JUDGMENT OF THE COURT (First Chamber)
15 January 1985 *

In Case 266/83

Euridiki Samara, an official of the Commission of the European Communities, residing in Strassen, represented by Victor Biel, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 18A rue des Glacis,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Dimitrios Gouloussis, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's refusal to reconsider the classification which the applicant obtained following an open competition,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

* Language of the Case: French.

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

1. Facts and procedure

Euridiki Samara, who is a Greek national and who was a successful candidate in an open competition held by the Council of the European Communities, was appointed by a decision of 3 December 1981 a probationary official in Grade C 5, Step 3. By a decision of 22 December 1981 she was transferred to the Commission in Luxembourg, still as a probationary official in Grade C 5, Step 3. She was established in her post as from 1 June 1982 and towards the end of that year she obtained an appointment in Grade C 3, Step 1, following an open competition in which she was placed first.

The candidates who were placed second and third in that competition came from outside the institutions. They were appointed, on the basis of their experience, respectively to Grade C 3, Step 2, and Grade C 3, Step 3. Miss Samara took the view that her experience of 17 years was considerably greater than that of the other two candidates and she submitted a request to the appointing authority on 26 January 1983 asking that her classification should be reconsidered and all her relevant experience taken into account. By a decision of 16 February 1983 that request was rejected on the ground that Miss Samara's classification in Grade C 3, Step 1, was a correct application of Article 46 of the Staff Regulations in view of the fact that she had been an established official in Grade C 5 prior to her success in the competition.

On 26 April 1983 Miss Samara submitted to the Commission a complaint pursuant to Article 90 (2) of the Staff Regulations. That complaint was rejected by a decision of 5 August 1983 which was communicated to her on 13 September following.

By an application registered at the Court on 28 November 1983 the applicant brought this action against the decision of 5 August 1983 rejecting her complaint.

Upon 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.

2. Conclusions of the parties

The *applicant* claims that the Court should:

(1) Annul the decision rejecting her complaint;

(2) Declare that she is to be regarded as having been recruited pursuant to Articles 29 to 32 of the Staff Regulations and that accordingly Article 46 of the Staff Regulations is not applicable to her case;

(3) Refer the case back to the appointing authority so that it may comply with the judgment to be given;

(4) Order the Commission to pay the costs.

The *defendant* claims that the Court should:

(1) Dismiss the action as unfounded;

(2) Order the applicant to pay the costs.

3. Submissions and arguments of the parties

The *applicant* considers that in view of her experience she ought to have been classified on her appointment in 1982 in Grade C 3, Step 3, by virtue of the second paragraph of Article 32 of the Staff Regulations. Against the contested decision she advances four submissions: (i) infringement of Articles 32, 45 and 46 of the Staff Regulations, (ii) breach of the principle of equal treatment, (iii) breach of the principle of good administration, and (iv) infringement of Article 5 (3) of the Staff Regulations.

In the *Commission's* view, all those submissions are ill-founded.

The submission based on the infringement of Articles 32, 45 and 46 of the Staff Regulations

According to the *applicant*, her appointment in Grade C 3, Step 1, following an open competition, constitutes a recruitment within the meaning of Article 32 of the Staff Regulations and cannot be regarded as a promotion within the meaning of Articles 45 and 46 of the Staff Regulations. In support of that view she notes in the first place that she could not have been elevated from C 5 to C 3 by promotion in view of the fact that an official may be promoted only by a single grade and that, at the time, she did not have the seniority required under Article 45 to be promoted. Furthermore, Article 46 applies only to officials appointed to a higher grade; it does not concern officials who, following an open competition, are appointed to posts which are two or more grades higher. In that regard, the applicant then refers to the opinion of Mr Advocate General Reischl in Case 176/83 (*Van Belle* v *Council*, [1974] ECR 1361) in which he attributed a broad meaning to the concept of 'recruitment':

'... the concept "recruitment" must in fact not be understood in the narrow sense of appointment to the service, that is to say in the sense of external appointment. Rather, it is a general concept which, understood correctly, embraces all possible forms of appointment to posts.'

