

JUDGMENT OF THE COURT (Second Chamber)
11 July 1985 *

In Joined Cases 66 to 68 and 136 to 140/83

- (1) 66/83: **Pierre Hattet**, residing at 18 avenue Eléonore, 1150 Brussels,
- (2) 67/83: **Sabine Matt, née Gerard**, residing at 12 avenue Léon Bâtonnier-Braffort, 1040 Brussels,
- (3) 68/83: **Gérard de Szy-Tarrisse**, residing at 12 avenue Léon Tombu, 1200 Brussels,
- (4) 136/83: **Giorgio Donà**, residing at 19 avenue Jeanne, 1050 Brussels,
- (5) 137/83: **Monica-Nico Becquart née Delbaere**, residing at 89 rue Cervantès, 1190 Brussels,
- (6) 138/83: **Yvette Schmitz, née Feyaerts**, residing at 6 rue de la Fontaine, 1320 Genval,
- (7) 139/83: **Simone Le Maître, née Textier**, residing at 111 rue du Long-Chêne, 1970 Wezembeek-Oppem,
- (8) 140/83: **Nadine De Waegeneer, née Lacourt**, residing at 8 Panoramalaan, 1980 Tervuren,

all officials of the Commission of the European Communities, represented by Marcel Slusny of the Brussels Bar, 272 avenue Brugmann, 1180 Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Centre Louvigny, 34 B IV rue Philippe-II,

applicants,

v

Commission of the European Communities, represented by Hendrik Van Lier, a member of its Legal Department, acting as Agent, assisted by Robert Andersen of the Brussels Bar, 214 avenue Montjoie, 1180 Brussels, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

* Language of the Case: French.

APPLICATIONS for a declaration that the applicants have been employed by the Commission since the dates on which they entered into their contracts with the European Association for Cooperation, the annulment of procedural measures preceding the applicants' appointment as probationary officials and of the appointments themselves, a declaration that the Commission must re-grade the applicants and, in Cases 66/83 and 68/83, an order for the production of certain documents,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: P. VerLoren van Themaat

Registrar: H.A. Rühl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 6 June 1985,

gives the following

JUDGMENT

(The account of the facts and issues contained in the complete text of the judgment is not reproduced)

Decision

- 1 By an application lodged at the Court Registry on 27 April 1983, Mr Hattet, Mrs Matt and Mr de Szy-Tarrisse, officials of the Commission of the European Communities, brought an action for a declaration that they must be regarded as having been employed by the Commission since the dates on which they entered into their contracts with the European Association for Co-operation (hereinafter referred to as the 'EAC') and for annulment of the decisions appointing them as probationary officials in so far as they determine the applicants' grade and step. By an application lodged at the Court Registry on 11 July 1983, Mr Donà, Mrs Becquart, Mrs Schmitz, Mrs Le Maitre and Mrs De Waegeneer, all officials of the Commission, also brought an action seeking the same relief.

- 2 By order of the Court of 14 July 1983, the above-mentioned cases were joined.
- 3 All the applicants had been employed under a special contract by the EAC, an international non-profit making association incorporated under Belgian law by the Royal Decree of 15 September 1964 (*Moniteur Belge* of 3 October 1964, p. 10536).
- 4 Article 1 of the EAC Statute provided that the EAC was created 'in order to further cooperation between the European Communities and the developing countries and the territories and overseas departments associated with such Communities . . .'. The second paragraph of Article 3 of the Statute provided that the EAC was to 'be responsible under its Statute and the various conventions concluded with the Commission of the European Communities for the recruitment, placement and administration of persons appointed to carry out tasks in the field of cooperation, scientific and technical supervision and the administration of scholarships granted by the Community'. Though all the members of the Administrative Board of the EAC were to be Commission officials, the Director and Deputy Director were not to be in active employment with an institution of the European Communities (Article 25 of the Statute).
- 5 The Conventions of 13 July 1965 and 4 June 1974 concluded between the EAC and the Commission, referred to in Article 3 of the EAC Statute, entrusted the EAC, *inter alia*, with 'the task of recruiting and administering Commission delegates and officials to be placed under contract . . . in order to carry out projects financed by the European Development Fund or the Commission budget'. (Article 1 of the Convention of 13 July 1965). The Commission authorized the EAC to 'appoint at the place where it has its seat the officials needed to administer it', to select its personnel and lay down the conditions under which such personnel is appointed (Articles 2 and 3 of the same Convention). It is also clear from those Conventions that the EAC operated primarily on the instructions and under the control of the Commission.
- 6 The Financial Protocol on the management of the EAC's income and expenditure, adopted on 10 December 1965 by the EAC's Administrative Board, provided that expenditure incurred by the EAC was to be charged to the budget of the European

Development Fund. Estimates of expenditure were to be approved each year by the Commission.

