

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 25 April 2002 ¹

1. In the present case the appellant, Mr Hirschfeldt, asks the Court of Justice to annul the judgment in Case T-166/00 ² (the judgment under appeal) and the two decisions of the European Environment Agency (the EEA) which were at issue in that case.

The relevant legislative provisions

3. The Staff Regulations ³ lay down general provisions for the recruitment and transfer of officials.

4. Article 8 of the Staff Regulations provides:

‘An official seconded to another institution of the European Communities may, after a period of six months, apply to be transferred to that institution.

If the parent institution of the official and the institution to which he has been seconded both consent to the transfer, the official shall be deemed to have served his

2. The judgment under appeal concerned two decisions taken by the EEA in its capacity as appointing authority. The first decision related to the cancellation of an internal competition for the recruitment of an official of Grade A 4/A 5 at the EEA. The second concerned the transfer, at his own request, of Mr Hirschfeldt from the Commission to the EEA. By the judgment under appeal the Court of First Instance dismissed Mr Hirschfeldt’s claim for the annulment of the first decision and of the second decision in so far as it categorised him as an official of Grade A 5 (rather than of Grade A 4).

1 — Original language: English.

2 — *Hirschfeldt v Agence européenne pour l’environnement* [2001] ECR-SC II-157.

3 — Staff Regulations of Officials of the European Communities, introduced by Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to Officials of the Commission, OJ English Special Edition 1968(I), p. 30, since amended on numerous occasions.

entire service career in the Community in the latter institution. He shall not receive by virtue of such transfer any of the financial benefits which an official is entitled to receive under these Staff Regulations on termination of service with one of the institutions of the Communities.

(a) whether the post can be filled by promotion or transfer within the institutions;

If the decision granting the application involves establishment in a grade higher than that occupied in the parent institution, this shall count as promotion; such decision may be taken only in accordance with the terms of Article 45.'

(b) whether to hold competitions internal to the institution;

5. According to the first paragraph of Article 27 of the Staff Regulations:

(c) what applications for transfer have been made by officials of other institutions of the three European Communities;

'Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities.'

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

6. Article 29(1) of the Staff Regulations provides:

'1. Before filling a vacant post in an institution, the appointing authority shall first consider:

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.'

The factual and procedural background

Administration), Mr Bizarre, expressed doubts about the legality and appropriateness of the planned competition. He stated, *inter alia*:

7. The factual and procedural background to the case, as it appears from the judgment under appeal, may be summarised as follows.

8. Mr Hirschfeldt ('the appellant') was employed as an official within Directorate General XI (now Directorate General Environment) of the Commission from 1987 to 1996. In January 1997 he was, at his own request, seconded to the EEA. At that point, he was an official of Grade A 5. With effect from April 1997 he was appointed Financial Director of the EEA as a temporary agent of Grade A 4.

'La décision d'ouvrir un concours pour l'emploi de responsable du département des finances me paraît [...] regrettable à deux titres: elle est contraire à une politique introduite à la demande des agences et qui reste difficilement admise par la représentation du personnel de la Commission; elle ne répond pas à un besoin de service incontestable, puisque le but recherché — pourvoir l'emploi qui sera vacant en février 2000 — peut être atteint plus facilement par l'utilisation du transfert.

...

9. On 14 September 1999 the EEA published a notice of an internal competition for the recruitment of an official of Grade A 5/A 4 for the post of Head of Finance Department of the EEA (Competition EEA/T/99/1). The appellant applied to take part in that competition on 23 September 1999.

Je ne peux donc que vous inviter à reconsidérer l'organisation du concours EEA/T/99/1 et à réexaminer la possibilité d'un transfert [du requérant à l'AEE], au grade et à l'échelon qu'il avait lors de son détachement. Comme vous l'ont déjà indiqué mes services, [l'AEE] pourra ensuite le promouvoir au grade supérieur dès que les conditions statutaires seront remplies.

