JUDGMENT OF THE COURT (Sixth Chamber)
9 August 1994 *

In Case C-398/93 P,

Lars Bo Rasmussen, an official of the Commission of the European Communities, residing in Dalheim (Grand Duchy of Luxembourg), represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 6 July 1993 in Case T-32/92 between Lars Bo Rasmussen and the Commission, seeking to have that judgment set aside and seeking the annulment of the Commission's decision not to accept the candidature submitted by the appellant following publication of Notice of Post No 587 and to call for applications from external candidates for a temporary post in Grade A 3,

the other party to the proceedings being:

Commission of the European Communities, represented by Ana Maria Alves Vieira, of its Legal Service, acting as Agent, assisted by Alberto Dal Ferro, of the

* Language of the case: French.

Vicenza Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, also of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Diez de Velasco, C. N. Kakouris, F. A. Schockweiler and P. J. G. Kapteyn (Rapporteur), Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 2 June 1994,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 6 September 1993, Lars Bo Rasmussen brought an appeal, under Article 49 of the Protocol on the Statute of the Court of Justice of the EEC and the corresponding provisions of the Protocols on the Statutes of the Court of Justice of the ECSC and the EAEC, against the judgment of the Court of First Instance of 6 July 1993 in Case T-32/92 *Rasmussen* v *Commission* [1993] ECR II-765, in which the Court of First Instance

dismissed his application for the annulment of the Commission's decision not to accept his candidature for the post of Director of the Commission's Press and Information Office in Lisbon, together with the decision to call for applications from external candidates for a temporary post in Grade A 3.

2 It is apparent from the findings of the Court of First Instance in its judgment that the Commission has established a rotation system with respect to the staff for its press and information offices in the Member States. That system is governed by provisions adopted on 24 November 1976 pursuant to which, in the context of a general redistribution, officials are re-assigned together with their budgetary posts.

3 Within the framework of that rotation system, the Commission published Notice of Post No 587 for a Director of the Lisbon Office. Mr Rasmussen, who is an official of the Commission in Grade A 5, submitted his candidature on 28 November 1990. However, the rotation committee decided that none of the candidates possessed all the necessary qualifications. The appointing authority decided to proceed no further under the rotation procedure and to assign a temporary post in Grade A 3 to the Commission's office in Portugal. It therefore initiated the Commission's procedure for the external selection of temporary staff.

4 Upon rejection of the complaint which he had lodged under Article 90 of the Staff Regulations, Mr Rasmussen brought proceedings before the Court of First Instance by application lodged on 30 April 1992.

5 Mr Rasmussen based his application on two pleas in law: first, that Articles 4 and 29 of the Staff Regulations had been infringed in so far as they require that priority be given to filling vacant posts by means of promotion or transfer and, sec-

ondly, that Article 45 of the Staff Regulations had been infringed in so far as it requires a proper comparative examination of applications for promotion or transfer.

6 The Court of First Instance rejected the application on the ground that 'the provisions of Articles 4, 29 and 45 of the Staff Regulations are not applicable to the procedure at issue' (see paragraph 42 of the judgment under appeal).

7 Mr Rasmussen bases his appeal on a single plea in law to the effect that Articles 4, 29 and 45 of the Staff Regulations have been infringed by the Court of First Instance. The plea is divided into two limbs. The Court of First Instance is alleged to have infringed those provisions by holding that they are not applicable because Notice of Post No 587 fell under the rotation procedure and the external selection procedure had been conducted on the basis of Article 2(a) of the Conditions of Employment of Other Servants of the European Communities (hereinafter the 'employment conditions of other servants'), whereas (first limb), since the rotation procedure had been terminated, the general provisions governing recruitment should have been implemented, and (second limb) Article 9 of the employment conditions of other servants does not, in the context of the recruitment procedure, provide for any distinction between members of the temporary staff according to whether they are appointed to a permanent or a temporary post.

The first limb of the plea in law

8 The Court of First Instance held (paragraph 37) that, in so far as the purpose of the procedure initiated by Notice of Post No 587 was to find an official who would be re-assigned together with his post under the rotation system, the procedure could not relate to the filling of a vacant post within the meaning of Articles 4

and 29 of the Staff Regulations. It further stated (paragraph 38) that that conclusion was not affected by the existence of a job of Director of the Lisbon Office or by the subsequent engagement of a member of the temporary staff in Grade A 3 to that job.

9 Mr Rasmussen complains that the Court of First Instance failed to apply Articles 4, 29 and 45 of the Staff Regulations. He maintains that following termination of the rotation procedure the general provisions governing recruitment should have been implemented. He points out that the latter procedure concerns assignment to permanent posts and submits that, since the job of Director of the Lisbon Office is in the nature of a permanent post, the recruitment should have been governed by Articles 4, 29 and 45 of the Staff Regulations.

10 It should first be noted that the procedure at issue forms part of the rotation system established by the aforementioned provisions of 24 November 1976 and that that system is based on the principle that the official is re-assigned together with his post.

11 The Court of Justice has consistently held that the formalities prescribed by Articles 4 and 29 of the Staff Regulations do not apply when an official is re-assigned with his post because such a transfer does not give rise to a vacant post (see Joined Cases 161/80 and 162/80 *Carbognani and Coda Zabetta* v *Commission* [1981] ECR 543, paragraph 19). Contrary to the appellant's contention, the rotation procedure does not involve a transfer within the meaning of the Staff Regulations, even if the terminology employed by the Commission is occasionally inappropriate (paragraph 20 of *Carbognani*).

