

JUDGMENT OF THE COURT (Sixth Chamber)

18 March 1999<sup>\*</sup>

In Case C-304/97 P,

**Fernando Carbajo Ferrero**, an official of the European Parliament, residing in Madrid, represented by Georges Vandersanden and Laure Levi, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 30 Rue de Cessange,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 12 June 1997 in Case T-237/95 *Carbajo Ferrero v Parliament* [1997] ECR-SC I-A-141 and II-429, seeking to have that judgment set aside,

the other party to the proceedings being:

**European Parliament**, represented by Norbert Lorenz, of its Legal Service, acting as Agent, assisted by Francis Herbert and Daniel M. Tomasevic, of the Brussels Bar, with an address for service in Luxembourg at the Secretariat-General of the European Parliament, Kirchberg,

<sup>\*</sup> Language of the case: French.

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. Hirsch, G. F. Mancini, H. Ragnemalm (Rapporteur) and K. M. Ioannou, Judges,

Advocate General: N. Fennelly,  
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 December 1998,

gives the following

### Judgment

- 1 By application lodged at the Registry of the Court of Justice on 26 August 1997, Mr Carbajo Ferrero brought an appeal under Article 49 of the EC Statute and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the judgment of the Court of First Instance of 12 June 1997 in Case T-237/95 *Carbajo Ferrero v Parliament* [1997] ECR-SC I-A-141 and II-429 (hereinafter ‘the contested judgment’) which dismissed his action for annulment of the decision of 21 February 1995 appointing Mr X as head of division and assigning him to the Information Office of the European Parliament in Madrid and of the corresponding decision not to appoint the appellant to that post.

## Facts

Mr Carbajo Ferrero, an official in Grade A 5 in the Directorate-General for Information and Public Relations of the European Parliament, has been employed in the Madrid Information Office since 1 February 1987. On 10 January 1994 the Parliament published Vacancy Notice No 7424 with a view to filling the post of head of division in the Madrid Office, at Grade A 3, by promotion or transfer.

The vacancy notice described the duties associated with that post as follows:

‘Highly qualified official, entrusted with tasks in the field of public relations, more particularly in the Spanish sector and involving in particular:

- establishment and development of contacts with the press and all other media (radio, television, and so forth) in the Spanish sector;
  
- dissemination of information concerning the activities of the European Parliament in specialised areas (universities, young people, trade unions, and so forth);
  
- responsibility for the information office in Madrid.

These tasks require aptitude for contacts with a wide range of people and experience of political circles.’

- 4 The vacancy notice also specifies the qualifications and knowledge required of candidates:
- university studies evidenced by a diploma or professional experience guaranteeing an equivalent level;
  - substantial experience in public relations and journalism;
  - detailed knowledge of the functioning of the media and of the Spanish system of government;
  - very good knowledge of European problems;
  - thorough knowledge of an official language of the European Communities; very good knowledge of another official language. For operational reasons, thorough knowledge of the Spanish language is required. Knowledge of other official languages of the European Communities will be taken into account.
- 5 The procedure did not result in an appointment. On 9 March 1994 a notice of internal competition (No A/88) was published with a view to filling the post of head of division in the Madrid office.
- 6 Title I of that competition notice describes the nature of the duties in terms similar to those of Vacancy Notice No 7424. Title II lists the conditions of admission.

Those conditions require candidates to hold a university degree, to have achieved specified seniority in the service of the Community institutions and to have perfect knowledge of the Spanish language and very good knowledge of another language of the European Union.

Title III of the competition notice also deals with detailed arrangements for the competition and the nature of the tests, which involve:

- an essay on a subject chosen by the candidate from several subjects of a general nature in areas of interest to the European Union in order to assess the level of his knowledge, his drafting ability and the quality of his reasoning;
- a practical test based on a file given to the candidate, in order to evaluate his ability to analyse and summarise, and his ability to deal with a file relating to the relevant duties;
- an interview with the selection board enabling the latter to appraise the general knowledge of candidates and their ability to discharge the duties in question, and to appraise their qualifications and relevant experience;
- a group discussion to enable the selection board to assess candidates' abilities with regard to adaptability, negotiation, decision-making and conduct within a group; and
- an informal conversation with the selection board enabling the latter to establish candidates' knowledge of official languages of the European Union other than their main language.