10. In a letter of 22 September 1999 to the Executive Director of the EEA, Mr Jiménez-Beltrán, the Director of Directorate A (Staff Policy) of Directorate General IX (now Directorate General Personnel and

...

Si toutefois vous préféreriez continuer dans la voie du concours interne, la DG [IX] se verrait au regret de ne pas s'associer à ce dernier ni à aucun de ceux que vous seriez amenés à organiser dans le futur pour pourvoir vos autres emplois permanents. Elle devrait également renoncer définitivement pour l'avenir à l'utilisation des transferts au profit de l'[AEE].'

11. On 24 September 1999, the EEA announced its decision to cancel Competition EEA/T/99/1 (hereinafter 'the first contested decision'). Mr Jiménez-Beltrán communicated that decision to the appellant by letter dated 27 September 1999. In that letter he stated, *inter alia*:

'J'ai le regret de vous informer que, après la réception de cette lettre [de M. Bizarre], je n'ai pas d'autre alternative que d'annuler le concours interne pour lequel vous avez fait acte de candidature.

12. The appellant then asked to be transferred from the Commission to the EEA, pursuant to Article 8 of the Staff Regulations, on 27 October 1999. By letter of 6 December 1999 the Commission informed him of its approval of the transfer. In that letter it stated that the appellant was an official of Grade A 5 (since 1 April 1996), step 3 (since 1 August 1996). By decision of 13 December 1999 the appellant was transferred to the EEA with effect from 1 November 1999 (hereinafter 'the second contested decision'). By that decision, he was categorised as an official of Grade A 5, step 3.

13. The appellant made formal complaints against the two contested decisions pursuant to Article 90(2) of the Staff Regulations. Those complaints were rejected by the appointing authority of the EEA.

The judgment under appeal

Au vu du contenu de cette lettre, je vous encourage vivement à demander, aussitôt que possible, votre transfert de la Commission à l'AEE, cela étant la seule possibilité pour vous de continuer à travailler pour l'agence.'

14. Before the Court of First Instance the appellant sought the annulment of the first contested decision and of the second contested decision in so far as it categorised him as an official of Grade A 5, step 3, with effect from 1 November 1999.

15. With regard to the first contested decision, he relied on a single plea in law based on Article 27 of the Staff Regulations. Referring to the letter by Mr Bizarre of 22 September 1999, he contended that it was owing to an 'inter-institutional agreement' that the EEA had chosen to fill the post of Director of the Finance Department by transfer rather than by the organisation of an internal competition. The choice of recruitment procedure had, therefore, not been determined by the needs of the service, as required by Article 27 of the Staff Regulations, but by a policy imposed by the Commission. Being contrary to the Staff Regulations, the decision to cancel Competition EEA/T/99/1 was thus unlawful.

18. With regard to the first contested decision, the Court of First Instance recalled that it is settled case-law⁴ that the appointing authority is not obliged to carry through a recruitment procedure initiated pursuant to Article 29 of the Staff Regulations.⁵ Since, according to the Court of First Instance, it follows from that case-law that the appointing authority has a discretionary power to decide whether to carry through a recruitment procedure, it is entitled to cancel a competition where the lawfulness of filling a post by the holding of a competition is in doubt.⁶ The fact that the doubts had in this case been raised by a third party, namely the Commission, could not be considered equivalent to an 'inter-institutional agreement', nor did it vitiate the appointing authority's exercise of its discretionary power.⁷

16. With regard to the second contested decision, he also relied on a single plea in law based on Articles 5, 8 and 45 of the Staff Regulations. He contended, essentially, that the decision to transfer him to the EEA, pursuant to Article 8 of the Staff Regulations, was aimed at establishing him in the position which he had held at the EEA for more than two years as a temporary agent of Grade A 4. Moreover, he argued that the EEA should, in accordance with the second paragraph of Article 8 of the Staff Regulations, have 'reconstructed' his career and — considering that he had been eligible for promotion since 1 April 1998 — examined the possibility of promoting him in the context of the promotion exercises of 1998 and 1999.