12 Accordingly, the Court of First Instance was right to hold that the procedure could not concern the filling of a vacant post within the meaning of Articles 4 and 29 of the Staff Regulations and that, consequently, neither those provisions nor Article 45 of the Staff Regulations, which relates only to promotions within the meaning of the said articles, were applicable.

13 That conclusion is in no way affected by Mr Rasmussen's contention that the existence of a permanent post can be deduced in this instance from the fact that consideration had been given to assigning an official to the job of Director of the Lisbon Office and that, after termination of the rotation procedure, the general provisions governing recruitment should have been implemented.

14 In that regard, the Court of First Instance was right to observe first of all (paragraph 39) that 'the question of the existence of a given "job", as opposed to a "post", falls within the competence of the institution with respect to its departmental organization, whereas the question of the existence of a vacant post depends upon whether there is, amongst the total number of permanent posts set out in the budget, a post that is not filled'.

15 It follows, as the Court of First Instance correctly held (paragraph 39), that 'in so far as the budget does not define the duties amongst which the total number of posts is to be distributed, the existence in Lisbon of a vacant post within the meaning of the Staff Regulations cannot be inferred from the mere fact that the job of Director of the Lisbon Office has remained temporarily unfilled following the re-assignment of the former director together with his post'.

16 With regard to the subsequent recruitment of a member of the temporary staff, the Court of First Instance found (paragraph 40) that 'the said member of the temporary staff was appointed under Article 2(a) of the Conditions of Employment of Other Servants of the European Communities ..., that is to say, to fill a post which is included in the list of posts appended to the section of the budget relating to each institution and which the budgetary authorities have classified as temporary'.

17 Consequently, as the Court of First Instance stated (paragraph 40), 'it is not therefore possible to infer from the engagement of a member of the temporary staff under Article 2(a) of the employment conditions of other servants — as distinct

from an engagement under Article 2(b) of those conditions, which concerns staff engaged to fill temporarily a permanent post — the prior existence of a permanent post'.

18 Since the Court of First Instance has committed no error in law in that regard, the first limb of the plea in law must be rejected as unfounded.

The second limb of the plea in law

Admissibility

19 The Commission contends that, in so far as Mr Rasmussen purports to challenge the Commission's decision to assign a temporary post in Grade A 3 to the Lisbon office following termination of the rotation procedure, he is introducing a new ground of action which changes the subject-matter of the proceedings before the Court of First Instance and must be declared inadmissible in accordance with Article 113(2) of the Rules of Procedure.

20 Mr Rasmussen states that, by the second limb of his plea in law, he is asking the Court to examine whether, by drawing a distinction between members of the temporary staff according to whether they are called on to fill a permanent post or a post of a temporary nature, the Court of First Instance has infringed Article 9 of the employment conditions of other servants.

21 In that connection the Court has consistently held that an appeal is admissible only in so far as it is claimed that the decision of the Court of First Instance is incompatible with the rules of law the application of which it had to ensure (see Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 13).

22 Since Article 9 of the employment conditions of other servants is one of the rules of law the application of which the Court of First Instance has to ensure and since the appeal complains that the Court of First Instance failed to observe it, the second limb of the plea in law must be declared admissible.

Substance

23 Article 9 of the employment conditions of other servants states that 'temporary staff shall not be engaged for any purpose other than that of filling, in accordance with this Title, vacant posts included in the list of posts appended to the section of the budget relating to each institution'.

24 In the present case, no permanent post was vacant, because, as the Court of First Instance pointed out at paragraph 36 of the judgment under appeal, the person filling the job of Director of the Lisbon Office had been re-assigned to Tokyo together with his post, in accordance with the rotation procedure.

25 It has already been observed that Articles 4, 29 and 45 of the Staff Regulations are not applicable because no permanent post is vacant within the meaning of those provisions.

26 As the Court of First Instance pointed out, a member of temporary staff was engaged to fill a post in the list of posts appended to the section of the budget relating to each institution which the budgetary authorities have classified as temporary.

27 That recruitment could therefore only have been effected under Article 2(a) of the employment conditions of other servants. By holding that it is not possible to infer from the engagement of a member of the temporary staff under Article 2(a) of the employment conditions of other servants the prior existence of a permanent post, unlike the situation in which a member of the temporary staff is engaged under Article 2(b) of those conditions, the Court of First Instance has in no way infringed Article 9 of the said conditions. That provision merely states that the purpose of engaging a member of the temporary staff is to fill a vacant post provided for in the budget. It does not prohibit the division of budgetary posts into permanent and temporary posts.

28 Since the Court of First Instance has committed no error in law in that regard, the second limb of the plea in law must be declared unfounded.

29 It follows from the foregoing that the appeal must be dismissed in its entirety.

Costs

30 Article 70 of the Rules of Procedure provides that in proceedings between the Communities and their servants the institutions are to bear their own costs. However, by virtue of Article 122 of those rules, Article 70 is not to apply to appeals brought by officials or other servants of the institutions. Since the appellant has failed in his submissions, he must be ordered to pay the costs pursuant to Article 69(2) of the Rules of Procedure.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Mancini Diez de Velasco Kakouris

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber