JUDGMENT OF THE COURT (FIRST CHAMBER) OF 19 JUNE 1975 [1]

Berthold Küster v European Parliament

Case 79/74

Summary

1. *Officials — Recruitment — Notice of vacant post — Eligibility for post — Conditions — Officials eligible for transfer or promotion — Application excluded — Act adversely affecting such officials*
   (Staff Regulations, Article 29 (1) (a))

2. *Officials — Recruitment — Post — Post reserved for nationals of a specific Member State — Prohibition — Specific abilities — Requirement in the interest of the service — Permissibility*
   (Staff Regulations, Article 27)

3. *Officials — Recruitment — Conditions — Thorough knowledge of a language — Required level of knowledge*
   (Staff Regulations, Article 27)

1. To the extent to which the conditions for appointment to a post defined by the vacancy notice have the effect of excluding the applications of officials eligible for transfer or promotion, the vacancy notice amounts to an act adversely affecting those officials.
2. Whilst the Staff Regulations prohibit the reserving of a post for nationals of a specific Member State, the appointing authority may nevertheless make its selection, when recruiting an official, depending upon specific knowledge required in the interests of the service.
3. Where a 'thorough' knowledge of a language, other than that of the mother-tongue, is required for ultimate appointment, the level of knowledge required must be one appropriate to the actual requirements of the service.

In Case 79/74

BERTHOLD KÜSTER, an official of the European Parliament residing at Bertrange (Luxembourg), represented by Victor Biel, Advocate of the Cour

1 — Language of the Case: French.

Supérieure de Justice of the Grand Duchy of Luxembourg, with an address for service in Luxembourg at the Chambers of his counsel, 18a, rue des Glacis,

applicant,

and

EUROPEAN PARLIAMENT, Luxembourg, represented by its Secretary General, Hans Nord, acting as Agent, assisted by Alex Bonn, Advocate of the Luxembourg Bar, with an address for service at the Chambers of its counsel, 22, Côte d'Eich,

defendant,

Application for the annulment of Vacancy Notice No 1059 of 12 March 1974,

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, R. Monaco (Rapporteur) and A. O'Keeffe, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments advanced by the parties during the written procedure may be summarized as follows:

I — Facts and written procedure

1. By Vacancy Notice No 1059 of 12 March 1974, drawn up in English, a post of Head of Division (Grade A 3) was declared vacant in the Directorate General for Committees and Interparliamentary Delegations. This notice stated, *inter alia,*

- that the procedure for filling the post was to be first that of promotion and of transfer within the institution;
- that, 'for practical reasons, a thorough knowledge of English is required'.

By a letter of 1 April 1974 addressed to the President of the Parliament, the applicant submitted a complaint in respect of the said notice based in particular:

— on the fact that the notice in question had only been published in English, and
— on the fact that the condition of a thorough knowledge of English was calculated to reserve the vacant post for a British subject.

On 2 April 1974, that is to say, the day after his complaint, the applicant applied for the vacant post.

The Parliament then published this vacancy notice in all the official languages of the Community and extended the time-limit for the lodging of applications to 25 April 1974.

As the Parliament did not take note of the said complaint in so far as it concerned the condition of a thorough knowledge of English, the applicant lodged the present application on 28 October 1974.

2. On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'Rule that this application is admissible as to form and that it has been made within the prescribed period;

Take note of the applicant's offer of proof by witnesses that the Secretary General of the Parliament stated during the summer of 1974, on being asked about the language condition, that it was the intention, of the authorities to appoint a British national to the said post;

On the substance of the case

Rule that the application is well founded and consequently annul Vacancy Notice No 1059;

Rule that such annulment shall include the annulment of any procedure attaching thereto, where appropriate, and that such procedure cannot adversely affect the applicant;

Order the Parliament to pay the costs.'

The *defendant* contends that the Court should:

'Rule that the application is inadmissible;

Alternatively rule it to be unfounded;

Reject the applicant's offer of proof by witnesses as inadmissible;

Dismiss the application;

Make a ruling as to costs in conformity with the provisions applicable.'

III — Submissions and arguments of the parties

The *applicant* maintains that Vacancy Notice No 1059 is null and void, as the condition of a thorough knowledge of English contained therein is contrary to Articles 7, 27 and 45 of the Staff Regulations of Officials.

That condition in this case makes impossible an examination of the respective merits of all the candidates eligible for promotion and thus infringes Article 45 of the Staff Regulations. It merely constitutes a disguised means of reserving the post in question for a British national (there was no candidate of that nationality among the officials eligible for promotion), and because of

this involves a misuse of powers contrary to Article 7 and the third paragraph of Article 27 of the Staff Regulations.