19. The Court of First Instance added that Mr Hirschfeldt did not, in any event, have an interest in the annulment of the first contested decision.⁸ Having been appointed to the post of Director of the Finance Department at the EEA prior to his lodging of the case with the Court of First Instance, it was only his establishment in Grade A 5 which was capable of affecting him adversely. The fact that the post had been filled by transfer rather than by competition was incapable of so affecting him given that the competition notice of 22 April 1999 was for the recruitment of an official of Grade A 5/A 4 and that the person appointed following the compe-

17. The Court of First Instance did not accept Mr Hirschfeldt's arguments.

4 — Case 26/68 *Fux v Commission* [1969] ECR 145, paragraph 11 of the judgment, and Case T-38/89 *Hochbaum v Commission* [1990] ECR II-43, paragraph 15.

5 — Paragraph 25 of the judgment.

6 — Paragraph 26 of the judgment.

7 — *Ibid.*

8 — Paragraph 27 of the judgment.

tition would therefore not necessarily have been appointed in Grade A 4.

necessarily entail his establishment in a higher grade than the one he held at the Commission.¹⁵

20. With regard to the second contested decision, the Court of First Instance noted that since Mr Hirschfeldt was transferred at his own request, it followed from the second paragraph of Article 8 of the Staff Regulations that he was deemed to have served his entire service career in the Community in the EEA.⁹ However, the Court held that — as Mr Hirschfeldt had himself accepted at the hearing — an automatic right to promotion in connection with a transfer could not be derived from the third paragraph of Article 8 of the Staff regulations.¹⁰ Nor could the argument that the EEA should have examined the possibility of promoting Mr Hirschfeldt be upheld:¹¹ promotion of an official under the third paragraph of Article 8 of the Staff Regulations is possible only where (i) the transfer of the official necessarily entails his establishment in a higher grade and (ii) the promotion complies with the conditions laid down in Article 45 of the Staff Regulations.¹² In the case of Mr Hirschfeldt, the first condition was not fulfilled. Although he had been appointed temporary agent of Grade A 4 at the EEA, he had remained — in accordance with the rules on secondment¹³ — an official of Grade A 5 at the Commission.¹⁴ His transfer to a post of Grade A 5/A 4 at the EEA therefore did not

21. On those grounds, the Court of First Instance dismissed Mr Hirschfeldt's application as unfounded.

The appeal

22. In the appeal, the appellant claims that the Court of Justice should:

- annul the judgment of the Court of First Instance;
- annul the first contested decision;
- annul the second contested decision in so far as it categorised him as an official of Grade A 5, step 3, with effect from 1 November 1999; and
- order the EEA to pay the costs.

9 — Paragraphs 38 and 39 of the judgment.

10 — Paragraph 40 of the judgment.

11 — Paragraph 41 of the judgment.

12 — Paragraph 42 of the judgment.

13 — Articles 37 to 39 of the Staff Regulations.

14 — Paragraph 45 of the judgment.

15 — Ibid.

23. The EEA asks the Court of Justice to:

- dismiss the appeal as inadmissible in so far as it seeks a review of findings of fact and as unfounded for the rest;

- alternatively, in case the Court of Justice decides to annul the judgment under appeal, refer the case back to the Court of First Instance; and

- order the appellant to pay the costs.

competition which was cancelled by that decision, the appointing authority of the EEA would have been obliged to (aurait dû) establish him in the position and grade which he held as a temporary agent (Grade A 4). The appointing authority would, in any event, have been obliged to consider the possibility of promoting him under Article 31(2) of the Staff Regulations.¹⁶

25. According to the EEA, the Court of First Instance did not err in law. It points out that a person's interest in bringing an action is, according to settled case-law, to be appraised at the time when the action was brought.¹⁷ However, at the time when the present appeal was brought, the appellant had already been appointed to the relevant post. Moreover, since the competition was for a post of Grade A 5/A 4 the person appointed after completion of the competition would not necessarily have been appointed in Grade A 4.

