

Member State, may not seek to rely on the principle of equality of treatment to have the mother tongue taken into account instead of that first

working language for the purpose of the assessment of shorthand skills in connection with promotion procedure.

In Case 280/80

ANNE-LISE D'ALOYA, NÉE BAKKE, an official in the General Secretariat of the Council of the European Communities, 16 Avenue des Mésanges, Brussels, represented by Edmond Lebrun of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever of the Luxembourg Bar, 83 Boulevard Grande-Duchesse-Charlotte,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by John Carbery, an Adviser in the Legal Department of the General Secretariat of the Council, acting as Agent, with an address for service in Luxembourg in the office of Douglas Fontaine, head of the Legal Department of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

APPLICATION for the annulment of a decision rejecting a request that the procedure for the applicant's promotion be reopened,

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the arguments of the parties put forward during the written procedure may be summarized as follows:

I — Summary of the facts

The decision of 7 October 1963 on the description of the duties and powers of officials of the General Secretariats of the Councils of the European Communities, as amended by the Council Decisions of 25 June 1973 and 21 March 1974, adopted pursuant to Article 5 (4) of and Annex I to the Staff Regulations of Officials, describes the duties of officials in grades C 4 and C 5 (typist) as those of an "official carrying out typing duties", and the duties of officials in grades C 3 and C 2 (secretary/shorthand typist) as those of an "official carrying out shorthand-typing and secretarial duties". The promotion of an official who is a typist in grade C 4 to grade C 3 in the career bracket above therefore presupposes that the official must prove his shorthand skill.

In Staff Note No 184/79 of 26 September 1979, Council officials were informed of the following ways in which from then on they might provide evidence of that skill:

— either by passing a shorthand test set by the vocational training branch (speed of 150 syllables per minute, text dictated for three minutes); or

— by passing an optional shorthand test, with the same requirements, taken as part of the recruitment competition; or

— by production of a shorthand certificate or certificate issued by an institute unconnected with the Communities, provided that such documents gave clear information as to the knowledge and skills certified and in particular that they attested the speed (which must be 150 syllables per minute, text dictated for three minutes) and, where applicable, the number of marks awarded.

Pursuant to Decision 184/78 of the Secretary-General of the Council of 12 May 1978, an Advisory Committee on Promotion, made up of a chairman, four members appointed by the appointing authority and four members appointed by the Staff Committee was set up with the task of advising the appointing authority regarding examination of the comparative merits of officials eligible for promotion. The committee draws up, in respect of each year, using information from the personal files of staff on

the basis of which their merits may be assessed, a list, which is published, of the officials whose promotion to a higher grade it considers appropriate. The decision of the appointing authority on the promotions to be made each year is taken on the basis of that committee's report.

The applicant, Mrs d'Aloya, is a Council official, a typist in grade C 4. She is of Norwegian nationality and mother tongue. She was not promoted to grade C 3 in 1979 (1978 session) or in 1980 (1979 session).

She was recruited on 1 September 1972 as a member of the auxiliary staff in the typing pool, Norwegian section, of Directorate-General A of the Council and was subsequently appointed a temporary servant as a typist in grade C 4 assigned to the English section of the typing pool, since Norway did not accede to the European Communities. Following an open Council competition for the recruitment of English-language typists, the applicant was appointed a probationary official in grade C 4 with effect from 1 August 1973 and was established on 1 February 1974. Because of her Norwegian nationality, a derogation regarding the requirement of nationality of a Member State of the European Communities was granted by the appointing authority in accordance with Article 28 (a) of the Staff Regulations of Officials.

In the course of her career, the applicant was assigned to various English-language typing posts.

The applicant's personal file contains a certificate from a Norwegian school, St Olav Videregående Skole, Stavanger, dated 29 March 1979, attesting the fact that she had passed a shorthand examination in 1971, partly in Norwegian, in which she took down in shorthand a dictation of 500 words at a speed of 50 words per minute and a letter dictated at a speed of 60 words per minute, and partly in English, in which she took down in shorthand a dictation of 400 words comprising two letters dictated at a speed of 50 words per minute and one letter dictated at a speed of 60 words per minute. The speeds indicated correspond, according to the applicant, to a speed of 150 syllables per minute in Norwegian and a speed of 120 syllables per minute in English, and this has not been contested by the Council.