It is useless to rely, in order to justify such a condition, on the principle enunciated in the first paragraph of Article 27 of the Regulations ('Recruitment ... on the broadest possible geographical basis ...'). Recourse to this principle is irrelevant in this case as the appointing authority decided first to consider whether the post could be filled by promotion or transfer within the institution, whereas it could not have been unaware that no candidate capable of being transferred or promoted fulfilled the condition in dispute. Moreover, both the interest of the service and the right to observance of eligibility for promotion are compromised if the administration could, under the pretext of geographical distribution, reserve a post for a specific nationality without such an action being justified by the proven interest of the service. In support of his complaint, the applicant makes an offer of proof which he defines in his conclusions.

The *defendant* maintains first that the application is inadmissible, because it is directed solely against a notice of a vacant post, that is to say, against a measure which cannot be considered as being of adverse effect.

Subject to this plea of inadmissibility, the defendant points out, moreover, that the vacancy notice does not require that the mother-tongue of the candidate must be English, but merely requires a thorough knowledge of that language. It thus concerns a functional criterion, laid down in the interest of the service, as the committees, including that relating to the post in dispute, work in direct and close contact with parliamentarians, who are not obliged to draw up their reports in a foreign language. The condition complained of does not therefore constitute a 'disguised means' of reserving the vacant post for a specific nationality but is in the manifest interest of the service, to which the right of an official to advancement is subject.

As this is the justification for the condition in dispute, the offer of proof made by the applicant is irrelevant and therefore inadmissible. Moreover, no statement such as that attributed to the Secretary General was made.

With regard to the admissibility of the application, the *applicant* objects that, according to the case-law of the Court, there is a legal bond between the vacancy in a post and promotion. In so far as it lays down, as in this case, conditions having the effect of excluding an eligible candidate from promotion, the vacancy notice is directly prejudicial to the rights of such a candidate and thus constitutes an act adversely affecting him.

With regard to the substance of the case, the applicant disputes that the Head of Division of a Committee must possess a thorough knowledge of the national language of the Chairman of that Committee. Such a requirement is not practicable, by reason of the changes likely to occur in the chairmanship. Furthermore, it is neither necessary nor useful as the members of the Secretariats of the Committees have a very extensive knowledge of languages. Moreover, there is nothing in this case to justify the appointment of a Head of Division having a thorough knowledge of English, as that language is represented in the Division by at least one British national.

The applicant concludes by persisting in his allegation of the 'disguised' motivation of the disputed condition of recruitment and in his offer of proof.

In its rejoinder, the *defendant* raises a further submission of inadmissibility, based on the presentation on 19 February 1975 of a new application by Mr Küster against the European Parliament. This application (Case 22/75), which is directed against Notice of Internal Competition A/50, is concerned with the

same recruitment procedure as that criticized in this case through Vacancy Notice No 1059. Since the internal competition constitutes, in the series of measures inherent in the recruitment procedure, a wider measure than the vacancy notice, Application No 22/75 makes this application purposeless and, consequently, inadmissible. Bringing successive applications against the different stages of one and the same recruitment procedure creates an unjustified multiplication of costs.

With regard to the substance of the case, the defendant contests the applicant's right to put in issue the justification of the 'functional criterion' which, according to the appointing authority, justifies the disputed condition. It is not for officials to contest and discuss problems of the organization of the service, except in the case of an infringement of the relevant law, as these problems are ones exclusively for assessment by the administrative authority.

The defendant finally insists that the offer of proof should be rejected and concludes that, although no official must be rejected by reason of a criterion of nationality, nevertheless it cannot be contested that (according to the spirit and letter of the first paragraph of Article 27 of the Staff Regulations) 'the balance of nationalities also plays a rôle under the Staff Regulations in filling posts in a Community composed of nine States'.

The oral procedure took place at the hearing on 23 April 1975. During that hearing the Court put to the Secretary General of the European Parliament various questions concerning the nature and duties of the post to be filled.
The Advocate-General delivered his opinion on 28 May 1975.

Law

1 By application of 28 October 1974 an action was brought before the Court under Article 91 of the Staff Regulations of Officials for the annulment of Vacancy Notice No 1059 of 12 March 1974.

2 The applicant in support of this application submits in particular that the 'thorough knowledge of English' required by the notice in question amounts to a disguised means of reserving the vacant post for a particular nationality.

3 He states that for this reason the notice in question renders the comparative examination of merits of all the officials eligible for promotion devoid of any meaning and infringes Articles 29 (1) (a) and 45 of the Staff Regulations.

Admissibility

4 The defendant alleges that the action is inadmissible on the ground that the vacancy notice in question does not amount to an act adversely affecting the

applicant within the meaning of Article 91 (1) of the Staff Regulations, all the more so since it did not prevent the applicant from submitting his application for the vacant post.