In the applicant's view, the uncertainty and inconvenience involved in an open competition and the fact that a successful candidate in such a competition is chosen by a selection board in accordance with the rules of Annex III to the Staff Regulations constitute additional reasons for considering that she cannot be treated in the same way as an official who has been promoted.

The *Commission* contends, on the other hand, that the applicant's appointment in Grade C 3 cannot be regarded as recruitment. Since 1 December 1981 the applicant has had a legal relationship with the Commission falling within one of the categories of administrative status provided for in the Staff Regulations. Any subsequent alteration in that relationship, in particular an improvement in her administrative status, cannot be regarded as a recruitment, since Articles 31 and 32 of the Staff Regulations are applicable only once in the course of an official's career.

The Commission then states that under Articles 45 and 46 of the Staff Regulations it is possible for the applicant to be appointed to a *higher grade* (and not necessarily to the next higher grade) following her success in an open

competition. In the first place, those provisions do not exclude promotion by decision of the appointing authority following the success of an official in an open competition, which should in principle constitute a factor in considering his merits pursuant to the second sentence of the first subparagraph of Article 45 (1). Secondly, those provisions, and in particular the first paragraph of Article 45, refer expressly to the possibility that a promotion may lead to appointment to a higher grade.

The Commission states that there are two types of promotion: on the one hand, 'promotion *stricto sensu*' by virtue of Article 45 (1), which is promotion to *the next higher grade* in the category of the official concerned, and, on the other, 'promotion *lato sensu*' within the meaning of Articles 45 and 46 of the Staff Regulations, which is promotion to *a higher grade* following success in an open competition.

The Commission submits finally that the applicant cannot rely on the opinion of Mr Advocate General Reischl in Case 176/83. The legal question in that case was whether the special procedure laid down in Article 29 (2) of the Staff Regulations was applicable to candidates who were already officials. It was in that context that Mr Advocate General Reischl attributed a broad meaning to the concept of 'recruitment'.

In her *reply*, the *applicant* contends that the distinction between promotion *stricto sensu* and promotion *latu sensu*, as advanced by the Commission, finds no support in the Staff Regulations, which refer to only one type of promotion, namely that under Article 45. It is not possible to be promoted two grades.

In its *rejoinder*, the *Commission* contends that in regarding the applicant as having been promoted, it was applying correctly the provisions in question, in particular Article 46, which applies to just such a case as that of the applicant, who following an open competition, was appointed not to the next higher grade but to *a* higher grade.

The submission based on breach of the principle of equal treatment

According to the *applicant*, all candidates, whether external or internal, in an open competition must be treated in the same way for the purposes of their classification. In this instance two external candidates whose professional experience was less than the applicant's obtained a better classification. It would be absurd to treat a candidate who has already worked in a Community institution less favourably and to favour persons who have not yet contributed to the attainment of the Community's objectives.

In the *Commission*'s view, the principle of equal treatment is not relevant. That principle must be applied in relation to officials in Category C who entered the service at the same time as the applicant and not in relation to the two external candidates who took part in the same competition. Clearly the principle of equal treatment requires that all the candidates in a competition are subject to the same conditions as regards the tests and selection. The classification of the successful candidates in a competition is, however, governed by other rules. By taking part in a competition the applicant did not cease to be a Commission official. Therefore her appointment to a higher grade fell within the scope of Article 46 of the Staff Regulations, whilst the appointment of the other successful candidates in the competition, who came from outside the institutions, fell within the scope of Article 32.

The submission based on breach of the principle of good administration

According to the *applicant*, there is in this case a breach of the principle of good administration inasmuch as the Commission did not take into consideration all the factors capable of leading to a reasonable decision. In order to effect a fair classification the Commission ought to have taken into account the experience of all the candidates concerned, including the applicant.

