

take into account, in order to assess their qualifications for the post in question, in addition to the number and the nature of the degrees held by them, the competence and efficiency which they have shown in the service. Moreover, it cannot be suggested that it is a misuse of the power of

discretion to take into account, in conjunction with other factors, the age of candidates and their seniority in the grade or service. Indeed, the qualifications and merits of the candidates being equal, those matters may even constitute a decisive factor in the appointing authority's decision.

In Case 298/81

FRANCO COLUSSI, an official of the European Parliament, represented by Marcel Slusny of the Brussels Bar, with an address for service in Luxembourg at the applicant's residence, 36 Rue de Wiltz,

applicant,

v

EUROPEAN PARLIAMENT, represented by the Director of Personnel and Social Affairs, Martin Schmidt, acting as Agent, assisted by Alex Bonn of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Mr Bonn, 22 Côte d'Eich,

defendant,

APPLICATION for the annulment of a decision to promote an official,

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Lord Mackenzie Stuart and Y. Galmot, Judges,

Advocate General: S. Rozès

Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the submissions and arguments of the parties may be summarized as follows:

I — Facts

1. By Vacancy Notice No 2690 of 14 July 1980, the European Parliament commenced the procedure for filling, initially by promotion or transfer, seven posts of Linguistic Advisers in Grade L/A 3, one of which was in the Italian Translation Division.

The duties attached to the post were described as being those of:

A linguistic adviser with special responsibility for specialized work of revision and translation and for the vocational training of officials and trainees in the division;

To replace the head of the division in his absence.

The following qualifications and experience were required:

A university education with a degree or equivalent experience;

Proven experience in the sphere of translation, revision or terminology;

Knowledge of legal affairs, political science or economics or in the scientific field;

Knowledge of languages: a perfect command of Danish, German, English, French, Italian or Dutch; in addition candidates must have a thorough knowledge of two other Community languages and a satisfactory knowledge of a fourth such language.

2. The applicant, Franco Colussi, who entered the service of the European Parliament on 24 March 1961 and who has been a reviser in Grade L/A 4 since 1 July 1973, applied for the post in the Italian Translation Division.

Two other officials of Grade L/A 4, one of whom was Mrs Cattarino, submitted applications for the post.

3. In a letter addressed to the Directorate General of Administration, Personnel and Finance on 3 September 1980, the day on which he submitted his application, in order to supplement the information contained in his application form, Mr Colussi drew attention to his qualifications and experience and in particular to the fact that he had two degrees, one in foreign languages and literature, obtained in 1954, and the other in law, obtained in 1958, and that he was at that time registered with the Milan Bar as a trainee advocate.

On 1 October 1980, Mr Colussi addressed a letter to the President of the Parliament stating that he had learned that for the post in question, the competent authority would attach special importance to the candidate's age which, in his view, would be arbitrary and

discriminatory as against him. He requested that a decision be taken, in accordance with Article 90 (1) of the Staff Regulations, based on an actual comparison of qualifications and merits and on the basis of a vacancy notice drawn up in less conventional terms, in other words, on the basis of a vacancy notice excluding any discrimination or uncertainty.

4. By a memorandum of 8 October 1980, the Head of the Italian Translation Division, Mr Fua, informed the Director of Translation and Terminology of the conclusion which he had reached on the basis of his consideration of the applications and recommended the promotion of Mrs Cattarino, in view of the fact that, although she and the applicant both had excellent reports, Mrs Cattarino, who had for years regularly replaced the head of the division in his absence, was older and had greater seniority in the grade and in the service.

By decision of 1 December 1980, the President of the Parliament, acting as the appointing authority, promoted Mrs Cattarino to the post of Linguistic Adviser Grade L/A 3 in accordance with Vacancy Notice No 2690 with effect from 1 October 1980.

The applicant learnt of that decision when it was subsequently displayed for the information of the staff.

By letter of 28 January 1981, the applicant was informed that his application for the post had not been successful.

5. By letter of 15 April 1981, registered on 21 April 1981, the applicant submitted a complaint within the meaning of Article 90 (2) of the Staff Regulations, against the decision not to appoint him Linguistic Adviser, and against the

implied rejection of his request of 1 October 1980. He maintained that the successful candidate should have been selected on the basis of a competition, that there had been a misuse of power because the post had been reserved for the oldest officials, and that the comparative merits of the candidates had not been properly examined.

