

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the action as inadmissible;
2. Orders the Council to pay the whole of the costs, including those of the applicant.

Pescatore

Touffait

Due

Delivered in open court in Luxembourg on 26 February 1981.

A. Van Houtte

Registrar

P. Pescatore

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI
DELIVERED ON 29 JANUARY 1981¹

*Mr President,
Members of the Court,*

1. This case concerns the transfer procedure for a Community official within one of the institutions. The facts may be summarized briefly. A "Staff Note" from the General Secretariat of the Council dated 11 August 1978 and

numbered 189/78 informed interested officials in Grade A7/A6 that they could request transfer to a post which had become vacant for one year in Directorate-General E, Directorate III, in relation to the requirements of the service arising out of negotiations for the accession of new Member States. Mr Korter submitted his application for the post on 27 September 1978 but by a note

¹ — Translated from the Italian.

dated 6 February 1979 the head of the Personnel Branch informed him that neither his nor any similar application had been accepted.

A few days later Mr Korter, by letter of 23 February 1979, wrote to the Director of Administration questioning whether the communication which he had received came from the competent authority and seeking clarification in that regard. The answer given to him was that the note of 6 February was "purely informative in nature" and that the head of the Personnel Branch was empowered to sign it. He then requested, by letter of 19 March 1979, that the appointing authority should adopt a decision on his application for a transfer. However, on 25 April 1979 the administration reiterated that the communication of 6 February was informative in nature and stated that in any event it was not the task of the appointing authority to answer applications from candidates under the internal transfer procedure involved in this case.

Mr Korter reacted to that unfavourable attitude by submitting a complaint with a view to persuading the Council to accept his request for transfer or, at least, to take a decision on it. The Secretary-General of the Council informed him, by note of 27 June 1979, that under the procedure which had been set up by the Protocol of 5 April 1978 and which applied to the filling of the vacant post it was not for the appointing authority to take a decision; that in fact no decision had been taken and that, consequently, the complaint must be regarded as not in accordance with Article 90 of the Staff Regulations of Officials inasmuch as it was devoid of purpose. Mr Korter thereupon addressed to the Court his application of 25 September 1979, which seeks an order requiring the Council to take a decision, capable of being challenged by means of legal action, on

his request for a transfer of 27 September 1978.

2. There is no doubt that the present case falls within those governed by the Additional Negotiating Protocol concluded on 5 April 1978 between the Secretary-General of the Council and the organizations representing the staff. The text of the Protocol is contained in Staff Note No 77/78 of 14 April 1978 issued by the General Secretariat of the Council. The Protocol provides, under paragraph (1) of point IV thereof, that:

"Any post which becomes available . . . shall be communicated to the staff in the form of a notification of transfer, together with a description of the duties and an invitation to submit applications.

The immediate superior shall be at liberty to choose either from candidates applying for transfers as a result of such notification or from other candidates. This choice may be made only in accordance with the criteria of the interests of the service."

However, it is also necessary to have regard to Article 7 (1) of the Staff Regulations of Officials. That provision states that:

"The appointing authority shall, *acting solely in the interest of the service* and without regard to nationality, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade.

An official may apply for a transfer within his institution."

The parties hold contrasting views on the relationship between the aforementioned rules. According to the submissions for

the Council, the purpose of the procedure defined in the Protocol is to provide both the administration and the staff, fully and speedily, with information which is of use in filling vacant posts in a prompt and rational manner by means of transfers within the institution. It allows both the vacancy and the criteria on the basis of which the administration proposes to fill the vacancy to be brought to the knowledge of interested officials in good time and, at the same time, it allows officials' aspirations to be brought to the notice of the administration. Such a procedure, it is maintained, has a purely exploratory and preliminary character and is accordingly wholly distinct from transfers governed by Article 7 of the Staff Regulations. The principle difference lies in the fact that under the procedure defined in the Protocol the appointing authority is not bound to decide upon requests for a transfer, whereas Article 7 of the Staff Regulations places such a duty on the administration in relation to the ordinary procedure.

However, according to the submissions for the applicant, the rules of the Protocol must be construed within the framework of Article 7 of the Staff Regulations. Those rules in fact define the specific detailed rules for filling vacant posts but do not affect the nature of requests for transfer, which continue to be governed by Article 7 (1) of the Staff Regulations. Therefore, it is always for the appointing authority, and for it alone, to take a decision upon a request of that kind.