The *Commission* concedes that the principle advanced by the applicant certainly requires that all the factors on the basis of which its administration may reach reasonable decisions must be taken into account but adds that they must be taken into account in accordance with the rules of law applicable in the particular case. In the applicant's case those rules, in particular Article 46 of the Staff Regulations, make it impossible to take her previous experience into consideration for the purposes of her classification.

The submission based on the infringement of Articles 5 (3) of the Staff Regulations

The *applicant* points out that according to Article 5 (3) of the Staff Regulations identical conditions of recruitment and career development must apply to officials belonging to the same category or the same service. That is a fundamental provision which cannot be overridden by another provision of the Staff Regulations, such as Article 46, which, if applied to the applicant's case, would not guarantee her identical career conditions to those of the other two candidates who took part in the same competition.

According to the *Commission*, a distinction between provisions which are fundamental and those which are not does not contribute to a solution of the problem raised in these proceedings. Rather, the question is whether the applicant's classification was in fact consistent with the principle of equal treatment. The reply to that question is affirmative, as the Commission has already explained in its observations regarding the applicant's second submission.

4. Oral procedure

At the sitting of 25 October 1984 the parties presented oral argument.

The Advocate General delivered his opinion at the sitting on 29 November 1984.

Decision

1 By an application lodged at the Court Registry on 28 November 1983, Euridiki Samara, an official of the Commission of the European Communities, brought an action for the annulment of the Commission's decision of 16 February 1983 refusing to reconsider the classification in step contained in the decision of 21 December 1982 appointing the applicant a secretary/shorthand typist in the Directorate-General 'Personnel and Administration', in Grade C 3, Step 1.

2 The applicant was appointed a probationary official at the General Secretariat of the Council, as a typist in Grade C 5, Step 3, by a decision of 3 December 1981, with effect from 1 December 1981. By a decision of 22 December 1981 she was transferred to the Commission, also with effect from 1 December 1981. She was established in her post with effect from 1 June 1982. After taking part in Open Competition No COM/C/365, she was appointed to her present post in Grade C 3, Step 1.

3 On 26 January 1983 the applicant submitted a request that her classification in step should be reconsidered and all her relevant experience taken into account. That request was rejected by a decision of 16 February 1983. On 26 April 1983 she lodged a complaint against that rejection, which was in turn rejected by the Commission.

4 The dispute concerns the applicant's classification in step. The applicant takes the view that in the light of her relevant experience prior to her entry into service, she ought to have been classified in a higher step in Grade C 3, by virtue of the second paragraph of Article 32 of the Staff Regulations, the provision which governs the classification in step of an official upon recruitment.

5 In support of that claim, the applicant maintains that she was placed first in Open Competition No COM/C/365 and that she had 17 years relevant experience prior to her entry into the service of the Communities, whilst her sister, Kalliopi Samara, who was placed second in the same competition and whose professional experience was much less, was appointed to Step 2 of Grade C 3 and the candidate who was placed third even obtained Step 3 of that grade.

6 The Commission does not dispute those facts. However, it considers that the appointment of the applicant to Grade C 3 did not constitute, as she claims, a 'recruitment' within the meaning of Article 27 of the Staff Regulations, since, when she took part in Competition No COM/C/365, she already had a legal relationship with the Commission governed by the Staff Regulations. The existence

of such a relationship made it impossible to regard an improvement in her position as a recruitment to which Article 32 of the Staff Regulations would have been applicable. On the contrary, it was a promotion within the meaning of Articles 45 and 46 of the Staff Regulations or, in any event, an appointment which must be regarded as a promotion in the broad sense of the term and to which Article 46 applied. Since that was the legal position, the appointing authority had no discretion to place the applicant in a higher step in her grade.

7 The applicant pleads the following submissions: (i) infringement of the relevant articles of the Staff Regulations, in particular Articles 27, 31, 32, 45 and 46; (ii) breach of the principle of equal treatment; (iii) breach of the principle of good administration, and (iv) infringement of Article 5 (3) of the Staff Regulations, which, in the applicant's view, is a fundamental rule laying down the general principle that officials are to be subject to identical conditions of recruitment and career development.