- 8 Mr Carbajo Ferrero, who took part in the competition, was informed on 13 December 1994 that the selection board had decided to place him second on the list of suitable candidates after Mr X.
- 9 The Director-General for Information and Public Relations of the Parliament then held meetings with the first three successful candidates. Having regard, in particular, to the ranking of the candidates on completion of the competition, their experience in the sphere of information and their experience in the management of employees, the Director-General proposed that Mr Carbajo Ferrero be appointed.
- 10 The Secretary-General of the Parliament, having noted that Mr Carbajo Ferrero and Mr X had achieved entirely comparable results in the competition and that the difference of one point in favour of Mr X was due to his knowledge of a third language of the European Union, considered it necessary to accept the conclusions of the selection board, and consequently proposed to the President of the Parliament that Mr X be appointed to the vacant post. On 21 February 1995 the appointing authority appointed Mr X as head of division, in Grade A 3, and assigned him to the Madrid Information Office.
- 11 On 22 February 1995 Mr Carbajo Ferrero wrote to the Secretary-General inquiring when a decision might be taken. By letter of 2 March 1995 the Secretary-General informed him that a decision had been adopted in favour of the person ranked first on the list of successful candidates. Considering that reply to be not entirely unambiguous, Mr Carbajo Ferrero asked the Secretary-General to state whether it expressed a definitive position. The Secretary-General thereupon confirmed that the candidate ranked first had in fact been appointed.
- 12 On 29 May 1995 Mr Carbajo Ferrero lodged a complaint against the decision of the appointing authority not to appoint him to the post for which he had applied and to appoint Mr X. His complaint was rejected by an express decision of 6 October 1995.

## The contested judgment

13 On 29 December 1995 Mr Carbajo Ferrero brought an action before the Court of First Instance for the annulment of the decision of the appointing authority of 21 February 1995 appointing Mr X to the post of head of division in the Madrid Information Office and of the decision contained in the letter of 2 March 1995 of the Secretary-General of the Parliament not to appoint the appellant to that post.

14 Mr Carbajo Ferrero put forward seven pleas in law in support of his action for annulment, alleging misuse of power, non-observance of the competition notice, breach of the appeal procedure, breach of the obligation to state reasons, breach of the principle of good administration and protection of the interests of the service, manifest error of assessment and breach of the principle of non-discrimination.

15 In his first plea Mr Carbajo Ferrero maintained that the misuse of power derived in particular from an *ad hoc* amendment to the competition notice as compared with the vacancy notice. He pointed out that the three special conditions regarding the requisite qualifications and knowledge — namely substantial experience in public relations and journalism, detailed knowledge of the functioning of the media and of the Spanish system of government and very good knowledge of European problems — appearing in the vacancy notice had been omitted from the competition notice.

16 In paragraph 50 of the contested judgment, the Court of First Instance held that the conditions laid down in a vacancy notice must correspond to those set out in the notices relating to subsequent stages.

- 17 However, in paragraph 51 of the contested judgment, the Court of First Instance concluded that there had been no substantial change in the examination taken by the candidates. Their knowledge and professional qualifications in the areas of public relations and journalism, the functioning of the media and European problems were properly examined by the selection board, albeit in the context of the competition tests — at the second stage of the competition rather than the first stage, that is to say when, on the basis of diplomas and other supporting documents, the extent to which the candidates' applications fulfilled the conditions laid down in the competition notice is verified.
- 18 According to the Court of First Instance, the competition notice had not thus been amended in such a way as to detract from the necessary correspondence between the conditions laid down in the vacancy notice and those laid down in the notices for the subsequent stages of the procedure. In any event, the Court of First Instance held in paragraph 52 of the contested judgment that the competition notice had not been amended in such a way as to undermine the right of staff members of the institution to participate in the competition and, therefore, to favour applications from outside.
- 19 Moreover, according to paragraph 55 of the contested judgment, the applicant did not show that the absence in the competition notice, among the preconditions for admission, of the requirement of qualifications and experience relating to the nature of the functions associated with the post to be filled had been intended to enable Mr X to take part in the competition.
- 20 The Court of First Instance therefore rejected the first plea in law and likewise rejected the other pleas put forward by Mr Carbajo Ferrero.



## The appeal

21 Mr Carbajo Ferrero seeks, first, to have the contested judgment set aside and, consequently, to have his initial claims upheld and the Parliament ordered to pay the costs of both actions.

22 In support of his appeal, Mr Carbajo Ferrero puts forward six pleas in law and maintains, in particular, that the Court did not properly assess the issues of law raised in the application.

23 The Parliament contends that the Court should dismiss the application as inadmissible or, in the alternative, as unfounded and that Mr Carbajo Ferrero should be ordered to pay the costs.

## Findings of the Court

24 In his first plea, Mr Carbajo Ferrero maintains in particular that the Court of First Instance improperly substituted for the criticism regarding a substantial change in the competition notice as compared with the vacancy notice an analysis relating to a substantial change in the examination taken by the candidates. The Court thus did not take due account of the various stages of the procedure for competitions based on both tests and qualifications, as set out in Article 5 of Annex III to the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations'). According to Mr Carbajo Ferrero, it thus erred in holding that the competition notice had not been amended in such a way as to compromise the necessary correspondence between the conditions set out in the vacancy notice and those set out in the notices relating to subsequent stages of the procedure.