That complaint was rejected by decision of the President of the Parliament of 4 September 1981.

II — Written procedure and conclusions of the parties

1. By application lodged at the Court Registry on 27 November 1981, the applicant brought this action. He claims that the Court should:

Declare that the President's decision to appoint Mrs Cattarino as Linguistic Adviser to the Italian Division is null and void;

Declare so far as necessary that the express rejection on 4 September 1981 of the applicant's complaint is null and void;

and

Order the opposite party to pay the costs.

2. In his reply, the applicant claims in addition that the Court should:

So far as necessary annul Vacancy Notice No 2690.

3. The Parliament claims that the Court should:

Dismiss the action;

and

Order the applicant to pay the costs.

4. The written procedure followed the normal course.

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. However, it put to the parties certain questions, to which written replies were provided before the hearing.

III — Submissions and arguments of the parties in the course of the written procedure

The *Parliament* raises no objection to the *admissibility of the action* but it considers that, in accordance with the Rules of Procedure, the applicant cannot be allowed to make good in his reply a deficiency in the conclusions formulated in the application.

In his *first submission*, the *applicant* points out that it was impossible for the appointing authority to consider the comparative merits of the officials eligible for promotion without organizing an internal competition, as provided for in Article 29 (1) (b) of the Staff Regulations of Officials in view of the fact that certain of the duties attaching to the vacant post, such as vocational training, had never before been performed by officials in Grade L/A 4. In the absence of any frame of reference and in view of the novelty of the post, it was not possible to make a decision solely on the basis of the periodic report because that report could not contain any information relating to those duties, which moreover were not described in a precise manner in the vacancy notice. The vacancy notice is therefore void. If a step in the recruitment procedure is void, it follows that the disputed decision to promote one of the candidates must also be void.

The *Parliament* points out in the first place that the above submission according to which the vacancy notice is void, is inadmissible inasmuch as the applicant did not claim it to be void in the conclusions set out in his application.

In addition, the Parliament emphasizes that it had merely followed the chronological order prescribed by Article 29 of the Staff Regulations for the consideration of the different steps in the recruitment procedure. The appointing authority is free to choose between the different means of recruitment. Similarly, the administration has an exclusive discretion as regards the description of the nature of the duties relating to a vacant post.

In his *second submission*, the *applicant* maintains that it is not established that the President of the Parliament was empowered to act as appointing authority in the circumstances of the case. The appointment of the President as appointing authority made by Decision No 175/62 of the Bureau of the Parliament on 12 December 1962, in the form of a sub-delegation, is not valid because the Bureau itself had no authority so to act. The Rules of Procedure of the Parliament of 26 July 1958 contain no provision which empowers the Bureau to act in that sphere and Article 49 of the Rules of Procedure of November 1969 is identical in that respect. It is therefore the institution itself, namely the Parliament, which should have designated the appointing authority according to Article 2 of the Staff Regulations. In the absence of such a decision, only the Parliament itself is empowered to act as the appointing authority.

The *Parliament* states that the disputed decision was adopted on the basis of Decision No 175/62 of the Bureau of 12 December 1962 concerning the designation of the appointing authority according to which the Bureau

“Having regard to Article 2 of the Staff Regulations of Officials . . .

Decides that the powers conferred by the Staff Regulations of Officials on the appointing authority . . . shall be exercised:

(i) . . .

(c) by the President, on the proposal of the Secretary General:

For the application of the provisions of Articles . . ., 29, . . . 45, to officials of Category A, Grades 1 to 7 inclusive, and of the languages, staff, Grades 1 to 6 inclusive . . .; however, advance notification shall be given to the Bureau of decisions in connection with the filling of posts in Category A:

. . .”

That decision was adopted under the former Staff Regulations, Article 2 of which already contained a provision identical to Article 2 of the present Staff Regulations. The applicant’s theory that a plenary sitting of the Parliament itself must regulate its administrative organization is absurd, as it is a deliberative body with a large number of members. For that reason the Parliament in its Rules of Procedure, both in the version in force at the time of the disputed promotion (Article 49) and in that in force at the time of the adoption of Decision No 175/62 of the Bureau which was published in Official Journal 2449/62 of 15 October 1962 provides as follows:

“1. Parliament shall be assisted by a Secretary General appointed by the Bureau.

