JUDGMENT OF THE COURT (Fourth Chamber)

29 June 1994 *

In Case C-298/93 P,

Ulrich Klinke, an official of the Court of Justice of the European Communities, residing in Luxembourg, represented by Martin Huff, Rechtsanwalt, Frankfurt, with an address for service in Luxembourg c/o Joseph Dietrich, 1 Rue Nico Klopp,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 30 March 1993 in Case T-30/92 *Klinke* v *Court of Justice* [1993] ECR II-375, seeking to have that judgment quashed,

the other party to the proceedings being:

Court of Justice of the European Communities, represented by Timothy Millett, Principal Administrator, acting as Agent, assisted by Aloyse May, of the Luxembourg Bar, with an address for service at the office of Mr Millett, Palais de la Cour de Justice, Kirchberg,

* Language of the case: French.

THE COURT (Fourth Chamber),

composed of: M. Diez de Velasco, President of the Chamber, C. N. Kakouris (Rapporteur) and P. J. G. Kapteyn, Judges,

Advocate General: C. Gulmann,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 10 February 1994,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 27 May 1993, Ulrich Klinke brought an appeal pursuant to Article 49 of the Protocol on the Statute of the Court of Justice of the EEC and the corresponding provisions of the protocols on the ECSC and Euratom statutes against the judgment of 30 March 1993 in Case T-30/92 *Klinke* v *Court of Justice* [1993] ECR II-375, in which the Court of First Instance dismissed his application for the annulment of the decision of the President of the Court of Justice, acting as the appointing authority, appointing him Administrator in the Information Service, inasmuch as that decision classified him in Grade A 7, Step 3, and of the decision of the Administrative Committee confirming his appointment in Grade A 7, and for a declaration that he was entitled to be appointed in Grade A 6.

2 It appears from the judgment under appeal that on 1 April 1982 the appellant entered the service of the Court of Justice as a temporary agent with the status of

a lawyer-linguist in the German Translation Division. He was established on 1 October 1983 and classified in Grade LA 6.

3 With effect from 1 June 1985, the appellant was placed at the disposal of the Court's Information Service. By decision of the appointing authority of 1 July 1991 he was appointed administrator in that service and classified in Grade A 7, Step 3, having passed Internal Competition No CJ 115/89.

4 Mr Klinke then lodged a complaint against that decision inasmuch as it classified him in Grade A 7, requesting that he be reclassified in Grade A 6. By decision of the Administrative Committee of 20 January 1992, that complaint was dismissed. The Committee found that the contested classification had been made '... in accordance with the consistent practice of the Court, as decided with reference to its case-law at the administrative meeting on 11 July 1979'.

5 The Administrative Committee continued as follows:

'According to the Court's case-law, an official may only in exceptional circumstances be appointed in a higher grade within the starting and intermediate career brackets; such appointment lies in any event within the discretionary power of the administration.

In the exercise of that discretion, the Court, by its aforementioned decision of 11 July 1979, which was taken in compliance with the principle of equal treatment in the recruitment of officials, took the decision in principle to recruit officials from the Language Service at Grade A 7.

In the circumstances of this case, the Administrative Committee is of the view that, in applying that decision to you, the administration did not commit an error in its

assessment of the facts and did not treat you unequally vis-à-vis other officials who are called upon to perform similar duties.'

6 The Administrative Committee added that that conclusion was not altered by the fact that the individual concerned had been placed at the disposal of the Information Service for approximately six years, an arrangement to which he had himself consented and which corresponded to his personal aspirations, and that the practical experience acquired by him in the performance of his duties in the Information Service had been taken into account, within the limits allowed by Article 32 of the Staff Regulations, for the purposes of his classification in step within his new grade.

7 At its administrative meeting on 11 July 1979, the Court adopted a decision laying down the following principle:

'Officials in Category LA who have already attained Grade LA 6 within their category are not entitled to be appointed automatically to Grade A 6. Article 31 of the Staff Regulations provides that officials are to be appointed to the starting grade of their career bracket. Furthermore, in view of the limited number of posts available in the higher grade of career bracket A 7/A 6, a move from LA 6 to A 6 would result in Grade A 7 officials being held back in that category, thereby considerably diminishing their chances of promotion to a higher grade in that career bracket.'

8 Article 31 of the Staff Regulations provides as follows:

'1. Candidates thus selected shall be appointed as follows:

— officials in Category A or the Language Service:

to the starting grade of their category or service;

— officials in other categories:

to the starting grade for the post for which they have been recruited.

2. However, the appointing authority may make exceptions to the foregoing provisions within the following limits:

(a) in respect of Grades A 1, A 2, A 3 and LA 3,

— up to half the appointments to posts becoming vacant;

— up to two-thirds of the appointments to newly created posts;

(b) in respect of other grades,

— up to one-third of the appointments to posts becoming vacant;

— up to half the appointments to newly created posts.