The first contested decision

- Admissibility

24. The appellant submits that the Court of First Instance erred in law by stating — in paragraph 27 of the judgment under appeal — that he lacked an interest in the annulment of the first contested decision. He argues that if he had succeeded in the

26. It is, as the EEA points out, clear that the comments set out in paragraph 27 of the judgment under appeal — to the effect that Mr Hirschfeldt did not have a legal

¹⁶ — The appellant refers in that regard to Case T-17/95 *Alexopoulou v Commission* [1995] ECR-SC II-683.

¹⁷ — It refers in that regard to the Order of the Court of First Instance in Case T-128/96 *Lebedev v Commission* [1996] ECR-SC II-1679, paragraphs 19 to 21.

interest in the annulment of the first contested decision — were *obiter dicta*. That is confirmed by the wording of the judgment ('En outre et en tout état de cause') and by the fact that the Court of First Instance declared the claim unfounded, not inadmissible. It is therefore not necessary for the Court of Justice to rule in the present case on whether the view taken by the Court of First Instance on the question of legal interest is erroneous in law.

27. I would venture to suggest, however, that the judgment under appeal rests on an unduly strict interpretation of the notion of legal interest. The fact that the appellant would not *necessarily* have been established in Grade A 4 had he succeeded in the cancelled competition does not, in my view, deprive him of a legal interest in the annulment of that cancellation. It appears from information in the file about the appellant's qualifications and work experience, and the special needs of the EEA, that he would have had a strong chance of being established in Grade A 4. In those circumstances it would, in my view, be inappropriate to deny him access to the Court of First Instance on the grounds of a lack of interest.

— Substance

28. The appellant contends that the Court of First Instance erred in law in considering that the Commission's letter of 22 Septem-

ber 1999, in which it expressed its doubts about the lawfulness and appropriateness of Competition EEA/T/99/1, was not equivalent to an 'inter-institutional agreement' and did not vitiate the appointing authority's exercise of its discretionary powers under the first paragraph of Article 27 of the Staff Regulations.

29. He submits that, while the appointing authority has a wide discretion to decide whether to carry through a recruitment procedure, that discretion must be exercised in the interest of the service. However, referring to the letter of 27 September 1999 by Mr Jiménez-Beltrán,¹⁸ the appellant contends that the first contested decision was adopted solely with the aim of meeting the Commission's explicit threat to 'renoncer définitivement pour l'avenir à l'utilisation des transferts au profit de l'[AEE]'. The appointing authority did not therefore exercise any discretion, nor did it act in the interest of the service as required by the first paragraph of Article 27 of the Staff Regulations. He maintains, moreover, that since the planned competition would have been open to all Community officials fulfilling the conditions set out in the competition notice, it cannot be argued that the competition was organised for the sole purpose of appointing him to the post declared vacant.

30. The EEA resists those arguments.

¹⁸ — Cited above in paragraph 11.

31. It argues, first of all, that the appellant's plea is inadmissible because it concerns findings of fact, or the assessment of facts, set out in the judgment under appeal. In its view, the question whether the doubts about the planned competition, expressed by the Commission in its letter of 22 September 1999, vitiated the appointing authority's exercise of its discretion is not a question of law which may be reviewed by the Court of Justice under Article 225 EC and Article 51 of the Statute.

32. According to the EEA, the appellant's plea is also unfounded. It points out that the Court of First Instance found that the EEA decided to cancel Competition EEA/T/99/1 because that competition had — contrary to settled case-law¹⁹ — been organised for the sole purpose of remedying the anomalous administrative status of a specific official and of appointing that official to the post declared vacant. In those circumstances, it would clearly not have been in the interest of the service to carry through the competition and the EEA was thus entitled to cancel it.

33. I agree with the EEA that the appellant's plea is inadmissible.

34. It appears from the judgment under appeal that the Court of First Instance considered that the EEA cancelled Competition EEA/T/99/1 because it had doubts about its lawfulness in the light of the Court's case-law about competitions aimed essentially at establishing a particular candidate in a vacant position. That aspect of the judgment under appeal — which is consistent with the reasons set out in the decision of the appointing authority of the EEA rejecting the appellants's complaint pursuant to Article 90(2) of the Staff Regulations²⁰ — is, in my view, a finding of fact which cannot be reviewed by this Court.