2. The Secretary General shall head a secretariat the composition and organization of which shall be determined by the Bureau.

3. The Bureau, after consulting the appropriate committee of Parliament, shall decide the number of staff and lay down regulations relating to their administrative and financial situation.”

The Bureau was therefore empowered to designate the appointing authority in accordance with the Staff Regulations.

In his *third submission*, the *applicant* maintains that the above-mentioned decision of the Bureau was not observed because, in this case, the Bureau was not informed in advance. The applicant considers that the distinction made by the decision of the Bureau between officials of Categories A and L/A is explained as a clerical error.

The *Parliament* points out that the wording of the decision of the Bureau clearly limits to officials in Category A the requirement of advance notification and it is impossible to extend it, by means of interpretation, to officials of the languages staff. In that respect it refers to the judgment of the Court of 13 July 1972 (Case 90/71, *Bernardi v Parliament*, [1972] ECR 603). Moreover the provision merely makes a recommendation, and does not impose an obligation. Failure to observe it cannot therefore entail nullity.

In his *fourth submission*, the *applicant* claims that it is not established that the President of Parliament gave his personal consideration to the examination of the comparative merits required by Article 45 of the Staff Regulations, since his letter of 4 September 1981, which dismissed the complaint, referred only to a thorough investigation undertaken by the

President's staff and did not state that the President had personally conducted such an investigation. It is therefore for the Parliament to provide the evidence that such a personal examination of the periodic reports and the merits of the candidates actually took place.

The *Parliament* states that the disputed decision was actually taken by the President of the Parliament himself. It is for the applicant to establish the contrary, and there is absolutely no evidence to that effect.

In his *fifth submission*, the applicant maintains that it has not been established that the appointing authority undertook a genuine examination of the merits of the candidates and their periodic reports and that it did not merely consider Mr Fua's memorandum of 8 October 1980 in which the decisive factors were presented incompletely and inaccurately.

The *Parliament* replies by referring to the absence of any evidence and points out that the memorandum in question was drawn up in accordance with administrative practice. It does not prove that the appointing authority failed to consider the prescribed criteria.

In his *sixth submission*, the *applicant* claims that the appointing authority did not take into consideration the fact that the applicant's abilities were more impressive than those of the successful candidate. It did not take into account the degrees and certificates, in particular in law, which he held in addition to the two theses on subjects relating to economics which he completed in the course of his studies. Those facts appeared in his file and he drew attention to them again at the time of his application for the post. Mrs Cattarino on the other hand, did not have the specific knowledge of legal affairs, political science, economics or scientific

matters referred to in the notice. Mr Fua's memorandum of 8 October 1980 shows that the candidates' files were not examined fully and fairly, with the necessary care, in particular in so far as the fact that the applicant, unlike Mrs Cattarino, had on several occasions been called upon to serve as a member of a selection board was not taken into account.

According to the *Parliament*, that submission must fail because it questions the discretionary power of the appointing authority. The applicant's qualities were noted in his periodic report and taken into consideration as part of the examination of merits, as is also shown by Mr Fua's memorandum.

The *applicant's seventh submission* alleges misuse of power. The appointing authority did not expressly refute the allegation made by the applicant in his request of 1 October 1980 and in his complaint of 19 April 1981 that the posts in question had been reserved for the oldest officials. Moreover, the wording of Mr Fua's memorandum supports that conclusion. Thus the appointing authority automatically selected the oldest official in the English and Danish Divisions. The applicant suggests that, in reality, when recruitment is by competition, the age of the candidates may be a negative factor.

The posts in question were therefore actually reserved in advance for the oldest candidates, which constitutes a misuse of power.

The *Parliament* disputes the assertion that the posts concerned were reserved in advance for the oldest official or the one with the greatest seniority in each division. However, it points out that age and seniority may be a factor, even a decisive factor, when other conditions and qualifications are equal.

In his *eighth submission*, the *applicant* maintains that the fact that the President of the Parliament adjudicated on both the promotion and the complaint constituted a breach of the principle *nemo iudex in re sua*. The decision on the complaint should have been taken by the Bureau of the Parliament.