Save in respect of Grade LA 3, this provision shall be applied by groups of six posts to be filled in each grade for the purpose of this provision.'

9 In support of his application, Mr Klinke advanced four pleas in law, all of which were rejected in the contested judgment. In his appeal, the appellant contests those sections of the judgment in which the Court of First Instance rejected three of those pleas.

The first plea in law

10 The Court of First Instance held that, as is apparent from the case-law of the Court of Justice (see Case 146/84 *De Santis* v *Court of Auditors* [1985] ECR 1723), it is not permissible to recruit staff to the higher grade of a career bracket save in exceptional cases where the application of Article 31(2) of the Staff Regulations is justified by the specific needs of the service, which call for the recruitment of a specially qualified official (paragraph 25 of the contested judgment).

11 The contested judgment thus states that, unlike the second paragraph of Article 32 of the Staff Regulations, which permits the appointing authority to take account of the training and practical experience of a person who has passed a competition for the purposes of his classification in step, '... Article 31(2) is intended to enable the appointing authority to accommodate the specific needs of a particular service by offering desirable terms with a view to attracting candidates who are particularly well qualified' (paragraph 26).

12 The Court of First Instance found, next, that 'the applicant has produced no evidence whatsoever, in particular from the notice of competition, to show that in the present case the needs of the Information Service were such as to require the recruitment of a particularly well-qualified official' (paragraph 27) and concluded that 'the applicant's qualifications were irrelevant to the determination of his classification in grade on his appointment and that, even though the applicant was eminently qualified for the A 7 post to which he was appointed and which he occupies to the general satisfaction of all concerned, that still does not mean that exceptional qualifications were required in order to occupy that post' (paragraph 28).

13 The appellant contests that interpretation. He claims that Article 31(2) of the Staff Regulations does not contain any criteria relating to its application and thus does not preclude the possibility of taking the qualifications of the individual concerned into account. Moreover, it is apparent from the case-law of the Court of Justice that, for the purposes of filling a vacant post, account must also be taken, in parallel with the abstract needs of the service, of the interests of the person to be appointed, namely his specific qualifications and his personal situation (Case 343/82 *Michael* v *Commission* [1983] ECR 4023 and Joined Cases 314/86 and 315/86 *De Szy-Tarisse and Feyaerts* v *Commission* [1988] ECR 6013).

14 That plea is well founded. Whilst it is true that, according to the case-law of the Court (see Case 33/67 *Kurrer* v *Council* [1968] ECR 127), Article 31(2) of the Staff Regulations enables the appointing authority exceptionally, by way of derogation from Article 31(1) and in order to meet the specific needs of a service, to declare vacant a post in a higher grade of a career bracket and not in the starting grade, and to organize a competition relating directly to that grade, that does not mean that the sole purpose of the power of derogation conferred on the appointing authority by the provision in question is in order that it may declare a post vacant and organize the procedure to fill it.

15 Article 31(2) does not contain any criteria regarding the application of the exception to the rule laid down in Article 31(1). However, it follows from a consistent line of cases decided by the Court that the appointing authority has a wide discretion in the matter (see, for example, *Michael* v *Commission* and *De Szy-Tarisse and Feyaerts* v *Commission*, cited above, and Case 219/84 *Powell* v *Commission* [1987] ECR 339) and, in particular, that under the provision in question, as with the second paragraph of Article 32 of the Staff Regulations, the appointing authority also has that discretion in assessing the practical experience of the persons concerned for the purposes of their classification in grade (see the judgments in *Michael* v *Commission*, paragraph 19, and *De Szy-Tarisse and Feyaerts* v *Commission*, paragraph 26).

16 Consequently, in interpreting Article 31 as meaning that the sole classification criterion is the interests of the service, and in finding, as a result, that 'the applicant's

qualifications were irrelevant to the determination of his classification in grade on his appointment', the Court of First Instance erred in law. That section of the contested judgment must therefore be set aside.

The second plea in law

17 As is apparent from the contested judgment, the applicant claimed that Internal Competition No CJ 115/89 was intended, according to its heading, to provide for the appointment of administrators in Grades A 6 and A 7. Given that the appointing authority had decided *a priori* that LA 6 officials could not be appointed to A 6 posts, it was reasonable to infer that only A 7 officials could attain Grade A 6 positions by means of that competition, which constituted discrimination in favour of A 7 officials. By disregarding the fact that for more than six years the applicant had in fact performed the duties of an administrator in the Information Service, the appointing authority discriminated against him vis-à-vis Grade A 7 officials.

18 The Court of First Instance rejected that line of argument in paragraphs 35, 36 and 37 of the contested judgment, as follows:

'35. At all events, the Court considers that the discrimination allegedly suffered by the applicant must be examined in the light of the rationale for the provision the application of which he claims discriminated against him, as defined in the judgment (in Case 146/84 *De Santis* v *Court of Auditors* [1985] ECR 1723).