- 7 The Administrative Protocol on the organization and functioning of the EAC, also adopted by the Administrative Board, laid down, in Articles 28 to 37, the rules applicable to supervisory staff and staff concerned with technical cooperation and assistance. According to Article 28, 'requests for staff made to the Association by the Commission are to be drawn up by the department concerned and addressed to the Director of the Association...'. Pursuant to Article 31 of the same Protocol, a liaison department set up between the Commission and the EAC was to inform the latter of the names of the candidates selected for interview and their grading as provisionally accepted by the Commission. Though candidates had to be accepted by the Commission (Article 33), the contract of employment was drawn up by the EAC in the framework of the Protocol and the directives adopted by the Commission.

- 8 In order to achieve its objective, which was to facilitate the economic cooperation undertaken by the European Communities with the developing countries, the EAC employed three categories of staff, which it managed itself: headquarters staff, overseas staff and staff recruited by the EAC under a special contract placing them at the disposal of the Commission's Directorate General VIII (Development).

- 9 The special contracts between the applicants and the EAC were concluded for one year; the applicants' contracts were renewable and in practice always were renewed. According to Belgian law, the applicants were therefore regarded as having been recruited for an indefinite period.

- 10 The terms of the applicants' contracts of employment with the EAC were contained in two documents entitled 'General Terms of the special contract applicable to certain staff responsible for special duties in connection with projects financed by the European Development Fund' and 'Specific Terms of the special contract'. The latter laid down, *inter alia*, the date on which employment commenced, the duration of the contract and the basic salary.

- 11 By decision of the EAC's Administrative Board of 4 November 1976, changes were made in the salary scales of the EAC's special contract and headquarters staff, the effect of which was to assimilate the pay scales for both categories of staff to those applicable to Commission officials.
- 12 For several years, the applicants had been seconded to the Commission.
- 13 In Regulation No 3245/81 of 26 October 1981 setting up a European Agency for Cooperation (Official Journal, L 328, p. 1), the Council stated that, in order to help the Commission implement financial and technical cooperation with the developing countries, there should be set up, within the framework of the European Communities, an agency acting in conformity with Community law; it was intended that that agency should take over the activities formerly exercised by the EAC. Article 14 of the regulation provided that 'the general terms of recruitment and of employment ... for the staff referred to in Article 3 (1) and for the staff of the agency's headquarters shall be determined by specific provisions adopted by the Commission ...'. Those general terms have not yet been adopted; consequently, the agency is not yet operational and the EAC has not yet been dissolved.
- 14 Since Regulation No 3245/81 had set up the European Agency for Cooperation and it was thus necessary to resolve the problems concerning the position of the 56 members of the EAC's headquarters staff, the Council adopted Regulation No 3332/82 of 3 December 1982 laying down special transitional measures for the recruitment as officials of the European Communities of 56 members of the staff of the headquarters of the European Association for Cooperation (Official Journal, L 352, p. 5). Article 1 of that regulation provides that a staff member who occupied a post at the headquarters of the EAC on 1 January 1982 may be appointed a probationary official of the Commission. Article 3 provides that, 'by way of derogation from Articles 31 and 32 of the Staff Regulations, officials recruited by virtue of this regulation shall be appointed to the appropriate grade and step indicated in the table of equivalence in the Annex' to the regulation. Article 3 also provides that 'seniority in grade shall be reckoned from the date of appointment as a probationary official. Seniority in step shall be that acquired by the said official in the service of the [EAC].'

- 15 In that context and in order to permit the establishment of 32 special contract employees of the EAC, the budgetary authority, in the 1981 budget, granted the Commission 32 permanent posts, of which seven were at Grade A 4, eight at Grade A 5, five at Grade A 6, four at Grade A 7, one at Grade B 1, one at Grade C 2, two at Grade C 3, two at Grade C 4 and two at Grade C 5. The European Parliament stated that the permanent posts in question were intended for employees who had been seconded to Directorate General VIII for more than six years and were performing the same duties as their colleagues in the service of the Commission appointed in accordance with the Staff Regulations.
- 16 In order to establish those employees, the Commission applied the ordinary law of the European public service, that is to say the Staff Regulations of Officials of the European Communities. All the special contract employees received letters of dismissal from the EAC and, at the same time, the Commission offered them contracts as members of its temporary staff. On 16 July 1981, a vacancy notice for the 32 new permanent posts was published and the Commission held internal competitions, in which the great majority of those concerned, including the applicants, successfully took part. However, several exceptional appointments were made by the Commission under Article 29 (2) of the Staff Regulations.
- 17 Thus, on 25 June 1981, the applicants were offered and accepted contracts of employment as members of the temporary staff. After the expiry of their contracts, the applicants were appointed as probationary officials. The result of this procedure was as follows:

Mr Hattet, who had entered the service of the EAC on 21 December 1970 and at the time of his dismissal by the EAC was classified in Grade 15, Step 8 which corresponds to Grade A 5, Step 4, was appointed to Grade B 1, Step 3, by decision of 30 June 1982.