Since she did not appear on the published list of officials proposed by the Advisory Committee on Promotion for promotion to grade C 3 for the year 1979, the applicant sent a memorandum on 15 February 1980 to the appointing authority of the Council referring to her proved shorthand skills and asking for the situation regarding her career to be rectified. In that memorandum, the applicant stated in particular that the certificate as to her shorthand skills from the St Olav Videregående Skole was not submitted to the Advisory Committee on Promotion.

The Secretary-General of the Council treated that memorandum as a request within the meaning of Article 90 (1) of the Staff Regulations. He informed the applicant by a memorandum of

27 March 1980 that he was unable to accede to her request since the Norwegian language could not be taken into account and her certified speed in English shorthand was lower than the speed required.

By a memorandum of 29 May 1980, registered on 12 June 1980, the applicant lodged a complaint against that decision in accordance with Article 90 (2) of the Staff Regulations of Officials.

The applicant did not receive any reply to that complaint.

II — Written procedure and conclusions of the parties

By application received at the Court Registry on 30 December 1980 the applicant brought an action against the Council, claiming that the Court should:

- Annul the Council's memorandum of 27 March 1980 rejecting the applicant's request of 15 February 1980 and the implied decision rejecting the applicant's complaint of 29 May 1980;
- Order the Council to reopen with respect to the applicant the procedure for promotion to grade C 3 — post of secretary/shorthand typist — for the 1978 session or, at any rate, the 1979 session;
- Order the Council to pay the costs.

The Council contends that the applicant's claims should be dismissed and that she should be ordered to pay the costs.

The written procedure followed the normal course.

On 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.

III — Submissions and arguments of the parties

The applicant alleges infringement of the Staff Regulations of Officials, in particular Articles 5 (3) and 45 (1) thereof, *ultra vires* acts and breach of general principles of law such as the principles of equality, of the protection of legitimate expectation and of distributive justice, the principle that all administrative measures should state the reasons on which they are based and that such measures may not be vitiated by errors of law or fact and must be legally acceptable, and the principle of proportionality. In that regard, the applicant makes three submissions.

First submission

In her first submission the *applicant* alleges that the Council considers that knowledge of shorthand in Norwegian may not be relied upon for the purpose of applying the Staff Regulations to the applicant and that the Council's examination of the applicant's knowledge of shorthand relates only to her second language, namely English, and does so by reference to the standard set for a first language.

The applicant maintains that the shorthand skill required for promotion to the post of secretary/shorthand typist must be assessed in the first language of the person concerned, in other words in her mother tongue. The applicant irrefutably possesses that skill in her mother

tongue. The Council's decision places the applicant in a less favourable position than other officials in the same grade and lays down different conditions regarding her career. The decision prevents her from ever advancing beyond grade C 4 merely because her mother tongue is Norwegian and because that language is not an official language or a working language of the Community institutions.

The applicant has been in grade C 4 for more than eight years, despite the fact that the assessments of her work by her superiors are excellent, whereas the average seniority in that grade at the time of promotion to grade C 3 is 28.9 months. The applicant is not claiming a right to promotion but equality of opportunity regarding promotion.

Article 45 (1) of the Staff Regulations is also infringed because, according to the applicant, the certificate as to her shorthand ability in Norwegian was not brought to the knowledge of the Advisory Committee on Promotion and that committee did not reach its decision on the basis of a complete file. Several members of the committee named by the applicant are prepared to give evidence to that effect.

The fact that Norwegian is neither a Community language nor a working language of its institutions must not have any negative effect on the applicant's progress in her career since she was recruited, as a Norwegian, when Norway's accession to the Community was in prospect and she was maintained without interruption in the service of the Council thereafter. The mere fact that the applicant was appointed an official following a competition for English-

language secretaries is likewise no reason for disregarding the fact that Norwegian is her first language.