36. The relevant criterion for the purposes of comparison is not the category or service in which the officials appointed have hitherto been employed, nor their qualifications, but the specific requirements of the different posts to be filled.

37. The Court noted at the hearing that since the decision of 11 July 1979 was communicated to the staff members concerned, no official moving from an LA post to category A has been recruited to a grade other than A 7. In the circumstances, the applicant cannot claim that any posts comparable with his have been filled at Grade A 6.'

19 The appellant claims that the Court of First Instance based its finding on a comparative criterion not raised by him, namely the 'specific requirements of the different posts to be filled'. The comparative criterion referred to by the applicant for the purposes of assessing whether he has suffered discrimination can only be 'the individual circumstances of the (in this case, hypothetical) candidates who passed the competition for that post'. The applicant's situation was, he says, different from that of any of his potential rivals because he had in fact been occupying the post in question for more than six years.

20 This plea is also well founded. It follows from the aforesaid grounds of the contested judgment that the Court of First Instance did not answer the plea of alleged discrimination advanced by the applicant but responded to a different plea concerning discrimination which had not been raised by him. Consequently, that section of the contested judgment must also be set aside.

The third plea in law

21 The applicant claimed in his application that, by placing him at the disposal of the Information Service — a situation for which the Staff Regulations do not provide — the appointing authority jeopardized his career. By then deciding, by means of the contested act, not to classify the applicant in Grade A 6, the appointing authority maintained the adverse effects of that irregular situation and thus failed to discharge its duty under Article 24 of the Staff Regulations to provide assistance to its officials.

22 The Court of First Instance considered (paragraphs 41, 42 and 43 of the contested judgment) that, in advancing that plea, the applicant was calling in question the lawfulness of his having been placed at the disposal of the Information Service, that the time-limit laid down in Article 90(2) of the Staff Regulations for contesting the lawfulness of such an act had long since expired and, consequently, that that plea was inadmissible.

23 The appellant maintains that, in making his complaint relating to the administration's duty to provide assistance, his aim was not to call in question, after six years, the lawfulness of the decision to place him at the disposal of the Information Service. Consequently, the Court of First Instance totally failed to appreciate the import of that complaint, which was as follows: the enduring nature of a situation inconsistent with the Staff Regulations prejudiced the applicant in two ways, inasmuch as he was denied, in law, any chance of promotion within the Information Service and, in fact and in law, any chance of promotion within the Language Service. The appointing authority's duty under Article 24 of the Staff Regulations to provide assistance was such, therefore, as to require it to take steps to bring the adverse effects of that situation to an end.

24 This plea is also well founded. The plea made in the application did not call in question, six years after it was implemented, the lawfulness of the decision to place the applicant at the disposal of the Information Service. The import of the plea in question was that the appointing authority should, in pursuance of its duty under Article 24 of the Staff Regulations to have regard for the welfare of officials, have taken account of the fact that the applicant had worked in the Information Service for six years in an administrative situation which was not in conformity with the Staff Regulations and which prejudiced the normal progression of his career. According to the applicant, the only way in which the appointing authority could have taken account of that fact and remedied the situation, in keeping with its duty to have regard for the welfare of officials, was to grant him an A 6 classification on his becoming established.

25 Consequently, that plea in law was not inadmissible and the Court of First Instance should have examined it to determine whether it was well founded.

26 In the light of the foregoing, the contested judgment must be partially set aside, inasmuch as it rejected the applicant's three pleas in law set out above.

27 Under the first paragraph of Article 54 of the Protocol on the Statute of the Court of Justice of the EEC, if an appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may then either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment. Since the state of the proceedings so permits, it is appropriate to give final judgment on the three pleas in law advanced in the application which were rejected by the Court of First Instance in the sections of the judgment which have been set aside.

The application

28 In the first of those pleas in law, the applicant asserted that the decision on a matter of principle adopted by the Court of Justice on 11 July 1979, cited above, left it ultimately to the appointing authority, in exceptional cases, to recruit at Grade A 6 officials from the Language Service in Grade LA 6. Whilst the strict application of the principle expressed in that decision is understandable as regards officials from the Language Service starting new jobs as administrators, it is inexplicable in relation to an LA 6 official who, like the applicant, has already gained sound experience in the category A job for which he was recruited. Consequently, in considering that the applicant's situation did not justify his classification in Grade A 6, the appointing authority necessarily committed a manifest error in its assessment of the facts.

29 That argument is not well founded. It is apparent from the documents before the Court, and in particular from the Administrative Committee's decision of 20 January 1992, mentioned above, that the appointing authority acted on the basis of a

correct interpretation of Article 31(2) of the Staff Regulations when examining the applicant's situation. It considered itself able to take account equally of his practical experience, as well as other factors, for the purposes of his classification in grade and, taking all the relevant factors into account, it arrived at the conclusion, in the exercise of its discretion, that it was not appropriate in that instance to grant the applicant the grade of A 6.

