# JUDGMENT OF THE COURT (Second Chamber)
20 June 1985 *

In Case 228/84

**Maurice Pauvert**, an official of the Court of Auditors of the European Communities, residing at 8 Cité Mameranus, Mamer, assisted and represented by Victor Biel, of the Luxembourg Bar, with an address for service in Luxembourg at Mr Biel's Chambers, 18 A Rue des Glacis,

applicant,

v

**Court of Auditors of the European Communities**, represented by its Secretary, Jean-Aimé Stoll, acting as Agent, and by Mr Marty-Gauquié, acting as co-Agent, assisted by Lucette Defalque, of the Brussels Bar, with an address for service in Luxembourg at the offices of the Court of Auditors, 29 Rue Aldringen,

defendant,

APPLICATION for a declaration that the appointing authority's memorandum of 17 March 1983 (No 2517) has the effect of promoting the applicant from Grade D 2 to D 1,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: Sir Gordon Slynn
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 6 June 1985,

gives the following

* Language of the Case: French.

# JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

## Decision

1 By application lodged at the Court Registry on 12 September 1984, Maurice Pauvert, an official of the Court of Auditors, who entered the service of the Commission as a chauffeur in 1973 and was transferred to the Court of Auditors in Grade D 2 in 1978, brought an action for a declaration that the memorandum dated 17 March 1983 sent to him by the appointing authority has the effect of promoting him from Grade D 2 to D 1 and for the annulment as far as necessary of the appointing authority's memorandum of 12 July 1983 rejecting the applicant's complaint concerning the same matter.

2 It appears from the documents before the Court that on 16 February 1983 the Court of Auditors published Vacancy Notice No CC/D/1/83 for the post of 'head of group — chauffeur' (Grade D 1). According to the notice, candidates for the post had to have fifteen years' experience as a chauffeur and 'requests for transfer' had to be lodged by 10 March 1983 at the latest. Following publication of that notice only one official at the Court of Auditors, Mr Q., who was in Grade D 2 and eligible for promotion, submitted his application with a request for promotion.

3 However, the appointing authority did not appoint that candidate but offered the post to the applicant in these proceedings, as may be seen from the contested Memorandum No 2517 of 17 March 1983 sent to him by the President of the Court of Auditors and containing *inter alia* the following passages:

'As I informed you today, ...I intend to fill the Grade D 1 vacancy (for a chauffeur) at the Court.

...

After considering your abilities I am prepared to appoint you to the D 1 post if you will let me know that you are able to carry out the duties specified and that you are in agreement. If so, I shall proceed to your appointment ... '.

On the following day the applicant signified his agreement to the offer.

4 However, that appointment did not take place either. Instead, on 7 July 1983, the President of the Court of Auditors, acting as the appointing authority, signed a new vacancy notice, No CC/D/2/83. The notice stated that it 'cancels and replaces Vacancy Notice No CC/D/1/83' and that candidates for the post in question must have 'a minimum of fifteen years' relevant experience of which eight must be as a chauffeur'.

5 Following the second notice, the appointing authority made a comparative assessment of the merits of all the officials eligible for promotion, including the applicant and Mr Q. Although the Head of the Personnel and Administration Division had suggested promoting Mr Q., the appointing authority decided not to fill the post by promotion but to use the internal competition procedure. Internal Competition Notice No CC/D/2/83 was accordingly published on 16 May 1984. It stated that the competition was open to candidates 'furnishing evidence of experience related to Category D duties of a minimum of fifteen years, of which eight must be as a chauffeur'.

6 On 27 June 1984 the applicant lodged a complaint under Article 90 (2) of the Staff Regulations requesting the appointing authority in substance 'to make [his] appointment to the vacant D 1 post official, as envisaged by Memorandum No 2517'. That complaint was expressly rejected by the appointing authority in a memorandum dated 12 July 1984 addressed to the applicant and worded as follows:

'...

Memorandum No 2517 of 17 March 1983 does indeed constitute an undertaking on the appointing authority's part to fill the post of head of group — chauffeur (Grade D 1) by promoting you.

As required by Article 45 (1) of the Staff Regulations, that undertaking was entered into after a comparative assessment of the merits of officials who were eligible for promotion. ... That assessment was obviously made in the light of the conditions laid down in Vacancy Notice No CC/D/1/83.

However, after Memorandum No 2517 of 17 March 1983 had been sent to you, the appointing authority's attention was drawn to the fact that, although you could then show fifteen years' or more of relevant experience, it was not all gained as a chauffeur, as the vacancy notice required ('fifteen years' experience as a chauffeur').

...

That fact alone was liable to render any measure promoting you to the vacant post illegal and to lead to its annulment in the event of court proceedings.

...