The *Council* contends that Article 5 (3) of the Staff Regulations has not been infringed and that the applicant's progress in her career is normal since she has the benefit of automatic advancement to the next step in her grade; neither is there any infringement of Article 45 (1) since her complete file was placed before the Promotion Committee and the Staff Regulations do not guarantee any official a right to promotion.

The certificate from the St Olav Videregående Skole does not specify that the applicant can take shorthand at the speed indicated for three minutes, which is a requirement of Staff Note No 184/79. The certificate is therefore incomplete and could not in any case have been regarded as sufficient by the Advisory Committee on Promotion. The Council is unable to state that the administration received that certificate, dated 29 March 1979, before the last meeting of the Advisory Committee on Promotion for the 1978 session, 24 April 1979, but if it had been received it would have been placed in the applicant's personal file. As regards the 1979 promotion session, the secretary of the Advisory Committee on Promotion responsible for keeping officials' personal files is willing to give evidence that the statement was in the file passed to the Promotion Committee at the beginning of the session and that it was brought to the notice of the committee.

There is from the outset a difference between the applicant's situation and that of the great majority of officials since

Norwegian is not a Community language or a working language of the Council. It is not possible to change the Communities' rules governing languages by means of a mere derogation pursuant to Article 28 (a) of the Staff Regulations and no derogation from Article 28 (f) is possible. When it became apparent that Norway was not going to become a member of the Community, extension of the applicant's employment was considered only because she had performed satisfactorily as a typist in Community languages. When she was established the applicant demonstrated a thorough knowledge of English. As she was appointed following a competition for English-language typists, the applicant is not in a position to accuse the Council of failure to protect her legitimate expectation on the grounds that it does not recognize Norwegian as her first language. Moreover, the applicant is not prevented from ever advancing beyond grade C 4 because she will become eligible for promotion as soon as she attains a shorthand speed of 150 syllables per minute in one of the seven official and working languages of the Community.

Second submission

In her second submission, which is subsidiary to the first, the *applicant* alleges that the Council, by implication but undeniably, takes the view, in the measures adopted, that the interests of the service preclude assessment of her shorthand ability in her mother tongue since it is neither an official language nor a working language of the Community institutions.

The applicant maintains that the derogation from Article 28 (a) of the Staff

Regulations of Officials implies the finding that the interests of the service were no obstacle to maintaining her in her post, even at a time when it was established that Norwegian would be neither an official language nor a working language of the Community institutions. Accordingly, the fact that the applicant's mother tongue is neither a Community language nor a working language of the Community institutions ought not in any way to be detrimental to her progress in her career and may not be held against her. It is contradictory and unacceptable to take the view at a later stage, as the applicant progresses in her career, that the interests of the service prevent consideration of her shorthand ability in Norwegian.

The applicant already works in English and French shorthand and her work is regarded by her superiors as outstanding. Where shorthand is still used, it is in French on most occasions, in which language she possesses skill at least equal to that of the other secretaries in career bracket C 3/C 2 whose mother tongue is not French. The damaging consequences for the applicant of a refusal to take her knowledge of shorthand in Norwegian into account are thus manifestly out of all proportion to the actual interests of the service.

In this case there is a manifest imbalance between the applicant's entitlement to equal treatment and the bar to progress in her career, on the one hand, and the real interests of the service with regard to shorthand, on the other. Those interests are minimal, since in practice shorthand is required only sporadically or on a wholly secondary basis in the Italian and German sections and it is

hardly required at all in the Dutch and Danish sections. The Staff Committee of the Secretariat of the Council has proposed that that criterion, which has become a mere formality, should be replaced by functional criteria. The disproportion between the effective interests of the service, on the one hand, and the discrimination and serious prejudicial consequences for the applicant, on the other, is clearly demonstrated by the fact that the applicant already actually carries out shorthand work in English and in French, in which languages shorthand is still used to some extent, and that proof of her shorthand skills in those languages is provided by the assessments of her superiors.

The *Council* emphasizes that the applicant was established on the result of a competition for English-language secretaries and because she had shown the working capacity necessary in English and in another Community language. If the Council informed its staff that proof of knowledge of shorthand was necessary for promotion from grade C 4 to grade C 3, it was precisely because of the importance of shorthand.

