Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

19 November 2020*

(Appeal – Civil service – Officials – European External Action Service (EEAS) – Policy of rotating officials – Position of Head of the European Union Delegation to Ethiopia – Decision refusing to extend the assignment to that position – Interests of the service – Principle of equal treatment – Positive discrimination in favour of the under-represented sex – Article 1d of the Staff Regulations of Officials of the European Union)

In Case C-93/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 February 2019,

European External Action Service (EEAS), represented by S. Marquardt and R. Spac, acting as Agents,

appellant,

the other party to the proceedings being:

Chantal Hebberecht, residing in Luxembourg (Luxembourg),

applicant at first instance,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra (Rapporteur), S. Rodin, D. Šváby and K. Jürimäe, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2020,

gives the following

* Language of the case: French.

Judgment

1 By its appeal, the EEAS seeks to have set aside the judgment of the General Court of the European Union of 27 November 2018, *Hebberecht* v *EEAS* (T-315/17, EU:T:2018:842; 'the judgment under appeal'), in which the General Court upheld Ms Chantal Hebberecht's action for, inter alia, annulment of the EEAS's decision of 30 June 2016 refusing her request for an extension of her posting as Head of the European Union Delegation to Ethiopia ('the contested decision').

Legal context

2 Under Article 5(3) of Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service (OJ 2010 L 201, p. 30), 'the Head of Delegation shall receive instructions from the High Representative [of the European Union for Foreign Affairs and Security Policy] and the EEAS, and shall be responsible for their execution'.

3 Article 6(2) and (10) of that decision provides:

'2. The EEAS shall comprise officials and other servants of the [Union], including personnel from the diplomatic services of the Member States appointed as temporary agents.

The Staff Regulations [of Officials of the European Union] and the [Conditions of Employment of Other Servants of the European Union] shall apply to this staff.

…

10. The High Representative [of the Union for Foreign Affairs and Security Policy] shall lay down the rules on mobility so as to ensure that the members of the staff of the EEAS are subject to a high degree of mobility. … In principle, all EEAS staff shall periodically serve in Union delegations. The High Representative [of the Union for Foreign Affairs and Security Policy] shall establish rules to that effect.'

4 Article 1d of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'1. In the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.

…

2. With a view to ensuring full equality in practice between men and women in working life, which shall be an essential element to be considered in the implementation of all aspects of these Staff Regulations, the principle of equal treatment shall not prevent the institutions of the [Union] from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

3. The appointing authorities of the institutions shall determine, by agreement, after consulting the Staff Regulations Committee, measures and actions to promote equal opportunities for men and women in the areas covered by these Staff Regulations, and shall adopt the appropriate provisions notably to redress such *de facto* inequalities as hamper opportunities for women in these areas.

…

6. While respecting the principle of non-discrimination and the principle of proportionality, any limitation of their application must be justified on objective and reasonable grounds and must be aimed at legitimate objectives in the general interest in the framework of staff policy. …'

5 Article 7(1) of the Staff Regulations provides:

'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 function group which corresponds to his grade.

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

6 Article 95(1) of the Staff Regulations provides:

'The powers conferred by these Staff Regulations on the Appointing Authority shall be exercised by the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter referred to as the High Representative) in respect of staff of the EEAS. The High Representative may determine who within the EEAS shall exercise those powers. …'

Background to the dispute and the contested decision

7 On 1 September 2013, Ms Hebberecht, an EEAS official, was appointed Head of the European Union Delegation to Ethiopia for a four-year term.

8 In the rotation exercise for 2017 and 2018, officials serving in Union delegations were informed, by memorandum from the EEAS of 22 March 2016, of the possibility of submitting a request for early rotation or for an extension of their posting. That memorandum stated that such requests would be granted only in exceptional, duly substantiated cases in the light of the interests of the service.

9 On 15 April 2016, Ms Hebberecht requested that her posting be extended for a fifth year. On 30 June 2016, the EEAS appointing authority, by the contested decision, refused that request, stating, inter alia, that 'in the interests of ensuring regular rotation of heads of delegation, a clear policy of rotation after a maximum of four years in the post has generally been implemented'.