Mrs Matt, who had entered the service of the EAC on 7 January 1984 and at the time of her dismissal by the EAC was classified in Grade 31, Step 5, corresponding to Grade C 1, Step 5, was appointed to Grade C 4, Step 3, by a decision of 30 June 1982.

Mr de Szy-Tarrisse, who had entered the service of the EAC on 18 February 1975 and at the time of his dismissal was classified in Grade 15, Step 7, corresponding to Grade A 5, Step 7, was appointed to Grade A 5, Step 3, by a decision of 30 June 1982.

Mr Donà, who had entered the service of the EAC on 1 April 1971 and at the time of his dismissal was classified in Grade 16, Step 6, corresponding to Grade A 6, Step 6, was appointed to Grade A 6, Step 3, by a decision of 14 July 1982.

Mrs Becquart, who had entered the service of the EAC on 13 July 1975 and at the time of her dismissal was classified in Grade 32, Step 6, corresponding to Grade C 2, Step 6, was appointed to Grade C 4, Step 3, by a decision of 8 July 1982.

Mrs Schmitz, who had entered the service of the EAC on 1 April 1972 and at the time of her dismissal was classified in Grade 33, Step 6, corresponding to Grade C 3, Step 6, was appointed to Grade C 4, Step 3, by a decision of 8 July 1982.

Mrs Le Maître, who had entered the service of the EAC on 1 October 1974 and who, at the time of her dismissal was classified in Grade 32, Step 6, corresponding to Grade C 2, Step 6, was appointed to Grade C 4, Step 3, by a decision of 8 July 1982.

Mrs De Waegeneer, who had entered the service of the EAC on 12 November 1972 and who, at the time of her dismissal, was classified in Grade 33, Step 8, corresponding to Grade C 3, Step 8, was appointed to Grade C 4, Step 3 by a decision of 8 July 1982.

18 In their complaints against those decisions and in their applications to the Court, the applicants claim that they should be regarded as having been employed by the Commission since the date on which their contracts of employment were concluded with the EAC, since the latter is no more than an administrative unit of the Commission. Their appointment by the Commission, which determined their grade and step, was therefore in fact a downgrading. Consequently, each and every procedural measure preceding their appointment as probationary officials, as well as the appointments themselves, are void in so far as they entail classification in a lower grade or step.

19 Furthermore, the applicants point out that the Commission adopted internal Decision No 61/IX/81, Article 3 of which provides that '... the appointing authority may, exceptionally and in order to meet recruitment needs, appoint a candidate to the upper grade in the starting or intermediate career bracket, if the candidate gives evidence of professional experience ... of at least: 12 years for

Grade A 4, 8 years for Grade A 6, ...4 years for Grade B 4 [and] 2 years for Grade C 4...'. According to the applicants, the Commission ought, under that decision, to have appointed Mr Hattet to Grade A 4, Step 4, Mrs Matt to Grade C 1, Mr de Szy-Tarrisse to Grade A 4, Step 4, Mr Donà to Grade A 5 and Mrs Schmitz, Mrs Le Maitre and Mrs De Waegeneer to Grade C 3.

- 20 For the same reasons as those set out in the judgment delivered today in Joined Cases 87 and 130/77, 22/83 and 9 and 10/84 (*Salerno and Others v Commission and Council*), the Commission contests the proposition that the EAC constitutes a legal fiction. The applicants were not servants of the Commission before the entry into force of their contracts of employment as members of the temporary staff. Consequently, the applicants were not downgraded but were recruited from outside the European institutions. Since the applicants were appointed to the vacant posts which had been offered, the Commission correctly applied Decision No 61/IX/81. The fact that Mr Hattet was not appointed to category A is explained by the fact that he does not have a university degree. As regards the other applicants, the Commission emphasizes that Article 3 of Decision No 61/IX/81 is an exceptional measure and that the appointing authority therefore has a broad discretion with regard to its application.