- 25 The Parliament contends that this plea is inadmissible because Mr Carbajo Ferrero is merely reiterating his plea before the Court of First Instance or, in any event, because he is asking the Court of Justice to deal with the factual issue of whether there was a substantial discrepancy between the vacancy notice and the competition notice.
- 26 As regards the substance, the Parliament contends that no change was made as between the vacancy notice and the competition notice and argues that the section of the vacancy notice entitled 'requisite qualifications and knowledge' has as its counterpart the description of the nature of the tests in the competition notice. In addition, the Parliament submits that the judgment in Joined Cases 341/85, 251/86, 258/86, 259/86, 262/86, 266/86, 222/87 and 232/87 *Van der Stijl and Cullington v Commission* [1989] ECR 511 relied on by Mr Carbajo Ferrero is based on the view that internal candidates must be protected *vis-à-vis* those from outside. However, in this case, the problem of protecting the interests of the staff of the institution does not arise because both the vacancy notice and the competition notice are addressed to the staff of the institution. The Parliament thus concludes that this plea in law is unfounded.
- 27 At the outset, with regard to the objection of inadmissibility raised by the Parliament, it must be observed that Mr Carbajo Ferrero essentially maintains that the Court of First Instance infringed Article 29(1) of the Staff Regulations and Article 5 of Annex III thereto in assessing the correspondence between the conditions set out in the vacancy notice and those set out in the internal competition notice in the second stage of the competition, namely when the tests were taken by the candidates, rather than making that appraisal at the first stage, when, on the basis of diplomas and other supporting documents, the extent to which the candidates' applications fulfilled the conditions laid down in the competition notice was verified.
- 28 Mr Carbajo Ferrero has thus raised an issue of law which is admissible in an appeal.

- 29 As regards the substance, Article 29(1) of the Staff Regulations sets out the successive stages which must be observed when a vacant post in an institution is to be filled. Under that provision, the appointing authority must examine, in order of priority, first, the possibilities of promotion or transfer within the institution in which the vacancy arises, second, the possibility of holding competitions internal to the institution and, third, what applications for transfer have been made by officials of other institutions, before initiating a competition procedure on the basis of either qualifications or tests or of both qualifications and tests (see Case 176/73 *Van Belle v Council* [1974] ECR 1361, paragraphs 5 and 6).
- 30 That provision thus accords priority, in a procedure involving a number of successive stages, to those already serving in the institution (first and second stages) as compared with officials of other institutions (third stage).
- 31 The vacancy notice, which is drawn up before commencement of the first stage, establishes the framework for that procedure, in particular by defining the nature of the post to be filled and setting out the qualifications and knowledge required of the candidates in the interests of the service.
- 32 The appointing authority must therefore take account of the special conditions of eligibility required of the holder of the post when drawing up the vacancy notice (see Case 188/73 *Grassi v Council* [1974] ECR 1099, paragraph 39).
- 33 If, after the event, the appointing authority finds that the conditions of eligibility laid down in the vacancy notice were more exacting than the needs of the service demanded, it is entitled to reopen the procedure after withdrawing the original vacancy notice and putting an amended one in its place (*Grassi v Council*, cited above, paragraph 43).

- 34 On the other hand, it must be observed that any amendment of the conditions of participation from one stage to another of the procedure provided for by Article 29(1) of the Staff Regulations would be liable to deprive the provisions of that article of their effect.
- 35 In *Van der Stijl and Cullington v Commission*, cited above, which concerned the requirement of correspondence between a vacancy notice and a notice of open competition, the Court held, in paragraph 52, that if the institutions were able to amend the conditions of participation from one stage of the procedure to another, in particular by making them less strict, Article 29 of the Staff Regulations would be deprived of its effect in that the institutions would, in fact, be at liberty to organise external recruitment procedures without having to consider internal candidates.
- 36 It is important to note that the same considerations apply to amendments of conditions of participation between the stages of a procedure affecting only the staff of an institution or of the institutions in general and occurring before an open competition is commenced.
- 37 As the Advocate General emphasised in paragraph 19 of his Opinion, if an institution were able to relax the conditions laid down in the vacancy notice after completion of the first stage of an internal competition, it would exclude from promotion or transfer officials of the institution concerned who might have been able to meet the less strict conditions laid down in the competition notice.
- 38 In those circumstances, the institution would thus be in breach of the obligation contained in Article 29(1) of the Staff Regulations to take account of the possibility of promoting or transferring its officials before deciding to organise an internal competition.

39 Furthermore, if an institution were allowed to amend and, in particular, from one stage to another of the procedure, relax the conditions concerning the qualifications and knowledge required of the candidates which the institution itself prescribed as being necessary in the interests of the service, the procedure provided for by Article 29(1) of the Staff Regulations would hardly be conducive to the appointment of persons of the highest standard of ability, efficiency and integrity as required by Article 27 of the Staff Regulations.