10 Ms Hebberecht submitted a complaint, registered on 30 September 2016, against that decision, under Article 90(2) of the Staff Regulations, contending that it was contrary to the interests and continuity of the service, transparency, equal treatment and compliance with positive discrimination measures in favour of women.

11 By decision of 1 February 2017, the EEAS appointing authority rejected that complaint, stating that the administration has a broad discretion as regards what is necessary in the interests of the service and the policy of staff mobility. It also pointed out that there was no obligation to take account of Ms Hebberecht's gender when considering her request that her posting be extended.

The procedure before the General Court and the judgment under appeal

12 By application lodged at the Registry of the General Court on 15 May 2017, Ms Hebberecht brought an action for, first, annulment of the contested decision and, second, compensation for non-pecuniary damage allegedly suffered.

13 In support of that claim for annulment, she raised three pleas in law, alleging infringement of the interests and continuity of the service, the obligation of transparency and the principle of equal treatment.

14 The General Court rejected the first two pleas as unfounded. It also rejected the first two parts of the third plea by which Ms Hebberecht alleged, first, discrimination on grounds of race and, second, that extensions had been granted to other heads of delegation. However, it upheld the third part of the third plea, concerning the measures to be taken in respect of women.

15 In that regard, the General Court held, first of all, in paragraphs 89 to 91 of the judgment under appeal, that, although Article 1d(2) and (3) of the Staff Regulations indicates the EU legislature's willingness to give equality between men and women an 'essential' place in decisions implementing 'all' aspects of the Staff Regulations, such a willingness was not, however, reflected in the position adopted by the EEAS, which, on the contrary, stated that, in the absence of provisions implementing those articles of the Staff Regulations, it was not required to offset the under-representation of women in certain positions.

16 The General Court then pointed out, in paragraph 93 of the judgment under appeal, that, in Article 1d(2) of the Staff Regulations, the EU legislature not only provides for the adoption of measures by the EU institutions but states, without prescribing any conditions, that equality between men and women is an 'essential' element to be considered in the implementation of 'all' aspects of the Staff Regulations. It concluded, in paragraph 94 of the judgment, that, by excluding equality between men and women from the considerations underlying the adoption of the contested decision, the EEAS infringed Article 1d(2) and (3) of the Staff Regulations, and then stated, in paragraph 95 of the judgment, that that error was obvious.

17 Lastly, after stating in paragraph 96 of the judgment under appeal that, according to settled case-law, 'the annulment of an administrative decision due to an error is not justified where that error had no decisive influence on the content of that decision', the General Court found, in paragraph 97 of the judgment, that the operative part of the contested decision could have been different if equality between men and women had not, as a matter of principle, been excluded at the outset from the assessment undertaken by the EEAS.

18 Consequently, the General Court annulled the contested decision. It also dismissed the claim for damages as inadmissible.

Forms of order sought by the parties before the Court of Justice

19 By its appeal, the EEAS claims that the Court should:

– set aside the judgment under appeal;

– dismiss the action at first instance as unfounded; and

– order Ms Hebberecht to pay the costs.

20 Ms Hebberecht has not filed a response.

The appeal

The EEAS's submissions

21 In support of its appeal, the EEAS relies on a single ground of appeal, alleging that the General Court erred in law in that it, first, interpreted Article 1d(2) of the Staff Regulations as meaning that that provision 'contains a principle that is directly applicable to individual decisions taken by the institution pursuant to the Staff Regulations [and] confers an individual right on the official concerned' and, second, disregarded, in that context, 'the way in which the EEAS applies the policy of gender equality under the policy of mobility and rotation between the EEAS headquarters and the Union delegations …'.

22 As regards, first, the alleged misinterpretation of Article 1d(2) of the Staff Regulations, the EEAS submits that that provision sets out only a general objective, which is not directly applicable in individual decisions such as the contested decision. Paragraph 2 should be read in conjunction with paragraph 3 of that article, which requires the EU institutions to determine the measures to be introduced in order to achieve that objective.

23 In that regard, the EEAS points to the use, in the wording of Article 1d(2) of the Staff Regulations, of the phrase 'to be considered', which leaves the administration broad discretion. That interpretation is unaffected by the phrases 'all aspects of these Staff Regulations' or 'essential element' highlighted by the General Court in the judgment under appeal. According to the EEAS, '[considering]' equality between men and women is not synonymous with 'implementing equal opportunities'.