It appears to me that the latter interpretation should be upheld. In the first place, the Protocol in fact speaks of "transfer" thus employing the same terminology as Article 7 of the Staff Regulations. Secondly, it is not possible

for the Protocol to derogate from the Staff Regulations by conferring on officials of intermediate rank power to decide on applications for transfer, since an agreement with trade unions only involves the placing on the institution participating therein of self-imposed limits on the exercise of its own powers in regard to relations with the staff and certainly cannot amend the Staff Regulations, which have the status of a regulation. Thirdly, the text of the agreement with the trade unions does not justify the notion that it seeks to introduce a procedure which is independent of that laid down by the Staff Regulations. In particular, the power to select the official to be transferred, which the Protocol confers on the immediate superior in the department to which the transfer is to be made, may and must be construed in harmony with the power to decide on transfers which, by virtue of Article 7 of the Staff Regulations, resides with the appointing authority.

I would observe in this regard that the possibility of discerning in the aforementioned provisions of the Protocol a delegation by the appointing authority to the immediate superior of the power to decide on transfers must be ruled out. In fact, it must not be forgotten that pursuant to the Council Decision of 14 May 1962 (Official Journal, English Special Edition 1963-1964, p. 4), "the powers conferred by the Staff Regulations of Officials on the appointing authority . . . shall . . . be exercised . . . by the Secretary-General" and that he, in turn, is authorized to sub-delegate to the Director-General of Administration all or part of his powers in regard to officials in Categories B, C and D but not, however, in regard to officials in Category A, to which the applicant belongs. It must be borne in mind moreover that the Protocol speaks

generally of "the immediate superior" and thus does not identify with the necessary clarity the person to whom the power was allegedly delegated. Accordingly, the argument that the Protocol contains a delegation of power must be rejected.

In my opinion, a different solution may be found. The right of selection which the Protocol accords to the immediate superior is to be understood as meaning that the administration has promised the staff organizations that it will follow the point of view held by the immediate superior concerned on the filling of the vacant post and thus satisfy the requirements of the service in the most appropriate manner. But notwithstanding that, the power of formally deciding on applications for transfer remains, in accordance with the Staff Regulations, in the hands of the appointing authority and therefore, as we have seen, in the case of officials in Category A it may not be exercised otherwise than by the Secretary-General of the Council.

3. It is possible in the light of the observations set forth hitherto to examine the various stages of the procedure for temporarily filling a vacant post which was followed in the present case and in which the present dispute has its source.

So far as the request for a transfer which was submitted by Mr Korter on 27 September 1978 is concerned, it falls, in my opinion, within the ambit of not only paragraph (1) of point IV of the 1978 Protocol but also Article 7 (1) of the Staff Regulations, which expressly gives an official the right to "apply for a transfer within his institution". The provisions of the 1978 Protocol in this regard (namely, that after publication of the vacancy those interested should

submit an application for a transfer) cannot lead to the view that such an application falls outside Article 7 of the Staff Regulations. The procedure outlined in the Protocol is no different from that based on Article 7. Hence it follows that the appointing authority was bound to take a decision on Mr Korter's request for a transfer and that its failure to do so was capable of being challenged both through administrative channels and before the Court pursuant to Articles 90 and 91 of the Staff Regulations.

The administration's note of 6 February 1979, which informed the applicant that his and all the other applications for the vacant post were not to be accepted, could not constitute a decision on the application in question, since, as Counsel for Mr Korter correctly pointed out, it expressed a point of view emanating not from the appointing authority but from the official in charge of the Personnel Branch, a Mr J. Van Guyse. The same reasons are also valid as grounds for not according the status of a decision of the appointing authority to the two other notes sent by the administration to the applicant on 19 March and 25 April 1979, which confirmed the content of the February note. Neither emanated from the appointing authority, in fact the first bore the signature of a Mr Übel with the indication that he was signing on behalf of the Director, Mr Pourvoyeur, and the second bore the signature of Mr Pourvoyeur himself.

There came, finally, the note of 27 June 1979 from the Secretary-General, Mr Hommel. In my opinion it constituted the adoption by the appointing authority of its position on Mr Korter's application for a transfer and therefore represented a decision of the administration against which it was possible to lodge a complaint and also an appeal to the Court. It is true that in the note the

Secretary-General maintained that it was not for the appointing authority to take any decision on applications for transfers submitted under the procedure provided for in the aforementioned Protocol and that Mr Van Guyse, who was in charge of the Personnel Branch, was empowered to sign the note of 6 February 1979. However, precisely by confirming the administration's previous answers concerning Mr Van Guyse's powers the Secretary-General in substance adopted as his own the decisions which had already been expressed at intermediate level by the administration and the gist of which was that all the requests for a transfer were rejected. The practical effect of that was that the Secretary-General issued his decision, albeit impliedly, in favour of the rejection of Mr Korter's application for a transfer. I do not think that it is possible to reject that interpretation on the ground that the Secretary-General, in the same letter, insisted on attributing a special character to the procedure laid down in point IV of the Protocol up to the point of renaming the procedure an "appel de candidatures pour un poste disponible", whereas the Staff Note of 11 August 1978 spoke of "demandes de changement d'affectation (mutation)". I have already considered that submission and I need only refer to the arguments set forth in criticism of it in order to refute it.

defendant has raised a preliminary objection to the admissibility of the application on the grounds that the applicant has no interest to sue and that the application is devoid of any substance.