5 The vacancy notice, published in pursuance of Article 29 (1) (a) of the Staff Regulations, makes clear which officials may apply, by defining the conditions relating to eligibility for the post.

6 To the extent to which these conditions have the effect of excluding the applications of officials eligible for transfer or promotion the vacancy notice amounts to an act adversely affecting those officials.

7 In the applicant's view this is precisely the case here, since the vacancy notice in question sets out a condition for appointment to the post, based on the linguistic ability of the applicants, which has the effect of excluding his application and of affecting his eligibility for promotion.

8 The objection of inadmissibility must therefore be rejected.

9 The defendant also contests the admissibility of the action on the ground that the applicant on 19 February 1975 brought a fresh action — registered at the Court under Number 22/75 — against the Notice of Internal Competition No A/50.

10 In this respect it argues that since the Internal Competition A/50 had the purpose of filling, within the framework of one and the same recruiting procedure, the same post as that referred to by the vacancy notice in question, Application 22/75 renders the present action devoid of purpose.

11 Whilst Application 22/75 and the present action relate to the same recruiting procedure, they nevertheless deal with two distinct stages of this procedure, each of them involving different methods of filling the post, that is to say by transfer or promotion in one case and by internal competition in the other.

12 Since the two actions have different purposes the objection of inadmissibility raised by the defendant must be rejected.

Substance

13 According to the English version of the vacancy notice in question, amongst the conditions for appointment to the post it is stated that 'for practical reasons, a thorough knowledge of English is required'.

14 The applicant argues that such a condition is not justified for reasons relating to the running of the service but amounts to a disguised method of reserving the post in question for a particular nationality.

15 For this reason the notice in question is alleged to infringe the last paragraph of Article 27 of the Staff Regulations under the provisions of which: 'No post shall be reserved for nationals of any specific Member State'.

16 Whilst the Staff Regulations prohibit the reserving of a post for nationals of a specific Member State, the appointing authority may nevertheless make its selection, when recruiting an official, dependent upon specific knowledge required in the interests of the service.

17 In the present case the special nature of the tasks devolving on the secretariats of the parliamentary committees which have the task of assisting the members of these committees in their work, may justify a recruitment based *inter alia* on a thorough knowledge of the national languages used by such members belonging to the national parliaments of the Member States.

18 More specifically, the recruitment of an official having a thorough knowledge of English may correspond to the requirements of the service resulting from the accession to the Community of the new Member States.

19 The information appearing in the written pleadings and that furnished in the course of the oral procedure do not make it possible to arrive at the conclusion that in the present case the recruitment of an official having a thorough knowledge of the English language is unjustified having regard to the nature and characteristics of the vacant post or the requirements of the service.

20 Besides, in laying down the condition in question the vacancy notice in dispute does not intend to refer to so thorough a knowledge that only officials whose mother tongue is English can possess it but allows it to be clearly understood, by the specific reference to 'practical reasons' which justify such a condition's being imposed, that the level of linguistic knowledge required is one appropriate to the actual requirements of the service.

21 Moreover it is shown by the other 'qualifications and knowledge' specified that the thorough knowledge of English does not constitute the only criterion determing the choice of the candidate to be appointed.

22 On the contrary, the vacancy notice in question allows it to be understood that since such a choice can only result from the taking into consideration of several factors which are themselves justified in the interest of the service, the appointing authority must in assessing the level of the candidate's linguistic ability take into account both the actual needs of the service and the manner in which such candidate satisfies the other conditions for appointment.

23 The application must therefore be dismissed

Costs

24 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

25 The applicant has failed in his action.

26 However, under the terms of Article 70 of the said rules, the costs incurred by institutions in actions brought by servants of the Communities are to be borne by such institutions.

On those grounds,

THE COURT (First Chamber)

hereby

1. **Dismisses the application;**

2. **Orders each party to bear its own costs.**

Mertens de Wilmars Monaco O'Keeffe

Delivered in open court in Luxembourg on 19 June 1975.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 28 MAY 1975 [1]

Mr President,
Members of the Court,

By Vacancy Notice No 1059 the European Parliament on 12 March 1974 declared vacant an A 3 post in the Directorate General for Committees and Interparliamentary Delegations. In the notice it was stated that the President of the Parliament had decided to fill the post by promotion or transfer within the institution. As a requirement to be fulfilled it listed *inter alia* a thorough knowledge of English. Applications were to be lodged by 25 March 1974. The notice was published in the first instance only in English, similarly to another notice, (No 1058) in which a thorough knowledge of Danish was called for and which in the first instance was published only in Danish.

Once he became aware of this fact, Mr Küster, the applicant in the present proceedings, submitted a complaint under Article 90 of the Staff Regulations to the President of the Parliament on 1 April 1974 complaining of the way in which the vacancy was announced, in that the notice was not published in all

1 — Translated from the German.