24 Article 1d(2) of the Staff Regulations does not, therefore, impose any direct obligation on the EU institutions. It merely allows them to adopt measures of positive discrimination by way of derogation from the principle of equal treatment laid down in paragraph 1 of that article. In that context, paragraph 3 of that article directs those institutions to adopt a general policy on equality between men and women with the specific objective of redressing inequalities affecting women. That policy should then 'be considered' in specific situations.

25 It follows that, contrary to what the General Court held in paragraphs 92 and 93 of the judgment under appeal, the first part of Article 1d(2) of the Staff Regulations is subject to the adoption of implementing measures by the EU institutions and cannot therefore be applied directly and in isolation without giving rise to arbitrary or contradictory decisions. The second part of Article 1d(2), which follows the general objective to be pursued, enables the EU institutions to adopt measures of positive discrimination in favour of the under-represented sex or to prevent disadvantages.

26 Such an interpretation of Article 1d(2) of the Staff Regulations is confirmed by the legislative history of that provision. The EU legislature's intention was not to set out in that article directly applicable rights and obligations, but rather to encourage the EU institutions to adopt a policy and implementing measures in respect of equality between men and women.

27 As regards, second, the claim that the General Court erred in its assessment of the EEAS's policies on the rotation of its officials, the EEAS submits, in essence, that even if the principle of equality between men and women, guaranteed by Article 1d(2) of the Staff Regulations, were directly applicable, it would not apply to a decision refusing to extend the term of office of a head of Union delegation since such a decision does not entail a choice between several persons.

28 First of all, the EEAS takes issue with the General Court for having distorted its arguments in paragraph 90 of the judgment under appeal. It submits that it never asserted in general terms that considerations of gender are outside the interests of the service. It submitted that a decision on requests to extend the terms of office of heads of Union delegations is by nature individual and

neutral as regards the relevant person's gender, since it is not a decision on the filling of a vacancy for which the administration must make a choice between several candidates. It states in that regard that it applies an equal opportunities policy in the context of rotations between the EEAS headquarters and the delegations.

29 The EEAS then states that it is clear from Article 6(10) of Decision 2010/427 that all EEAS staff are subject to a 'high degree of mobility', which results in the regular rotation of that staff in Union delegations. Those elements, which define the interests of the service, are reflected in the EEAS's rotation policy.

30 The EEAS states that, in practice, account is taken of the need to promote equal opportunities for men and women as part of its general rotation policy, namely when selecting candidates for vacancies in Union delegations. It is therefore necessary to distinguish between, on the one hand, a competitive situation between various candidates and, on the other, an individual request to extend a posting, such as that at issue in the present case, which is exceptional and should 'be dealt with first and foremost in the light of the interests of the service and the general objective of ensuring regular rotation between the headquarters and the delegations and vice versa'.

31 Even if Article 1d(2) of the Staff Regulations were to require that account be taken of the principle of equality between men and women when adopting an individual decision, such as that at issue in the present case, the assessment of whether it is appropriate to extend a posting should be carried out primarily having regard to the interests of the service.

32 It follows that the policy of equal opportunities for men and women must be applied at the time of the annual rotation of staff between the EEAS headquarters and the Union delegations, or between the Union delegations, when vacancy notices for the positions concerned are published. By contrast, such a policy could 'hardly be applied to decisions extending a term of office, which are by their nature individual decisions for which there is no competition between several candidates'. The EEAS would then be obliged to compare requests for extension from women and men and to favour those from women, irrespective of whether that is in the interests of the service, which is, however, as stated in paragraph 77 of the judgment under appeal, a decisive factor in the adoption of the decision.

33 In that context, the EEAS disputes the General Court's assertion, in paragraph 97 of the judgment under appeal, that the operative part of the contested decision could have been different if equality between men and women had not been excluded at the outset from the assessment carried out. It submits that it has a policy of favouring positively applications from the under-represented sex for positions of responsibility where the merits of the candidates in question are equal to those of male candidates, which assumes that the candidates are in a comparable situation. Such a practice is illustrated by the documents which were provided to the General Court, at its request, but which it failed to take into account.