The challenge to the admissibility of the action which is based on the plea of no interest to sue is, in my opinion, well founded. An interest to sue exists where the decision which is requested of the Court is a means of making good the damage allegedly done to the applicant's material interest by the conduct of the defendant. In the present case there would be an interest to sue if the decision sought from the Court were capable of satisfying the applicant's interest in obtaining a decision by the administration on his request for a transfer. But if (as I hold) it is correct that in his letter of 27 June 1979 the Secretary-General of the Council decided, in substance, to reject Mr Korter's request for a transfer it is not possible to detect in the conduct of the administration the omission of which the applicant complains. Since the administration has already given a decision it seems pointless to ask the Court to order the administration to take a decision, whatever its content may be, on the same point.

4. It has been seen that the applicant complains that the defendant institution has not adopted any decision, which is capable of challenge on his request of 27 September 1978 for a transfer. In other words he accuses the administration not of refusing to appoint him to the vacant post but, rather, of failing to take a decision, favourable or otherwise, on his application. In view of that, the

The defendant then objects to the admissibility of the action on the further ground that it is devoid of any substance: that is to say, the action is not directed against an act of the institution adversely affecting the official, there being no act at all of that kind. In that regard I would observe that an act adversely affecting the official clearly

took place when the Secretary-General rejected the request for a transfer. However, the application has not challenged that act but rather the administration's omission (the alleged failure to take a decision), whereas on 25 September 1979 (when the action was brought) the Secretary-General of the Council had already given his decision on the request for a transfer. Consequently, the action is devoid of any substance and the second objection to its admissibility should be upheld.

5. It is appropriate in any event also to consider the complaints made in regard to the merits of the case. According to the submissions for the applicant, the administration's alleged omission infringed Articles 7, 25 and 90 of the Staff Regulations of Officials. In regard to Article 7, Mr Korter contends that since he had submitted a request for a transfer within the meaning of that provision the administration was bound to issue a decision and that by having failed to do so it contravened the provision in question. However, it is plain that such an argument cannot be upheld. Even if it is correct that Article 7 of the Staff Regulations applies to Mr Korter's request for a transfer it is not true that the administration failed to take a decision. I have sought to make clear my views on this matter and it is unnecessary for me to repeat what I have already said.

As regards the alleged infringement of Article 25 of the Staff Regulations — which provides *inter alia* that any decision adversely affecting an official shall state the grounds on which it is based — it is not clear whether the applicant has invoked this provision because it implies an obligation on the administration to take a decision

whenever an official has exercised his right to present a request to the appointing authority or because it lays down that decisions adversely affecting an official shall state the grounds on which they are based. In the former case the infringement of Article 25 would coincide with that of Article 7 and the arguments which I have set forth in regard to that rule would be equally valid in the case of Article 25. In the latter case it would be necessary to hold that Mr Korter accepts that he was the addressee of an adverse decision from the administration and that he seeks to criticize it for want of form. However, that would fly in the face of the applicant's whole approach in this litigation — including the conclusions of his application — which (as has been said on several occasions) is based on the view that the administration has not yet issued a decision on his transfer. Now it is clearly impossible to submit at one and the same time that a decision has never been adopted and that a decision vitiated through want of a statement of the reasons upon which it is based has been taken.

A complaint of that nature would have been conceivable if the applicant sought the annulment of the adverse decision taken by the administration in relation to his request for a transfer. I may perhaps be permitted to add that even in that event the criticism in question would have to be regarded as unfounded. According to the well established case-law of the Court, the appointing authority is not in fact under a duty to state the grounds of decisions not selecting a candidate since a statement of such reasons could be harmful to the candidate himself (see the judgments of 30 October 1974 in Case 188/73 *Grassi v Council* [1974] ECR 1099 and of 13 April 1978 in Case 101/77 *Ganzini v Commission* [1978] ECR 915).

The third provision of the Staff Regulations with which the applicant seeks to enforce compliance is Article 90 which the administration is said to have infringed by refusing to take a decision on the substance of the complaint made through administrative channels. Clearly, this criticism must also be rejected if it is held that the administration adopted, albeit by implication, a negative decision.

However, in this regard I should like to express the hope that in future prompt and express decisions on requests from officials for transfers will be adopted by the appointing authority, both in the interests of the service and so that relations with the staff may follow a proper course and damaging and pointless litigation may be discouraged.

6. I therefore conclude by suggesting to the Court that it declare the action brought by Mr Korter against the Council on 25 September 1979 to be inadmissible or, alternatively, that it dismiss the action as unfounded. In view of the nature of the dispute the parties should bear their own costs.