30 The applicant's line of argument is tantamount to saying that the appointing authority could not in the circumstances exercise its discretion otherwise than by appointing him to the higher grade of the career bracket concerned, as if a given level of practical experience could confer on the person possessing it a right to be appointed at that grade.

31 Where a decision is adopted by the appointing authority in the exercise of discretionary powers as wide as those under consideration, judicial review cannot take the place of the assessment by the appointing authority but must be restricted to the question whether the appointing authority exercised its powers in a manifestly erroneous manner (see Case C-107/90 P *Hochbaum* v *Commission* [1992] ECR I-157). It has not been established that that was the position in this case. The applicant's plea must therefore be rejected.

32 In pleading breach of the principle of non-discrimination, the applicant claimed, essentially, that, coming from the Language Service and being excluded *a priori* by the appointing authority from classification in Grade A 6 on the basis of a misinterpretation of the Court's decision of 11 July 1979, he was discriminated against vis-à-vis Grade A 7 officials, who were the only ones able to benefit from the possibility offered by Internal Competition No CJ 115/89 and thus to move up to Grade A 6. Moreover, he claims to have suffered further discrimination in that he was treated like any other official from the Language Service who took part in Competition No 115/89 without having any administrative experience.

33 As regards the first part of this plea, it should be noted that it starts from the premiss that the appointing authority misinterpreted the aforementioned decision on a matter of principle adopted by the Court on 11 July 1979 in the exercise of the discretion conferred on it by Article 31(2) of the Staff Regulations. That premiss is incorrect. It is apparent from the documents before the Court that the appointing authority's understanding of that decision was correct, namely that it leaves intact its discretion in that field, and it was that discretion which the appointing authority applied in the present case.

34 As to the second part of the plea in question, it is apparent from the documents before the Court that the applicant's practical experience was one of the factors that had to be, and was, taken into account by the appointing authority in this instance. However, the appointing authority did not consider itself bound by that factor to exercise its power of assessment in the way that the applicant wanted. Whilst recognizing that his professional qualifications are impressive, the Court, in exercising its powers of judicial review, is unable to find otherwise than that the appointing authority, in adopting the contested decision, did not exercise its powers in a manifestly erroneous manner.

35 The plea alleging breach of the principle of non-discrimination cannot therefore be upheld.

36 As regards, lastly, the plea alleging breach of the administration's duty to provide assistance, referred to in paragraph 21 and explained in paragraph 23, the applicant claims that the fact of his having been improperly placed by the administration at the disposal of the Information Service, with the adverse effects which he suffered as a result, constitutes a further reason in support of his view that the appointing authority should have taken account of the period of six years spent by him in the Information Service and that the only way in which it could have done so was by classifying him in Grade A 6.

37 It should be noted that the first paragraph of Article 24 of the Staff Regulations, upon which the applicant relies, obliges the Communities to assist any official in relation to third parties, particularly in respect of any attack or threat to which he is subjected by reason of his position or duties. It cannot therefore serve as a basis for the applicant's plea.

38 The administration's duty to have regard to the welfare of officials, as expounded by the Court in its case-law, reflects the balance of reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants. A particular consequence of this balance is that when the authority takes a decision concerning the situation of an official it should take into consideration all the factors which may affect its decision and that, in so doing, it should take into account not only the interests of the service but also those of the individual concerned (see Joined Cases 33/79 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, paragraph 22).

39 In the circumstances, it is apparent from the documents before the Court that the administration took into consideration the applicant's interests, and not merely the interests of the service, upon his establishment in his new post. In particular, it took into account, in exercising its power of assessment, his specific professional qualifications in addition to the other relevant factors in determining his classification in grade and in step. Consequently, this plea is ill founded and must be rejected.

40 In the light of the foregoing, the action must be dismissed in its entirety.

Costs

41 Under the first paragraph of Article 122 of the Rules of Procedure, where an appeal is well founded and the Court itself gives final judgment in the case, it is to make a decision as to costs.

42 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful it must be ordered to pay the costs of the appeal.

43 As to the costs of the application before the Court of First Instance, the parties must be ordered to bear their own costs in accordance with Article 70 of the Rules of Procedure.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. Quashes the judgment of the Court of First Instance of 30 March 1993 in Case T-30/92 *Klinke* v *Court of Justice*;

2. Adjudicating on the substance of the case, dismisses the action;

3. Orders the defendant to pay the costs of the appeal and the parties to bear their own costs of the application before the Court of First Instance.

Diez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 29 June 1994.

R. Grass

Registrar

M. Diez de Velasco

President of the Fourth Chamber