34 According to the EEAS, extending Ms Hebberecht's posting merely because she was of a particular gender would not have been a measure adopted pursuant to the principle of equal treatment, but a measure of positive discrimination in favour of women.

35 Finally, the EEAS states that it is contradictory to suggest that Ms Hebberecht's posting should have been extended on the basis that she is a woman after having rejected, as the General Court did in paragraph 44 of the judgment under appeal, the plea alleging infringement, by the contested decision, of the interests and continuity of the service. That would amount to finding that Article 1d(2) of the Staff Regulations gives an official who is of the under-represented sex an individual right to have her term of office extended, which the EEAS strongly disputes.

Findings of the Court

36 By its single ground of appeal, the EEAS alleges, in essence, that the General Court erred in law in that, first, it misinterpreted Article 1d(2) of the Staff Regulations by finding that that provision creates a directly applicable obligation on the part of the institutions in the absence of implementing measures and, second, it held that that provision is applicable in the context of the contested decision, namely an individual decision to extend the term of office in a position, which does not entail a choice between several persons.

37 As regards, first, the EEAS's argument that Article 1d(2) of the Staff Regulations is not applicable in the absence of implementing measures adopted by the institutions, it must be noted at the outset that, as the General Court stated, in essence, in paragraph 84 of the judgment under appeal, that provision comprises two parts. The first emphasises that the principle of equality between men and women is an essential element in 'all' aspects of the implementation of the Staff Regulations and the second that that principle does not prevent the EU institutions from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity.

38 While the principle of equality between men and women, as an individual right, does not require, for the purposes of its application, any implementing measure (see, by analogy, concerning Article 157(1) TFEU, judgment of 8 April 1976, *Defrenne*, 43/75, EU:C:1976:56, paragraph 24), that is not, however, the case with specific advantages intended to make it easier for the under-represented sex to pursue a vocational activity, referred to in the second part of Article 1d(2) of the Staff Regulations.

39 The second part of that provision is specifically and exclusively designed to authorise measures which, although discriminatory against one gender, are in fact intended to eliminate or reduce actual instances of inequality (see, by analogy, judgment of 28 March 2000, *Badeck and Others*, C-158/97, EU:C:2000:163, paragraph 19).

40 A measure that is intended to give priority to the promotion of women in sectors of the European public service where they are under-represented must thus be regarded as compatible with Article 1d(2) of the Staff Regulations if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates (see, by analogy, judgments of 28 March 2000, *Badeck and Others*, C-158/97, EU:C:2000:163, paragraph 23, and of 30 September 2004, *Briheche*, C-319/03, EU:C:2004:574, paragraph 23).

41 Those conditions are guided by the fact that, in determining the scope of any derogation from an individual right such as equal treatment of men and women, due regard must be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued (see, by analogy, judgment of 30 September 2004, *Briheche*, C-319/03, EU:C:2004:574, paragraph 24).

42 Article 1d(6) of the Staff Regulations provides that, while respecting the principle of non-discrimination and the principle of proportionality, any limitation of their application must be justified on objective and reasonable grounds and must be aimed at legitimate objectives in the general interest in the framework of staff policy.

43 Furthermore, the application of criteria which are manifestly intended to ensure substantive, rather than formal, equality must be transparent and amenable to review, so as to preclude any arbitrary assessment of the qualifications of candidates (see, by analogy, judgment of 6 July 2000, *Abrahamsson and Anderson*, C-407/98, EU:C:2000:367, paragraph 49).

44 It follows that individual decisions granting specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity cannot be adopted in the absence of general measures implementing the second part of Article 1d(2) of the Staff Regulations satisfying the requirements set out in paragraphs 40 and 41 above.

45 Accordingly, the EEAS is correct to contend that the second part of Article 1d(2) of the Staff Regulations, according to which the principle of equal treatment does not prevent the EU institutions from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity, read in conjunction with Article 1d(3), constitutes an enabling provision that cannot be applied directly in the absence of implementing measures.

46 However, it cannot be inferred from the foregoing that, in the absence of measures implementing the second part of Article 1d(2) of the Staff Regulations, an institution is relieved of the obligation to take account of the principle of equality between men and women when adopting an individual decision, such as the contested decision.