The Norwegian language, and in particular Norwegian shorthand, are not necessary for work in the Council. A knowledge of Norwegian shorthand cannot therefore be regarded as a major criterion for assessing the comparative merits of officials with a view to their promotion.

The Council contests the applicant's opinion regarding the interests of the service, as far as knowledge of shorthand is concerned. Shorthand is included in the description of duties now in force, which was adopted by the competent authority and may only be changed by that authority.

To help officials and servants to achieve the aim of fulfilling the conditions required for promotion to grade C 3, shorthand courses are organized by the General Secretariat of Council.

Third submission

In her third submission, which is subsidiary to the other two, the *applicant* refers to the fact that the Council assesses the applicant's shorthand ability in English, having regard not to the standard laid down for a second language (120 syllables per minute) but to that for a first language (150 syllables per minute).

The applicant maintains that since her skill in shorthand is assessed only in English, it is clearly the standard for a second language which should be applied. The applicant irrefutably meets that standard by achieving 120 syllables per minute. Moreover, the standard laid down by the Council for a first language is very high and it is possible to do shorthand very accurately in a language without achieving that standard. In the Commission the standard is 120 syllables per minute and the applicant reaches that speed in English.

It is not a question of taking into account the fact that the applicant has a better knowledge of Norwegian but of the fact that English is only her second language. The other English-language secretaries would not be put at a disadvantage if in the applicant's case English were to be regarded as what it is, namely her second language. A comparison of the applicant's situation with that of a secretary whose mother tongue is a

Community language clearly shows that the Council's position is totally formalistic and inequitable — whilst no shorthand ability is normally required in a secretary/shorthand typist's second language, the applicant possesses, in addition to her skill in Norwegian and her speed of 120 syllables per minute in English, skill in French which although unassessed is highly regarded by her superiors and her skills in English and French are actually used in practice. Regard being had to the real needs of the service, it must be agreed that there are no objective reasons for refusing to recognize that the applicant has shorthand skills which make her eligible for promotion to grade C 3.

The *Council* replies that, since the applicant was appointed following a competition for English-language secretaries, to accord her an advantage by taking account of her superior knowledge of Norwegian would discriminate against the other English-language secretaries. If it took the action requested by the applicant it would have to allow the same treatment for every other official whose mother tongue was not a Community language. The Commission's

requirements with regard to shorthand speed are not relevant since each institution is free to provide for its own internal organization as it sees fit. Moreover, the certificate submitted by the applicant does not in any case comply with the standards of the Council since, even in the case of a second language, it must indicate that the required speed was maintained for three minutes. Although the applicant has attended shorthand courses and taken two shorthand tests in English organized by the General Secretariat of the Council it has been proved that she is unable to attain the speed of 150 syllables per minute.

IV — Oral procedure

At the hearing on 2 July 1981 oral argument was presented by the following: Mr Lebrun, of the Brussels Bar, for the applicant and John Carbery, Adviser in the Council's Legal Department, for the Council.

The Advocate General delivered his opinion at the sitting on 22 October 1981.

Decision

- 1 By application lodged at the Court Registry on 30 December 1980 Anne-Lise d'Aloya, a Council official in grade C 4, brought an action seeking annulment of the decision rejecting her request that the procedure for promotion to grade C 3 (post of secretary/shorthand typist) for the 1978

session, or, at least, the 1979 session, should be reopened with respect to her.

- 2 The duties corresponding to grade C 3/C 2 (secretary/shorthand typist) are described in a decision taken by the Council pursuant to Article 5 (4) of and Annex I to the Staff Regulations of Officials, as being those of an "official carrying out shorthand-typing and secretarial duties". The staff of the Council was informed, by Staff Note No 7/79 of 17 January 1979, that promotion of an official classified as a typist in grade C 4 to grade C 3 in the higher career bracket was possible only if the person concerned had given prior evidence of expertise in shorthand. By Staff Note No 184/79 of 26 September 1979 it was stated that from then on those who wished to do so could prove that skill by passing a shorthand test using a text dictated at a speed of 150 syllables per minute for three minutes, organized either within the framework of vocational training or as part of a recruitment competition, or by production of a certificate issued by an outside institution giving clear details of the knowledge and skills to which it referred, with particular regard to the speed mentioned above.