Admissibility

- 21 The Commission contends that the applications are inadmissible on three grounds. Firstly, it claims that the contested measures do not adversely affect the applicants, since they freely entered into their contracts of employment as members of the temporary staff and accepted their appointments. Secondly, the Commission contends that the applicants did not submit their complaints against their appointment as members of the temporary staff within the prescribed period, because they submitted their complaints only against their appointment as probationary officials and as established officials but did not contest their appointment as members of the temporary staff. Finally, the Commission is of the opinion that, in so far as an official's classification merely confirms that already accorded to him when he was a member of the temporary staff, it cannot be contested separately.
- 22 Those submissions must be rejected. In numerous decisions the Court has interpreted the concept of an act adversely affecting an official, within the meaning of Article 90 of the Staff Regulations, as referring to any measures capable of directly affecting an official's legal position (see judgment of 10 December 1969 in Case 32/68, *Grasselli v Commission*, [1974] ECR 819). The

applicants' appointment as probationary officials or as established officials affects their legal position. In view of the fact that the applicants claim to be entitled to an appointment on more favourable terms, the contested measures are capable of adversely affecting them. Consequently, where an official wishes to contest an appointment made subsequent to his engagement as a member of the temporary staff, it is not necessary for him to have previously submitted a complaint against that engagement, since each of those measures is a separate act for the purposes of Article 90 of the Staff Regulations.

Substance of the case

23 With regard to the substance of the case, it must be pointed out that, in the judgment which it delivered today in Joined Cases 87 and 130/77, 22/83 and 9 and 10/84 (*Salerno and Others v Commission and Council*), the Court held that the EAC is an international Association governed by Belgian law and hence cannot be regarded either as an administrative unit of the Commission or as a legal fiction. Consequently, as the Court stated in the judgment which it delivered today in Case 119/83 (*Appelbaum v Commission*), annexed to the present judgment, when the Commission appointed the EAC's special contract staff it was recruiting staff from outside the institutions. The fact that the relevant provisions of the Staff Regulations were applied involved no irregularity.

24 As regards more particularly the recruitment by the Commission of the EAC's special contract staff, the Court held in its judgment in Case 119/83, cited above, that, since no essential difference existed between the factual and legal situation of the EAC's headquarters staff and that of its special contract staff, the difference between the treatment accorded to the latter at the time of their recruitment by the Commission and that accorded to the headquarters staff was not justified and constituted a breach of the principle of equal treatment laid down in Article 5 (3) of the Staff Regulations.

25 From those decisions it follows, on the one hand, that the contested measures, namely the decisions appointing the applicants as probationary officials, must be annulled in so far as they classify the applicants in grades or steps inferior to those which they held in the service of the EAC. On the other hand, the applicants' submissions to the effect that the EAC is a fictitious entity and that they were employed by the Commission from the date on which they entered the service of the EAC must be rejected.

- 26 Since the applicants' other submissions are either insufficiently clear or manifestly ill-founded, there merely remains to be considered the submission that the Commission infringed its own Decision (No 61/IX/81) on the criteria applicable to grade and step classification upon recruitment.
- 27 That additional submission is ill-founded inasmuch as it exceeds the limits of the power of judicial review which the Treaties and Article 91 (1) of the Staff Regulations confer upon the Court in Community staff disputes.
- 28 The Court has held in numerous decisions (in particular the judgment of 1 December 1983 in Case 190/82, *Blomefield v Commission*, [1983] ECR 3981, and the judgment of 12 July 1984 in Case 17/83, *Angelidis v Commission*, [1984] ECR 2907) that the appointing authority has a wide discretion, within the limits laid down by Article 31 and the second paragraph of Article 32 of the Staff Regulations or by the internal decisions implementing them, in assessing the previous experience of a person appointed as an official, both as regards the nature and length of that experience and as regards the extent to which it meets the requirements of the post to be filled.
- 29 In this case, the applicants have not shown that the Commission exceeded its discretion. The mere fact that the applicants possess the required experience does not in itself oblige the appointing authority to apply Article 3 of Decision No 61/IX/81.
- 30 In this instance the Commission must reconsider the position of the applicants in the light of the criteria laid down in Articles 5, 31 and 32 of the Staff Regulations and in Decision No 61/IX/81 in order to reach a decision on the applicants' grading.
- 31 Consequently, the contested decisions must be annulled and the Commission must take the necessary measures to comply with the present judgment, as is required by Article 176 of the Treaty.

Costs

- 32 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.
- 33 As the Commission has failed in its principal submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

- (1) Annuls the Commission's decision of 30 July 1982 appointing Mr Hattet, Mrs Matt and Mr de Szy-Tarrisse, its decision of 14 July 1982 appointing Mr Donà and its decision of 8 July 1982 appointing Mrs Becquart, Schmitz, Le Maitre and De Waegeneer, in so far as they determine the applicants' grade and step;**
- (2) Dismisses the remainder of the applications;**
- (3) Remits the cases to the Commission for new decisions;**
- (4) Orders the Commission to pay the costs.**

Due

Pescatore

Bahlmann

Delivered in open court in Luxembourg on 11 July 1985

P. Heim
Registrar

O. Due
President of the Second Chamber