47 As the General Court pointed out in paragraph 93 of the judgment under appeal, the EU legislature states, in the first part of Article 1d(2) of the Staff Regulations, that equality between men and women is an 'essential' element to be considered in the implementation of 'all' aspects of the Staff Regulations, without that declaration being accompanied by any time limit or condition, and without it being subject to the adoption of measures.

48 The General Court correctly concluded, in paragraphs 94 and 97 of the judgment under appeal, that, by excluding equality between men and women from the considerations surrounding the adoption of the contested decision, despite that element being regarded as 'essential' by the EU legislature, the EEAS infringed Article 1d(2) and (3) of the Staff Regulations, which constituted an error of law giving grounds for the annulment of the contested decision.

49 As regards, second, the EEAS's argument that, in any event, Article 1d(2) of the Staff Regulations does not apply to a decision refusing to extend a head of delegation's term of office since that decision does not entail a choice between several persons, it should be borne in mind, as stated in paragraph 38 above, that the principle of equal treatment between men and women is a directly applicable principle.

50 As the Advocate General noted, in essence, in points 43 and 45 of her Opinion, the wording of the first part of Article 1d(2) of the Staff Regulations does not make the application of that principle subject to any conditions.

51 Accordingly, the mere fact that a decision, such as the contested decision, which concerns the extension of the posting of an official in a managerial position does not entail a choice between several candidates does not mean that considerations of equality between men and women must not be taken into account when it is adopted.

52 Such considerations could militate in favour of extending the posting of a serving official if it appeared, in the rotation procedure established by the EEAS, that that official's gender is under-represented in equivalent positions and that, if there are no officials of the same gender who might be posted to that position if the request for extension were rejected, an official of the other gender would be assigned to the vacancy.

53 Similarly, the fact that a policy of equal opportunities for men and women is applied as part of the general candidate selection policy for vacancies in EU delegations does not mean that the principle of equality between men and women may not be applied when adopting an individual decision to extend a head of delegation's term of office. That principle, which excludes all discrimination on grounds of

sex, is not limited to competitive situations between candidates, but also requires an examination of whether the treatment accorded, in this case to a woman, would have been accorded equally to a man in a comparable situation.

54 The EEAS submits, however, that, as regards the adoption of the contested decision, taking into consideration the interests of the service rules out consideration of the principle of equal treatment between men and women. It states, inter alia, that it is contradictory to annul the contested decision on the ground that Ms Hebberecht's request for extension should have been granted on the basis that she is a woman, after having rejected, in paragraph 44 of the judgment under appeal, the first part of the first plea, alleging that the interests of the service required that the request for extension be granted.

55 In that regard, it must be borne in mind that the EU institutions have a broad discretion when adopting decisions concerning the organisation of their departments to suit the tasks entrusted to them and in the assignment of staff, on condition that that is in the interests of the service and in conformity with the principle of assignment to an equivalent post (see, to that effect, judgment of 23 March 1988, *Hecq* v *Commission*, 19/87, EU:C:1988:165, paragraph 6). However, it is for those institutions, when adopting decisions relating to the organisation of their departments, to weigh up the various interests at stake, taking into account, inter alia, the principle of equal treatment and the interests of the service.

56 Accordingly, it is not contradictory to hold, as the General Court did, in essence, in the judgment under appeal, first, that the EEAS did not commit a manifest error of assessment in the light of the interests of the service in rejecting Ms Hebberecht's request for extension and, second, that it cannot be ruled out that considerations relating to equality between men and women might militate in favour of granting that request, with the result that the EEAS was required to take into account, as one factor, the need to ensure equality between men and women.

57 The EEAS is therefore wrong to maintain that the principle of equal treatment between men and women cannot be taken into account when adopting an individual decision, such as the contested decision, which does not entail a choice between several persons.

58 It follows that the single ground of appeal must be rejected as unfounded, as must the appeal.

Costs

59 Under Article 137 of the Rules of Procedure of the Court of Justice, applicable to the procedure on appeal pursuant to Article 184(1) of those rules, a decision as to costs is to be given in the judgment or order which closes the proceedings.

60 Since Ms Hebberecht has not submitted a written pleading to the Court and, therefore, has not incurred costs, the EEAS must be ordered to bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Dismisses the appeal;

2. Orders the EEAS to bear its own costs.

[Signatures]