

- 25 However, in the light of the attitude of the Commission, which failed to dispel the applicant's misunderstanding of the meaning to be given to the rejection of his application, it is decided under the second subparagraph of Article 69 (2) of the Rules of Procedure to order the defendant to pay all the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the application;
2. Orders the defendant to pay all the costs.

Bosco

Mertens de Wilmars

O'Keefe

Delivered in open court in Luxembourg on 13 April 1978.

A. Van Houtte

Registrar

G. Bosco

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL MAYRAS
DELIVERED ON 9 MARCH 1978 ¹

*Mr President,
Members of the Court,*

Mr Ganzini, who was recruited by the ECSC on a contractual basis in 1953 as a messenger in the Publications Department, was established in 1956, within the framework of the Staff Regulations then in force, in Grade 13 of

Category C. He was promoted to Grade 12 (clerical assistant) with effect from 1 January 1958.

Subsequently, in compliance with his request, which was supported by a medical certificate, he was transferred to the Internal Services Branch as a messenger/receptionist with effect from 26 June 1961.

¹ — Translated from the French.

It is in his reclassification on the entry into force of the Staff Regulations common to the three Communities that the basic cause of the present action is to be found.

The applicant was, in fact, reclassified — with effect from 1 January 1962 — in the newly-created Category D and appointed as a messenger in Grade 2, step 7.

However, one year later the Directorate General for Administration and Finance expressly acknowledged that, having regard to the rights which he had acquired, he was eligible for transfer or promotion to such vacant post in Category C as might interest him.

Between 1963 and 1971, in reply to successive requests for explanations concerning what Mr Ganzini did not cease to regard as a "detrimental" downgrading, the administration invariably informed him that he could be promoted or transferred to a post in Category C *without a competition*.

Nevertheless, the applicant remained in Category D, in which he was promoted on 1 November 1975 to Grade D 1 (head of unit/messenger).

However, on publication of Notice of Vacancy COM/726/76, concerning a post of clerical officer (career bracket C 3/C 2) in the "Dispatch" department of Directorate General IX in Luxembourg, Mr Ganzini applied for the post, as did Gustave Sauvage, who was then classified in Grade C 4.

Each of those applications was admissible under Article 29 (1) (a) of the Staff Regulations, that is, within the context of the procedure for promotion or transfer within the institutions.

However, after a comparative assessment of the qualifications of the candidates, Mr Sauvage was preferred to the applicant on the ground that, while being better qualified, he had, in particular, both "much longer and more recent experience than Mr Ganzini in the field of dispatch".

It was in fact the former candidate who, by decision of 7 December 1976, was promoted to the vacant post of clerical officer.

The conditions under which the applicant was informed by the competent Head of Division of the rejection of his application for the post are directly at issue in the dispute before the Court.

The memorandum from the Head of Division was worded as follows: "I wish to inform you that the appointing authority has been unable to accept your application for the post to be filled". The Italian text reads: "non ha potuto *accogliere* alla Sua candidatura per l'impiego resosi vacante ...".

The applicant misunderstood the meaning of that memorandum and on 1 March 1977 submitted to the appointing authority, first, a *request* within the meaning of Article 90 (1) of the Staff Regulations for the regularization of his administrative status before his retirement by means of an appointment in Grade C 3 and, secondly, a *complaint* within the meaning of Article 90 (2), on the ground that it "was not possible to entertain" his application for the post of clerical officer and that it was, therefore, "*purely and simply refused*".

No reply was given to that complaint within the prescribed period of four months and it is against the implied decision of rejection resulting from that silence that Mr Ganzini lodged an application before the Court on 2 August 1977.

It was only on 29 September 1977 that Mr Tugendhat, a Member of the Commission, made a belated reply to the applicant's complaint through official channels and, once more, one can only deplore the fact that the departments of the Commission failed to reply to the applicant within the prescribed time, since it appears that the misunderstanding could easily have been cleared up. It would, in my

opinion, have been a simple matter to explain to him that his application for the post had not simply been set aside but had been considered together with that of another official in accordance with the procedure laid down in Article 29 (1) (a) of the Staff Regulations.

In any event, the applicant maintains that he never received the letter signed by Mr Tugendhat and states, further, that if he had received it it would have been belated, since the complaint was rejected by implication on 1 July 1977 and his application was lodged before the Court on the following 2 August.

While admitting that if an express and clearly reasoned reply had been sent to him within the prescribed time the proceedings would not have been brought, the applicant does not fail to add in his reply that liability for the proceedings rests with the Commission and that he might, at the most, be able to discontinue them if the defendant were to declare itself ready to bear the costs.

However, as things stand, the Court is required to rule on the application.

The first submission is based on the absence of a statement of reasons for the decision not to "entertain" the applicant's application.

In fact, as we have seen, there is no factual basis for this submission since the decision can only be interpreted as meaning that the administration was unable to accept that application after comparative consideration of the abilities and merits of each of the two candidates in question within the context of the procedure for promotion or transfer laid down by Article 29 (1) (a) of the Staff Regulations. In other words, the submission put forward is based on an unsound interpretation of the contested decision. Let us admit that the administration made no effort to clarify that decision. However, in the light of the explanations subsequently provided I am led to accept that the

appointing authority did not exceed its discretionary powers: its choice was in accordance with the interests of the service.

The second submission is based on the alleged irregularity of the vacancy notice. There, too, the applicant reasons — at least in his application instituting the proceedings — as if his application for the post had not been considered. I have already said that that is not the case. Furthermore, the vacancy notice complies perfectly with the specifications laid down by the Staff Regulations: it indicates clearly the post to be filled, the nature of the duties to be performed and the qualifications required. It also states that, in accordance with Article 29, the post in question must be filled by promotion or transfer.

The third submission is based upon the misuse of powers. In that connexion we are told that the administration refused to consider whether the case of Mr Ganzini is different from that of the other officials who had also been downgraded upon the entry into force of the new Staff Regulations and that its desire to treat them all equally made it lose sight of its bounden duty to observe the terms of Article 7 (1) of those Staff Regulations, according to which the interests of the service alone must be taken into account in the adoption of any decision for the purpose of filling a vacant post.

I admit that I do not perfectly understand that submission. The administration only received two applications for the post: that of Mr Ganzini and that of Mr Sauvage, who was already in Category C. It was only required to compare the qualifications and merits of each of those candidates — which it did. I see no consideration which, in this instance, ought to have led it to examine in what respect the position of the applicant could or could not be distinguished from that of the

other officials who had been "downgraded" into Category D on the entry into force of the joint Staff Regulations.

Furthermore, there is nothing in the file to support the allegation of misuse of powers, in the sense that the administration departed from the interests of the service.

On the contrary, I consider that it acted in accordance with those interests by appointing the candidate who, through his experience, appeared to it to be the better of the two officials who had applied for the post.

For those reasons, I am of the opinion that the application should be dismissed but that, in accordance with the second subparagraph of Article 69 (2) of the Rules of Procedure, the entire costs should be borne by the Commission by reason of its conduct in the case.