and D, in descending order of rank". Article 5 (4) states: "A table showing basic posts and corresponding career brackets is given in Annex I. By reference to this table each institution shall, after consulting the Staff Regulations Committee referred to in Article 10, define the duties and powers attaching to each basic post". According to the definition of duties drawn up by the defendant pursuant to the said Article 5 (4) the A 3 career bracket corresponding to the post of head of division is described as follows:

“Basic post: Head of Division

Description of duties:

- Directs an administrative unit under the authority of a Director — or where appropriate under the authority of a Director-General — in a specialized field.
 - Highly qualified official with the task of advising one body of the institution or engaged in studies or supervisory work under the authority of a Director-General or a Director.
- ...”.

- 9 It follows from those provisions and also from the general principles applicable to the public service that, although each institution has a wide discretion in relation to its internal organization and the assessment of posts, it is the importance of the different branches or posts as well as of the duties and responsibilities incumbent upon them which must be the principal criterion by virtue of which it is appropriate to decide whether a given branch must be directed by — or whether a given post must be assigned to — an official in a grade corresponding to a post of head of division rather than a post of principal administrator.
- 10 However, if it should appear that the need for such an arrangement were to affect simultaneously and in the same way several branches or posts without its being possible, as was the position in this case, to attend to it at the same time because the budget authority did not see fit to grant the number of posts applied for, the competent authority is entitled then to take into consideration the merits and qualifications of the officials who, after the conversion of the posts, might assume the duties of the regraded post. The application of this criterion presupposes however that the needs of the different branches or posts in question have been compared and assessed.
- 11 An examination of the Court’s file does not make it possible to state that all these obligations have been fulfilled. No factor has come to light permitting the finding that an assessment of the needs of the branches in question preceded the contested decision. Furthermore, although the decision of 5 October 1979 whereby the Court rejects the applicant’s complaint quotes the requirements of the different branches as being one of the reasons for the

selection, it does so only after first pointing out that the merits of each candidate and their careers have been compared.

- 12 The contested decision is therefore illegal and must be annulled.

Costs

- 13 Pursuant to Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. Since the Court has been unsuccessful it must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Annuls the Court's decision of 21 March 1979;
2. Orders the Court to pay the costs.

Kutscher

Mertens de Wilmars

Mackenzie Stuart

Delivered in open court in Luxembourg on 28 October 1980.

A. Van Houtte

Registrar

H. Kutscher

President