JUDGMENT OF THE COURT (FIRST CHAMBER)
9 JULY 1970[1]

Herta Grosz (née Lampe)
v Commission of the European Communities

Case 35/69

Summary

1. *Officials — Temporary posting — Express agreement of the appointing authority — Necessity*
(*Staff Regulations of Officials, Article 7 (2)*)

2. *Officials — Temporary posting — Official called upon to occupy a post temporarily — Discretionary power of the appointing authority*
(*Staff Regulations of Officials, Article 7 (2)*)

1. The application of Article 7 (2) of the Staff Regulations of Officials requires the express agreement of the appointing authority in order 'to call upon' an official to occupy temporarily a post in a higher career bracket.

2. The decision to call upon an official to occupy a post temporarily depends on an assessment of the interests of the service. An official cannot acquire a right to the temporary post from the mere fact that he is performing the duties attaching thereto.

In Case 35/69

HERTA GROSZ, NEÉ LAMPE, the widow of Fero Grosz and an official of the Commission of the European Communities, represented and assisted by José Saels, Advocate of the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of Fernand Loesch, 2 rue Gouthe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, with an address for service in Luxembourg

1 — Language of the Case: French.

at the Chambers of Émile Reuter, Legal Adviser of the Commission, 4 boulevard Royal,

defendant,

Application for the annulment of a decision as to promotion and for payment of the allowance provided for in Article 7 (2) of the Staff Regulations of Officials,

THE COURT (First Chamber)

composed of: R. Monaco, President of Chamber (Rapporteur), A. M. Donner and J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

1. The applicant, who took up employment with the Commission on 8 Feburary 1960, has since 25 March 1962 held the post of second secretary (C2) in Directorate-General IX (Personnel and Administration), Directorate B.
On 14 November 1968 Vacancy Notice No COM/450 was published concerning the post of executive secretary (C1) in the same Directorate, which had become vacant on the departure of Miss Marisa Nava who had ceased to perform the duties attaching thereto as from 23 October 1968.
On 18 October 1968 the applicant applied for the vacant post but was informed by letter of 23 January 1969 that it had been impossible to give favourable consideration to her application.
Miss Carla Borsa, a secretary in Grade C2 in Directorate-General IX, Directorate A, was appointed to the post in question, by way of promotion, with effect from 1 December 1968.
On 16 April 1969 the applicant submitted a complaint within the meaning of Article 90 of the Staff Regulations of Officials.
As this complaint received no reply, she lodged the present application on 4 August 1969.

2. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-

General, the First Chamber of the Court decided to open the oral procedure without any preliminary inquiry.
The parties submitted their oral observations at the hearing on 28 May 1970.
The Advocate-General delivered his opinion at the hearing on 9 June 1970.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(1) Rule that in accordance with Article 7 (2) of the Staff Regulations of Officials the applicant is entitled to receive the differential allowance payable in connexion with a temporary posting as from 24 January 1969;

(2) Order the Commission of the European Communities to pay this differential allowance as from 24 January 1969;

(3) Annul the decision of the appointing authority of 16 January 1969 promoting Miss Carla Borsa to the post in Grade C1, vacancy of which was published under No COM/450;

(4) Order the defendant to pay the costs.

In the alternative, order the Commission to pay the costs and expenses set out in the reply under No 4.

The *defendant* contends that the Court should:

— dismiss Application 35/69 as unfounded;

— order the applicant to pay the costs.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

1 — *The payment of the differential allowance*

The *applicant* maintains that, in accordance with the instructions received by her immediate superior, she has carried out since 23 October 1968 the duties attaching to the post of executive secretary which became vacant on that date. The Commission is thus obliged to pay her the differential allowance provided for under Article 7 (2) of the Staff Regulations of Officials as from 24 January 1969. Furthermore, in the performance of these duties she worked a large amount of overtime, greatly exceeding the working day of eight hours.
The *defendant* observes that the applicant had been neither requested nor called upon to occupy temporarily the post in question. It is undeniable that in the light of the specific requirements of a director of Italian nationality and mother tongue, the applicant is not in a position to carry out all the taks which must be performed by an executive secretary appointed to work with such a director. The mere fact of having occasionally performed certain taks formerly carried out by the previous occupant of the post cannot give rise to a right to the allowance payable in connexion with a temporary posting.
Furthermore, as the post in question had been transferred on 20 December 1968 to the office of a member of the Commission, it no longer existed in Directorate IX-B at the date from which the temporary posting allowance ought allegedly to be paid.
After referring to the provisions of Article 56 of the Staff Regulations concerning overtime worked by officials in Categories C and D, the defendant states that it is still prepared even now to grant compensation or remuneration in respect of the overtime, to the extent to which it had actually been worked.

The *applicant* makes the following reply:

— Her director, Mr Tinelli, entrusted his secretarial work to her, which clearly demonstrates that she possesses the necessary qualifications for this post and that a knowledge of the Italian language is not an essential requirement in this instance. Moreover, since 23 October 1968 five temporary secretaries have been appointed to assist him, only one of whom had a thorough knowledge of the Italian language. Finally, if the defen-

dant's argument were correct, it would be difficult to understand why on 1 October 1969 the head of department of Division IX-B-1 has refused to allow her 15 days' leave in the absence of Mr Tinelli and in spite of the presence of a temporary secretary, on the ground that she was to be responsible for distributing the post.