However, in order to safeguard the rights of all persons concerned, including your own, and in deference to the principle of legitimate expectation, the appointing authority decided to commence the whole procedure afresh.

...

Far from giving you cause for complaint, the new vacancy notice made you eligible for inclusion amongst the officials who could be promoted to the post.

...

However, [the] new comparative assessment showed that several officials in Category D had experience amply satisfying the conditions laid down in Vacancy Notice No CC/D/2/83 of 7 July 1983 and also very similar occupational backgrounds.

Exercising its discretion in the matter but acting in the interests of the service and of all the persons concerned, the appointing authority then decided not to fill the post by promotion but to use the internal competition procedure for which Article 29 of the Staff Regulations expressly provides, since it considered that a competition based on qualifications and tests organized by an impartial, independent selection board would be the most sensible way of deciding between the candidates.

In so acting the appointing authority has given you no cause for complaint. You are naturally at liberty to submit your application and to take part in the competition.

...'.

7 In support of his application the applicant contends first of all that Memorandum No 2517 constitutes a valid decision to promote him. As soon as that memorandum was communicated, the appointing authority had no further discretion; once the applicant had expressed his agreement to its terms the promotion was therefore complete. Furthermore, if the appointing authority had considered that the error in the appraisal of the applicant's qualifications precluded his appointment, the memorandum should in any event have taken effect after the publication of the second vacancy notice, the conditions of which were met in full by the applicant. The second notice therefore removed any irregularity which might have been committed at the outset, so that between the dates on which the notices were published the nullity was at most 'relative and potential' and could no longer be pleaded as against the applicant.

8 In the second place, the applicant alleges a breach of the principle of legitimate expectation. He points out that he had no reason to suspect any irregularity in the procedure for his promotion, since it is for the appointing authority to reduce, if necessary, the experience required, as indeed it did in the present case.

9 Lastly, the applicant alleges a breach of the principle of sound administration. He points out that the appointing authority acknowledges having made a mistake when it undertook to promote him. Such a mistake is quite sufficient to prove that there was a momentary breach of the aforesaid principle.

10 The Court of Auditors points out that the undertaking to fill the vacant post in question by promoting the applicant to the post was the result of a mistaken appraisal of the facts by the appointing authority due to insufficient details in the applicant's personal records. When it became aware of the facts, the appointing authority decided to recommence the appointment procedure in accordance with the law and in such a way as to enable the applicant to compete for the vacant post.

11 According to the Court of Auditors, the undertaking to promote the applicant contained in Memorandum No 2517 is vitiated by mistake of fact and must therefore be regarded as non-existent, null and void. The publication of Vacancy Notice No CC/D/2/83 did nothing to change the situation, since the undertaking

could not have been fulfilled after publication of that notice except by infringing the provisions of the Staff Regulations, in particular Articles 29 and 45.

12 The Court of Auditors disputes that the conditions for the application of the general principle of the protection of legitimate expectation are satisfied in this case. No legitimate expectation can arise if there is a breach of the provisions of the Staff Regulations and the applicant must have known, or ought to have known, that he did not satisfy the conditions laid down in Vacancy Notice No CC/D/1/83 and therefore that a measure promoting him would have been vitiated by illegality.

13 Lastly, the Court of Auditors considers that the appointing authority acted wholly in accordance with the principle of sound administration since it had corrected its mistake by observing the law whilst taking account of the applicant's interests and aspirations.

14 For the purposes of the resolution of this dispute it should be observed first of all that the appointing authority never adopted a decision promoting the applicant to the post in question and that, once it had discovered its error, it was impossible for it to promote him to the post since this would have been contrary to the conditions set out in the vacancy notice. The appointing authority therefore had no other choice than to recommence the procedure, which necessarily meant revoking the undertaking given to the applicant. It follows that the applicant may not base his claims on the validity of that undertaking.

15 Since the applicant was in the best position to know that he did not fulfil the conditions laid down in the vacancy notice, he is also debarred from founding his action on a breach of the principle of the protection of legitimate expectation because such expectation on his part may not be created by an undertaking vitiated by the mistake of fact described above.

16 As far as concerns the complaint against the administrative procedure in general, it must be recognized that the appointing authority should have informed the applicant about the situation and the necessity for it to revoke its undertaking as soon as it had discovered its error. None the less, since the appointing authority

gave a full explanation in reply to the applicant's complaint and took great care, when the procedure was recommenced, to safeguard his interests by giving him every opportunity to maintain his application and finally to compete for the post in question, this last complaint cannot be upheld.

17 For those reasons the application must be dismissed in its entirety.

## Costs

18 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure, institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT (Second Chamber)

hereby:

**(1) Dismisses the application;**

**(2) Orders the parties to pay their own costs.**

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 20 June 1985.

P. Heim
Registrar

O. Due
President of Second Chamber