The *Parliament* replies to that submission that the principles which govern legal affairs cannot be applied to the administrative procedure, instituted by Article 90 of the Staff Regulations, which in no way has the character of proceedings before a court of law.

As regards the *evidence* in support of the various submissions, the *applicant* considers that the Parliament should complete the file by submitting all the necessary papers, and in particular those relating to the description of the duties of Linguistic Adviser, the way in which the vacancy notice was drafted and settled, the choice of the procedure provided for in Article 29 (1) (a) of the Staff Regulations, the training, qualifications and merits of Mrs Cattarino including her personal file and

her periodic reports together with the documents to which, in addition to Mr Fua's memorandum of 8 October 1980, the President of the Parliament must have had access. The applicant has therefore asked the Court to request the Parliament to submit those documents.

The *Parliament* replies that it has provided the applicant's file and has included necessary or helpful documents in the annex to its defence. The applicant's request for supplementary information, in particular as regards the request for the production of the personal file of an official who is not a party to the action, is not justified.

IV — Oral procedure

At the sitting on 27 January 1983, the applicant, represented by M. Slusny, and the Parliament, represented by A. Bonn, presented oral argument.

In the course of that sitting, the applicant withdrew his third submission.

The Advocate General delivered her opinion at the sitting on 3 March 1983.

Decision

- 1 By application lodged at the Court Registry on 27 November 1981, Franco Colussi, an official of the European Parliament, brought an action for the annulment of the decision of the President of the Parliament to appoint Mrs Cattarino as Linguistic Adviser in the Italian Translation Division.
- 2 By Vacancy Notice No 2690 of 14 July 1980, the Parliament initiated the procedure for filling seven posts of Linguistic Adviser in Grade L/A 3, one of which was in the Italian Translation Division, initially by promotion or transfer.

- 3 The applicant together with two other officials, including Mrs Cattarino, all three in Grade L/A 4, submitted applications for the post in the Italian Division.
- 4 In order to supplement his application form, the applicant drew attention to the fact that in addition to a degree in languages, since 1978 he has also had a degree in law. He expressly requested that the appointment to the post be based on a genuine comparison of qualifications and merits and not on the age of the candidates.
- 5 By a memorandum of 8 October 1980, the Head of the Italian Translation Division informed the Director of Translation and Terminology of the result of his consideration of the applications. He proposed the promotion of Mrs Cattarino in view of the fact that although she and the applicant both had excellent reports, Mrs Cattarino, who had for years regularly replaced the Head of Division when he was absent, was the older and had greater seniority in the grade and in the service.
- 6 On 1 December 1980, the President of the Parliament, acting as the appointing authority, promoted Mrs Cattarino to be Linguistic Adviser in Grade L/A 3.
- 7 The complaint within the meaning of Article 90 (2) of the Staff Regulations, which the applicant submitted against the decision not to appoint him Linguistic Adviser and against the implied rejection of the request which accompanied his application for the post was rejected by decision of the President of the Parliament on 4 December 1981 and the applicant consequently brought the present action.
- 8 In support of his action, the applicant puts forward a series of submissions some of which relate to questions of form and procedure and others to the substance of the disputed decision.

Submissions relating to form and procedure

- 9 The applicant claims in the first place that the President of the Parliament was not competent to take the disputed decision because the power to make such a promotion had not been validly delegated.
- 10 In that respect it should be noted that, by Decision No 175/62 of 12 December 1962 of the Bureau of the Parliament, adopted in accordance with Article 2 of the Staff Regulations, the President of the Parliament, acting on a proposal of the Secretary General, was designated as appointing authority, in particular for the application of Article 45 of the Staff Regulations to officials in Categories A and L/A in the grade in question. According to the Rules of Procedure of Parliament both in the version applicable when the above decision of the Bureau was adopted and in that applicable at the material time, the composition and organization of the secretariat of the Parliament are determined by the Bureau, which also establishes the number of employees and the rules relating to their administrative and financial situation. It is therefore competent to designate the appointing authority. Under those circumstances the authority of the President of the Parliament to take the disputed decision is beyond question.
- 11 The applicant further maintains that according to the principle of *nemo iudex in re sua* the President of the Parliament was not empowered to arrive at a decision on the complaint lodged against a decision taken by himself.
- 12 In that respect it should be noted that Article 90 (2) of the Staff Regulations provides a preliminary means of seeking redress whereby the administration is enabled to reconsider its decision before an application is made to the Court. Under the terms of that article the complaint must be addressed, through official channels, to the appointing authority, that is to say in this case, pursuant to the above-mentioned Decision No 175/62 of 12 December 1962, the President of the Parliament. In accordance with the requirements of the Staff Regulations, the President therefore had no alternative but to decide on the complaint himself.