— Even though no document exists to show that the applicant was called upon officially to occupy the post temporarily, it is nevertheless true that she did so from 23 October 1968. The fact that she distributed the post to the various heads of division is clear evidence of this.

— It is irrelevant to object that on 24 January 1969 the post in question was already transferred to another department, as the duties involved in it continued to exist within Directorate IX-B.

Finally, the applicant takes note of the defendant's statement regarding overtime.

After emphasizing the fact that in this instance the applicant did not have the necessary qualifications to occupy a post on a temporary basis, the *defendant* states specifically that the applicant's director did not 'entrust his secretarial work' to her and that the duties which she performed were not the same as those carried out by the former occupant of the post. In fact, this director had dispensed with the services which he had received until his secretary left. On the other hand, his directorate had received compensation in the form of a post in Grade B3/2 given up by the office to which the Grade V1 post in question was transferrd. Moreover, the refusal to allow the applicant to go on leave on the ground that she was to be responsible for distributing the post is irrelevant in this instance, as it is not apparent that this was a task which could only be carried out by a secretary in Grade C1.

2 — *The annulment of the contested decision*

The applicant maintains that Miss Borsa was promoted to the vacant post whereas she was in fact intended to carry out other work. Moreover, this promotion, which took place on 16 January 1969, filled a post which the appointing authority had already decided on 20 December 1968 to transfer to the office of a member of the Commission and it is therefore vitiated on the ground of misuse of powers.

The *defendant* observes that the applicant's argument is irrelevant, if only because the promotion decision in question was not taken on 16 January 1969 but on 20 December 1968, as is clearly shown in Schedules IIA and B to the statement of defence.

Secondly, a memorandum of 9 December 1968 from the director of Directorate IX-B clearly shows that the purposes of the promotion procedure in question was to fill the vacant post in that directorate and not to recruit an official in Grade C1 to the office of a member of the Commission. The fact that, in the interests of the service, this post was transferred to the office in question on the very day that the promotion decision was taken in no way vitiates the legality of the promotion which had taken place earlier after an examination of the abilities of all the candidates.

The *applicant* replies that, contrary to the defendant's statements, Miss Borsa's promotion to the vacant post actually took place after that post had been transferred. In fact:

— it is not clear why, if the two decisions were actually taken on the same day, the notice of Miss Borsa's promotion was only published on 16 January 1969 and did not state that it had been decided on 20 December 1968. This, at all events, constitutes an infringement of an essential procedural requirement within the meaning of the third paragraph of Article 25 of the Staff Regulations, which provides that specific decisions regarding promotion shall at once be posted in the premises of the institution to which the official belongs;

— the only conclusive document in this instance is the promotion decision itself dating from 16 January 1969 and not an internal memorandum the sole purpose of which was to obtain the opinion of any individuals or departments concerned;

— the decision of 16 January 1969 shows expressly that the post to which Miss Borsa was promoted was that referred to in Vacancy Notice No COM/450, although it is not disputed that she never actually occupied that post;

— it cannot be accepted that at the very moment when the vacant post was filled by the promotion decision in dispute the interests of the service suddenly required it to be transferred.

The *applicant* observes, furthermore, that if it is assumed that the two decisions—the promotion and the transfer of the post—are actually concomitant it follows:

— that, as it was intended that Miss Borsa should occupy another post, the basic reason for her promotion, that is, her ability to perform the duties of principal secretary in Directorate IX-B, is incorrect;

— that, for this reason, the principle of equality between the candidates for such promotion was in that instance violated;

— that, at all events, by not publishing until 16 January 1969 a decision taken on 20 December 1968 the Commission made an error likely to cause confusion and must therefore be ordered to pay the costs, as claimed in the alternative conclusion.

The *defendant* explains that during the promotion procedure, when it became clear that Miss Borsa should be promoted because her qualifications coincided with those required for the vacant post, the office of Mr Colonna di Paliano had requested the transfer of a secretarial post in Grade C1, and offered in exchange to give up a post in Grade B3/2. The Administration had, therefore, considered it reasonable to bring to an end the procedure which was under way and to transfer the post in Grade C1 on the same day as that on which the promotion decision was adopted. Had it had the slightsst doubt as to the legality of its action it would have allowed several days to elapse between the promotion and the change in the detailed list of posts resulting in the transfer, in order to enable Miss Borsa to perform her duties in Directorate IX-B, if only for a few days.

The principle of equality between candidates has therefore not been violated since all the candidates submitted their applications in due form for the same vacant post, that is, the post referred to in Vacancy Notice No COM/450.

In addition, the defendant states that:

— although the decision of 16 January 1969 does not show the date on which Miss Borsa's promotion had in fact been decided, this is because it is irrelevant, as the contested promotion took effect on 1 December 1968, that is, before 20 December 1968. The absence of this information cannot justify the applicant's alternative conclusions regarding costs. In her complaint of 16 April 1969 she did not put forward the argument to which she refers for the first time in the present application, that is, that it was decided to appoint Miss Borsa to a post other than that referred to in the vacancy vacancy notice before the pomotion decision was taken;

— moreover, the publication of this promotion decision was delayed by the public holiday at Christmas and New Year.