- 3 The applicant is of Norwegian nationality and mother tongue. She entered the service of the Council on 1 September 1972 as a Norwegian-language typist and a member of the auxiliary staff. On 1 August 1973, after taking part in a competition for the recruitment of English-language typists, she became an English-language typist, established in grade C 4. It appears from her periodic report that, as part of her duties, she does shorthand work in English and French and sometimes works in Danish, German and Italian. According to that report her superiors regard her as "a particularly gifted secretary whose knowledge and skill are outstanding".

- 4 In 1979 the applicant submitted a certificate from a Norwegian school dated 29 March 1979 certifying that in 1971 she had passed a shorthand examination in Norwegian and English at a speed corresponding, according to the applicant, to 150 syllables per minute in Norwegian and 120 syllables per minute in English.

- 5 The applicant's name was not included in the lists drawn up and published on 16 May 1979 and 17 January 1980 by the Advisory Committee on Promotion making proposals for promotion for the years 1978 and 1979. Since the decisions as to promotion were taken on the basis of the report of that advisory committee the applicant was not promoted.

- 6 On 15 February 1980 the applicant sent a memorandum referring to her knowledge of shorthand in Norwegian and in English to the appointing authority of the Council, in which she requested that her merits should be re-assessed for the purpose of promotion with effect from 1 January 1978. The Secretary-General of the Council treated that memorandum as a request within the meaning of Article 90 (1) of the Staff Regulations and informed the applicant on 27 March 1980 that he was unable to accede to that request since Norwegian could not be taken into account and her certified shorthand speed in English was lower than the required speed.

- 7 A complaint against that decision rejecting her request, lodged by the applicant on 29 May 1980 in accordance with Article 90 (2) of the Staff Regulations, received no reply, and she thereupon instituted these proceedings with a view to having the procedure for promotion reopened.

- 8 In the three submissions on which she relies to support her action, the applicant maintains in substance that the Council should, for the purpose of promotion, have regarded as sufficient her shorthand skills in her mother tongue, in which her speed corresponds to 150 syllables per minute, or at least in English, in which her speed corresponds to 120 syllables per minute, the speed required in the shorthand tests organized by the Council for the purpose of vocational training in a foreign language. It is out of all proportion to prevent any further advancement in her career on the basis of a requirement which bears little relation to the interests of the service or to the work actually required of many secretaries, since in practice shorthand is used mainly in English and in French. Moreover, other institutions limit their requirement to a speed of 120 syllables per minute in the candidate's mother tongue and the applicant achieves that speed in English. Finally, the applicant refers to the evidence of several people to establish that the certificate as to her shorthand skills issued by the Norwegian school was not in the file

examined by the Advisory Committee on Promotion for the 1978 session or for the 1979 session.

- 9 The Council contends that the principle of equality of treatment, and also the Community institutions' rules governing languages pursuant to Article 28 (f) of the Staff Regulations of Officials, prevent it from taking the applicant's knowledge of shorthand in Norwegian into account, in view of the fact that the applicant was appointed following an English-language competition and Norwegian is neither an official language nor a working language of the Communities. In English the applicant did not satisfy the requirement of 150 syllables per minute which the appointing authority was entitled to lay down. In its rejoinder, and in particular during the hearing, the Council also rejected the view that the certificate from the Norwegian school as to the applicant's English-language shorthand ability demonstrates a level of skill corresponding to the Council's standards, even in a foreign language. The Council further contends that the certificate in question, which the applicant did not submit until after the Advisory Committee on Promotion had started its proceedings for the year 1978, was in any case included in the file examined by the committee for the year 1979.
- 10 It should be emphasized in the first place that in order to evaluate the interests of the service and the merits to be taken into account in connection with the decision provided for in Article 45 of the Staff Regulations, the appointing authority has a wide discretion and that, in that respect, the Court's review must be confined to the question whether, regard being had to the bases and procedures available to the administration for its assessment, it remained within the proper bounds and did not use its authority in a manifestly incorrect manner.
- 11 In that connection, the principle that knowledge of shorthand is required for posts in grade C 3/C 2 which are defined in Annex I to the Staff Regulations as posts of secretaries/shorthand typists is not open to criticism.