35. I thus conclude that the appellant's first plea should be dismissed as inadmissible.

The second contested decision

36. According to the appellant, the Court of First Instance erred in law in ruling that the second contested decision was lawful in so far as it established the appellant in Grade A 5, step 3, with effect from 1 November 1999. He relies on, essentially, two arguments in support of that contention.

¹⁹ — The EEA refers to Case 105/75 *Giuffrida v Council* [1976] ECR 1395 and Case 142/85 *Schwieger v Court of Auditors* [1986] ECR 3177, also cited in paragraph 23 of the judgment under appeal.

²⁰ — Decision communicated to the appellant by letter of 8 March 2000.

37. First, he submits that the Court of First Instance erred in law in ruling that promotion of an official under the third paragraph of Article 8 of the Staff Regulations is possible only where the transfer of the official *necessarily* entails his establishment in a higher grade and that that condition was not fulfilled in his case. In his view, the second contested decision should not be considered as a decision to transfer him from the Commission to a vacant post of category A 5/A 4 at the EEA, but as a decision to establish him in the post at the EEA which he held as a temporary agent of Grade A 4. In that regard he points out that it was in his capacity as a temporary agent at the EEA of Grade A 4 that he applied for transfer, and he submits that it follows from the principles of legitimate expectation and legal certainty that an official who is transferred following a secondment (and at his own request) must be established in the post and grade which he held *in the institution to which he was seconded* as a temporary agent. That interpretation is, according to the appellant, supported by the wording of the third paragraph of Article 8 which refers to the 'establishment' of officials who are transferred at their own request.

38. Second, the appellant contends that the Court of First Instance erred in law in rejecting (implicitly) his arguments alleging a violation of the second paragraph of Article 8 of the Staff Regulations. In his view it follows from that provision — which states that an official who has been transferred shall be deemed to have served his entire service career in the Community in the institution to which he has been

transferred — that the appointing authority of the EEA was obliged, when it approved his transfer, to examine whether his career had been properly 'reconstructed' and in that context to consider the possibility of promoting him. In that context, he refers to a letter of 26 April 1999 in which the Executive Director of the EEA encouraged the appellant to seek a transfer and in which he stated that 'your present category and grade A 4 would be confirmed and your years of service with the European Environment Agency recognised'. By omitting to examine whether the EEA had in fact reconstructed his career properly (and examined possibilities of promotion) and by omitting to respond to his arguments in that regard, the Court of First Instance erred in law and failed to provide adequate reasons for its ruling.

39. The EEA contests both of those arguments.

40. It argues, first, that the post and grade held by an official who is on secondment is irrelevant for the purpose of Article 8 of the Staff Regulations. That provision does not imply a right for an official to be established in the post and grade which he holds as a temporary agent on secondment. On the contrary, it appears from the wording of the third paragraph of Article 8 — which refers to the grade 'occupied [by the transferred official] in the parent institution' — that an official

who is transferred normally maintains the grade which he holds, at the time of the transfer, in the institution from which he is transferred. The possibility of establishment in a higher grade envisaged in the third paragraph of Article 8 exists, as the Court of First Instance held in the judgment under appeal, only where, by way of derogation from the normal situation, the decision granting the transfer necessarily involves establishment in a grade higher than that occupied by the official in the institution from which he is transferred. Where that occurs the transfer must be regarded as a promotion and is therefore according to the third paragraph of Article 8 subject to the conditions laid down in Article 45 of the Staff Regulations.²¹

41. However, the appellant applied for a transfer from a post as an official of Grade A 5 at the Commission to a position of Grade A 5/A 4 at the EEA, and the transfer thus did not necessitate his establishment in a higher grade. The Court of First Instance thus did not err in law in rejecting his submission that he had a right to be established in the post at the EEA which he held as a temporary agent of Grade A 4.