Grounds of judgment

The request for the award of a differential allowance

1 The application seeks first of all an order that the Commission pay the applicant

as from 24 January 1969 a differential allowance in respect of a temporary posting in accordance with Article 7 (2) of the Staff Regulations of Officials.

2 In support of this conclusion the applicant, who is classified in Grade C2, maintains that since 23 October 1968 she has performed the duties attaching to the post of executive secretary in Grade C1, which became vacant on the departure of its former occupant.

3 Under the terms of Article 7 (2) of the Staff Regulations of Officials, an official who has been 'called upon' to occupy temporarily a post in a career bracket in his category or service which is higher than his substantive career bracket shall receive, from the beginning of the fourth month of such temporary posting, a differential allowance equal to the difference between the remuneration carried by his substantive grade and step and the remuneration which he would receive in respect of the step at which he would be classified in the starting grade if he were appointed to the career bracket of his temporary posting.

4 At this provision involves for the official concerned a right to specific payments by the administration, its application implies the express agreement of the appointing authority in order to 'call upon' the official to occupy temporarily the post in the higher career bracket.

5 In this instance no such agreement exists.

6 Moreover, as the decision to call upon an official to occupy a post temporarily depends on an assessment of the interests of the service, the applicant cannot acquire a right to the temporary post from the mere fact that she performs the duties attaching to the post in question.

7 Furthermore, the applicant has not shown that she in fact performs the duties involved in the temporary posting in question.

8 It is clear that on 20 December 1968 the post relating to these duties was transferred from Directorate IX-B to another department, in fact to the office of a member of the Commission.

9 The applicant maintains that, in spite of this transfer, she continues to perform the duties attaching to the said post within the abovementioned directorate.

10 This allegation cannot be accepted, as the duties which the applicant claims to perform clearly fall within the framework of Directorate IX-B and therefore cannot be regarded as constituting the temporary occupation of a post which has been transferred to another department.

11 For these reasons, the application for the award of a differential allowance in respect of a temporary posting, as provided for in Article 7 (2) of the Staff Regulations, must be dismissed as unfounded.

The application for annulment

12 The application also seeks the annulment of the decision of 16 January 1969 appointing Miss Carla Borsa to the post in Grade C1, referred to in Vacancy Notice No COM/450.

13 The applicant maintains that this decision is illegal in that it was taken after the decision to transfer this post from Directorate IX-B to the office of a member of the Commission.

14 The documents in the file show that the appointment of Miss Borsa and the transfer of the post were both decided upon on 20 December 1968.

15 However, no evidence has been brought in this instance to show that this course of action was determined by considerations other than the interests of the service.

16 Secondly, the transfer in question involved no change in the definition of duties which had been drawn up in Vacancy Notice No COM/450, and therefore did not alter the criteria on which a choice between the candidates could be made.

17 In these circumstances, this transfer cannot invalidate the contested appointment.

18 The applicant also maintains that the essential reason for this decision was that it was intended that the candidate promoted should occupy a post other than the one in question in this instance.

19 It is established that Vacancy Notice No COM/450 required a knowledge of Italian shorthand and typing.

20 The documents in the file show that it was in relation to these requirements that Miss Carla Borsa's qualifications were examined and that she was the candidate chosen.

21 On these grounds the application for annulment must be dismissed.

The alternative claim

22 The applicant claims in the alternative that the defendant be ordered to pay the costs of the action.

23 She maintains that under the terms of the third paragraph of Article 25 of the Staff Regulations 'Specific decisions regarding... promotion... of an official shall at once be posted in the premises of the institution to which the official belongs and shall be published in the Monthly Staff Bulletin of the Communities'.

24 The applicant claims that, by publishing on 16 January 1969 a decision adopted on 20 December 1968, the Commission infringed the provisions of this article and created a confusing situation capable of misleading the applicant as to her rights.

25 The applicant has brought no evidence to support this allegation.

Costs

26 The applicant has failed in her application.

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

28 However, under the terms of Article 70 of those Rules, in proceedings by servants of the Communities institutions shall bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaties establishing the European Communities;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 7 (2), 25, 29 and 45, and Article 1 of Annex III;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Monaco Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 9 July 1970.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 9 JUNE 1970[1]

Mr President,
Members of the Court,

The case before us today concerns the right to the differential allowance provided for under Article 7 of the Staff Regulations of Officials and the legality of a promotion decision. The following observations must be made regarding the facts of the case.
The applicant entered the service of the European Atomic Energy Community on 8 February 1960 and since 25 March 1962 has occupied the post of second secretary (classified in Grade C2) in the secretariat of the directorate for 'administration and individual rights' of the Directorate-General for Personnel and Aministration. In the same directorate a post of executive secretary (in Grade C1) became vacant on 18 November 1968. The occupant of this post (of Italian nationality), who had been on holiday since 23 October 1968, obtained

1 — Translated from the French version.