40 It must therefore be concluded that Article 29(1) of the Staff Regulations requires correspondence between the conditions of recruitment laid down in the vacancy notice and those laid down in the notice of internal competition in a procedure for filling a vacant post in an institution where it was not possible to fill the post on completion of the first stage of the procedure.

41 It must be borne in mind that the Court of First Instance held that the necessary correspondence between the conditions laid down in the two notices was observed in this case, in that the qualifications and knowledge required by the vacancy notice were the subject of examination and appraisal in the tests in the internal competition.

42 In that regard, Article 5 of Annex III to the Staff Regulations provides that the selection board of an institution organising a competition must first draw up a list of candidates who satisfy the conditions laid down in the notice of competition before proceeding with the tests.

43 In those circumstances, the fact that the requirements concerning the candidates' qualifications and knowledge are relied on, in the conduct of the tests, as a basis for appraising the candidates' merits rather than being expressly set out in the competition notice reduces the importance and the essential role of that notice,

which is to give those interested the most accurate information possible on the conditions of eligibility for the post to be filled, in order to enable them to determine whether they should apply for it (see, in particular, the order of 28 November 1996 in Case C-119/96 P *Ryan-Sheridan v EFILWC* [1996] ECR I-6151, paragraph 47).

- 44 Moreover, as observed by the Advocate General in paragraph 23 of his Opinion, such a procedure is not without repercussions for the result of the competition. If the two notices did not correspond, it would be easier for candidates not in possession of the prescribed qualifications and knowledge to be appointed to the post in question.
- 45 Finally, it would be very difficult in such cases for the Community courts, in reviewing the legality of measures of the Community authorities, to verify whether, in a particular dispute, the necessary correspondence between the vacancy notice and the competition notice had been observed by the institution.
- 46 In those circumstances, it must be concluded that the Court of First Instance infringed Article 29(1) of the Staff Regulations and Article 5 of Annex III thereto in holding that the list in the notice of internal competition of the conditions concerning the knowledge and qualifications required of candidates could be replaced by the assessment of the merits of the candidates in relation to those conditions undertaken by the selection board when the competition tests were held.
- 47 Therefore, without there being any need to give a decision on the other pleas raised by the appellant, it is appropriate to uphold the plea alleging improper amendment of the competition notice as compared with the vacancy notice and to set aside the contested judgment.

- 48 Pursuant to the second sentence of the first paragraph of Article 54 of the EC Statute of the Court of Justice, the latter may, where the decision of the Court of First Instance is quashed, itself give final judgment in the matter where the state of the proceedings so permits. The Court of Justice considers that to be the position in this case.
- 49 It must be borne in mind that most of the conditions concerning the qualifications and knowledge required of candidates appearing in Vacancy Notice No 7424 — namely substantial experience in public relations and journalism, detailed knowledge of the functioning of the media and of the Spanish system of government and a very good knowledge of European problems — were deleted from Internal Notice of Competition No A/88.
- 50 In those circumstances, it must be concluded that the necessary correspondence between the conditions set out in the vacancy notice and those in the competition notice was not observed.
- 51 Accordingly, the appointing authority's decision of 21 February 1995 appointing Mr X as head of division and assigning him to the European Parliament Information Office in Madrid must be annulled.
- 52 As regards, finally, Mr Carbajo Ferrero's claim for annulment of the decision allegedly contained in the letter of 2 March 1995 from the Secretary-General of the Parliament not to appoint him to the post in question, it need merely be

observed that the fact that Mr Carbajo Ferrero was not appointed to that post is merely an inevitable consequence of the decision appointing Mr X. It is therefore unnecessary to adjudicate on that claim.

### Costs

53 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gave final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which apply to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they are applied for in the successful party's pleadings. Since the Parliament has been unsuccessful, it must be ordered to pay not only its own costs but also the whole of the costs incurred by Mr Carbajo Ferrero before the Court of First Instance and before the Court of Justice.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Sets aside the judgment of the Court of First Instance of the European Communities of 12 June 1997 in Case T-237/95 *Carbajo Ferrero v Parliament*;



2. Annuls the decision of 21 February 1995 appointing Mr X as head of division in the Directorate-General for Information and Public Relations of the European Parliament and assigning him to the Parliament Information Office for Spain in Madrid;
  
3. Orders the European Parliament to pay in their entirety the costs of the proceedings before the Court of First Instance and the Court of Justice.

Kapteyn

Hirsch

Mancini

Ragnemalm

Ioannou

Delivered in open court in Luxembourg on 18 March 1999.

R. Grass

P. J. G. Kapteyn

Registrar

President of the Sixth Chamber