- 13 Finally the applicant claims that the President of the Parliament did not himself decide on the appointment to be made. That is shown by the wording of his decision rejecting the applicant's complaint, which referred to a thorough investigation undertaken by his staff.
- 14 In that respect it should be noted that the appointing authority may enlist the services of administrative staff for the accomplishment of its task. In this case the decision was signed by the President of the Parliament, and there is no reason to suppose that the decision was not taken by that authority in person, even if his staff participated in the preparation.
- 15 The applicant's submissions relating to form and procedure are therefore unfounded.

The submissions as to substance

- 16 The applicant maintains in the first place that the vacancy notice on the basis of which the disputed decision was adopted is void on the ground that it did not provide for the organization of an internal competition despite the fact that because of the novelty of the post a competition would have been the sole means of evaluating the candidates' qualifications.
- 17 It should be recalled in that respect that Article 29 (1) of the Staff Regulations provides for various possible procedures for the filling of vacant posts, the first of which is a consideration of the possibilities of promotion or transfer within the institution. It is for the appointing authority to assess whether it is possible to fill the vacant post by means of that first procedure or whether it is appropriate to proceed to the second procedure envisaged, namely the organization of a competition internal to the institution. Since promotions or transfers within the institution are permitted by the Staff Regulations, it follows that the appointing authority has a wide discretion in that respect.
- 18 In this case there is no reason for taking the view that the appointing authority misused that power by reaching the conclusion that it was possible to fill the vacant post by an examination of the opportunities for promotion or transfer.

- 19 The applicant also maintains that it has not been established that the appointing authority genuinely considered the merits and the periodic reports of the various candidates. He further claims that the post in question, like the posts of adviser in the other divisions, was reserved for the oldest official and finally that his own abilities and degrees were more impressive than those of the official promoted.
- 20 As the case concerns a decision to promote an official, it should first be emphasized that in order to evaluate the interests of the service together with the merits which must be taken into account in the context of the decision provided for by Article 45 of the Staff Regulations, the appointing authority has a wide margin of discretion and that, in that sphere, the Court must restrict itself to the question whether, regard being had to the methods and means which may have led to the assessment made by the administration, the latter remained within bounds which are not open to criticism and did not use its power in a manifestly incorrect manner.
- 21 In this case there is no single factor in the papers on the case which makes it possible to state that the President of the Parliament did not actually assess the qualifications and merits of the various candidates. In particular, the applicant has not established that the President of the Parliament had decided from the outset to select the oldest candidate irrespective of the merits and qualifications of the various candidates. Indeed the appointments made in some other divisions disprove that allegation.
- 22 In view of the fact that the officials involved had lengthy experience, the appointing authority was entitled to take into account, in order to assess their qualifications for the post in question, in addition to the number and the nature of the degrees held by the applicant and Mrs Cattarino, the competence and efficiency which they had shown in the service. Moreover, it cannot be suggested that it was a misuse of the power of discretion to take into account, in conjunction with other factors, the age of candidates and their seniority in the grade or service. Indeed, the qualifications and merits of the candidates being equal, those matters may even constitute a decisive factor in the appointing authority's decision.

- 23 It follows that the submissions relating to the substance of the disputed decision must also be rejected and the action must therefore be dismissed as unfounded.

Costs

- 24 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Nevertheless, pursuant to Article 70 of the Rules of Procedure costs incurred by the institutions in proceedings brought by servants of the Communities are to be borne by those institutions.

On those grounds,

THE COURT (Third Chamber)

hereby:

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

Everling

Mackenzie Stuart

Galmot

Delivered in open court in Luxembourg on 24 March 1983.

J. A. Pompe
Deputy Registrar

U. Everling
President of the Third Chamber