8 In order to consider those submissions it is necessary first to determine which provisions are applicable to a case such as the applicant's. If the appointment is the result of a recruitment, the appointing authority may, taking account of the training and special experience for the post of the person concerned, allow additional seniority in his grade, which is limited to two steps (second paragraph of Article 32). If, on the other hand, the appointment falls within the scope of the provisions concerning promotion, the official appointed to a higher grade is to have, in his new grade, the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for his new grade (first paragraph of Article 46).

9 The Commission acknowledges that Articles 45 and 46 of the Staff Regulations do not apply directly to the applicant's case, since she was appointed following an open competition and not as a result of the promotion procedure provided for in Article 45. The provisions in question are, however, based on the principle that, once a person has been admitted to the body of officials of the Communities following recruitment, his position is governed by the provisions relating to the career development of officials. In particular, experience prior to entry into service is taken into consideration at the time of an official's initial appointment. It is no

longer relevant in any subsequent appointment. For those reasons, in the Commission's view, the provisions concerning promotion must be applied in a case such as that of the applicant, who was already an official and who was appointed to a higher grade following her success in a competition.

10 The applicant contests that argument on two grounds. She submits in the first place that open competitions are the normal recruitment procedure provided for in the Staff Regulations, as is clear from Article 29 in particular, and that, accordingly, the appointment of candidates who are successful in such competitions must be regarded as recruitment. She then maintains that even if it were otherwise, under Article 5 of the Staff Regulations and in accordance with the general principle of equality, the Commission would be compelled to treat all the participants in an open competition equally.

11 In that respect it must be pointed out that the differences between the provisions concerning classification in step in the event of recruitment and in the event of promotion are explained by the respective aims of Articles 32 and 46 of the Staff Regulations. While Article 32 concerns an employee who enters the service of the Communities and whose training and previous experience may within certain fairly strict limits be taken into consideration, Article 46 is intended to ensure that in the normal course of an official's career his seniority progresses with the greatest possible continuity.

12 It follows that in a case such as the applicant's the application of the provisions concerning promotion would require the appointing authority to ensure equality of treatment as between the official who has been successful in an open competition and the other officials, whilst the application of the provisions on recruitment would have the effect of ensuring equal treatment for all the successful candidates in an open competition, regardless of whether they were officials or not.

13 In either case, the application of the relevant provisions would be by analogy, since the Staff Regulations do not contain any provisions which govern the classification in step of an official appointed to another post following an open competition. Such an appointment does not follow the procedures which the Staff Regulations lay down for the promotion of officials; at the same time, it cannot be regarded as

recruitment within the strict meaning of the word, since the employee in question has already been recruited.

14 It is in that ambiguous context that the Court must appraise the Commission's refusal to take the applicant's previous experience and the fact that she was placed first in the competition into account when it appointed her to her new post on the ground that it was not possible to award seniority in step under Article 46.

15 Consideration of the facts of the case shows that the Commission should have applied the criteria defined by Article 32, since the applicant's appointment to her new post was not part of the normal development of her career. In the first place, the differences between the post of typist which she held as an official in Grade C 5 and the post of secretary/shorthand typist to which she was appointed were such that she was entitled to draw attention to her previous experience in the latter field. Secondly, her participation in an open competition organized shortly after her entry into the service placed her in direct competition with outside candidates rather than with colleagues who were eligible for promotion. In such a case, the principle that the participants in an open competition deserve equal treatment must take precedence.

16 It follows that the Commission could not rely on Article 46 of the Staff Regulations to maintain the applicant's classification in Grade 3, Step 1. The contested decision must therefore be annulled.

17 The Commission must reconsider the applicant's position and apply the criteria laid down in Article 32 of the Staff Regulations.

Costs

18 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the Commission's decision of 16 February 1983 refusing to reconsider the applicant's classification and its decision of 5 August 1983 rejecting the applicant's complaint;**

2. **Orders the Commission to pay the costs.**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 15 January 1985.

P. Heim
Registrar

G. Bosco
President of the First Chamber