- 12 Staff Note No 184/79 of 26 September 1979 concerning promotion from grade C 4 to grade C 3 states that the required shorthand speed is 150 syllables per minute and provides for three possible ways of proving that skill. Such proof, which is essential for the purposes of promotion, must according to the communication in question be provided only in the manner specified therein, which excludes any other evidence of the required skill.
- 13 Staff Note No 184/79 does not specify the language in which officials may or must prove their shorthand skills. It is true that in another Staff Note, No 114/79 of 29 May 1979, concerning the shorthand tests organized within the framework of vocational training, the speed of 150 syllables per minute was expressly laid down for tests taken in the candidate's mother tongue. However, it is wrong to infer therefrom that in Staff Note No 184/79 regarding promotion that requirement was laid down for the official's mother tongue without regard to the language presented in a competition before appointment, which is described as the first working language in the description of the post which the official occupies, and regardless of whether that language is an official language of the Communities and a working language of the Council. Having once agreed to be assigned to a post for which the first working language is not the mother tongue, an official who is a typist, in particular one who is not a national of a Member State, may not seek to rely on the principle of equality of treatment to have the mother tongue taken into account instead of that first working language for the purpose of the assessment of shorthand skills in accordance with Staff Note No 184/79.
- 14 The various items in the applicant's file were not sufficient to indicate that she had proved her shorthand skill in her first language, as indicated above. In particular, the certificate from the Norwegian school where the applicant had been trained could not be taken into consideration for that purpose since it did not establish that the applicant could take shorthand at a speed corresponding to 150 syllables per minute in her first working language, English. The question whether that certificate was or was not in the file examined by the Advisory Committee on Promotion during its proceedings

in respect of 1978 and 1979 is therefore without relevance to the decision to be made in this case since it is established that it could have no bearing on the committee's assessment in accordance with the criteria laid down in Staff Note No 184/79.

- 15 It follows that the Advisory Committee on Promotion and the appointing authority correctly assessed the applicant's shorthand skills having regard to the criteria laid down in Staff Note No 184/79.
- 16 However, the criteria laid down in Staff Note No 184/79 may appear to be inflexible in certain respects and, at least with regard to certain officials, they bear little relationship to the actual work to be done and the merits of the persons concerned. In particular, the note makes no provision for the possibility of reliance on other merits to compensate for the absence of proved shorthand skill at the required speed in the first working language or of taking into account knowledge of shorthand in other languages, even where that knowledge is actually used in practice and is recorded in the periodic reports.
- 17 Nevertheless, there are no grounds for considering that, when drawing up Staff Note No 184/79, the appointing authority exceeded the limits of its discretion in that field. It is for the administration to determine its criteria for selection in the exercise of its discretion, having regard to the exigencies of the rational organization of its various departments and there is nothing to prevent it from laying down for that purpose more rigorous criteria than those adopted by other Community institutions. The Court is not empowered to substitute its assessment for that of the administration, nor may it, in particular, amend or supplement the criteria laid down in Staff Note No 184/79.
- 18 By applying the criteria thus determined to the applicant's case and by taking the view that she should not be promoted within the framework of the promotions for the years 1978 and 1979 on the ground that she did not satisfy the conditions laid down in the note in question, the appointing authority did not use its discretion in a manifestly incorrect way.
- 19 The application must therefore be dismissed as unfounded.

Costs

- 20 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of those rules costs incurred by the institutions in proceedings by servants of the Communities are to be borne by the institutions.

On those grounds,

THE COURT (Third Chamber)

hereby:

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

Touffait

Mackenzie Stuart

Everling

Delivered in open court in Luxembourg on 3 December 1981.

For the Registrar

H. A. Rühl

Principal Administrator

A. Touffait

President of the Third Chamber