42. The EEA also resists the appellant's argument — based on the second para-

graph of Article 8 of the Staff Regulations — to the effect that the Court of First Instance should have verified whether the appointing authority of the EEA examined the possibilities of promotion in connection with the transfer. While it follows from that provision that the appointing authority of the EEA must consider the whole of the appellant's career within the Community service as if it had been completed at the EEA in the course of the promotion exercises to be held in the years following his transfer, that provision does not oblige the appointing authority to carry out, at the time of the transfer, a separate examination of the appellant's specific situation with a view to promoting him. As regards the appellant, the EEA has complied with its obligations under the second paragraph of Article 8 since it considered the appellant's situation in the course of the promotion exercise for the year 2000 and added his name to the list of official eligible for promotion.

43. It follows, according to the EEA, that the Court of First Instance did not err in law in rejecting the appellant's submission that the EEA should have examined the possibilities of promoting him and that it adequately met the appellant's arguments.

²¹ — The EEA also notes that it is settled case-law that the Staff Regulations do not confer an automatic right to promotion, even on officials who meet all the conditions for promotion, see for example Case T-3/92 *Latham v Commission* [1994] ECR-SC II-83, paragraph 50 of the judgment.

44. Although I am not entirely in agreement with the interpretation of the third paragraph of Article 8 of the Staff Regulations adopted by the Court of First

Instance and supported by the EEA in the appeal, the slightly different approach I propose would not have led to a different result in the judgment under appeal.

comply with the rules governing promotion.

45. The third paragraph of Article 8 refers to situations where a transfer 'involves' (emporte, umfasst, gepaard gaat met, comporta, implicase, medfører) establishment in a higher grade. As the appellant has stressed, that phrase does not appear to be limited to situations where the transfer 'necessarily' involves establishment in a higher grade. The wording of the third paragraph must, however, be interpreted in the context of Article 8 as a whole, taking account of the system of the Staff Regulations.

47. Promotion of Community officials takes place in the context of regular promotion procedures in accordance with detailed provisions laid down by the Staff Regulations which are aimed at guaranteeing equal treatment of all candidates through a comparative examination of their merits. Provisions which envisage promotion of officials outside those procedures must be interpreted restrictively.

46. It is clear from, in particular, the second paragraph of Article 8 that the system of transfers is based on the principle of continuity in the careers of Community officials. On the one hand, the rights of an official who has been transferred are not to be affected adversely: the official is deemed to have served his entire service career in the Community in the institution to which he has been transferred. On the other hand, a transfer does not normally entail an upgrading of the official concerned. An official who is transferred stays in the grade held at the time of the transfer in the institution from which he is transferred (the parent institution). Any establishment in a higher grade is exceptional and must

48. It follows, in my view, that Article 8 of the Staff Regulations cannot be interpreted in such a way as to require an official's promotion on the occasion of a transfer, or even to require his consideration for promotion outside the framework of the regular procedures governed, in particular, by Article 45. The second paragraph of Article 8 guarantees that he suffers no disadvantage in terms of promotion on the occasion of his transfer, whereas the third paragraph merely allows his promotion, exceptionally, in those circumstances — whether as a consequence of actual administrative necessity or for some other reason connected, for example, with the organisation of the relevant service —

provided that the terms of Article 45 are respected.

49. That interpretation of Article 8 of the Staff Regulations, which appears to be consistent with the practice of the Community institutions, is moreover supported by considerations of equal treatment. If officials who are transferred after a period of secondment were granted either a right to establishment in the grade they have held as temporary agents on secondment or a right to an examination of their specific circumstances with a view to promotion, those officials would obtain an advantage compared to officials who, rather than seeking transfer, opt to stay with the Community institution to which they were initially recruited. There is no suggestion in the provisions of the Staff Regulations that such a difference of treatment was intended and it appears, in any event, to be unjustified.

50. Finally, I cannot accept the appellant's contention that the Court of First Instance failed to consider his arguments based on the second paragraph of Article 8 of the Staff Regulation and that the judgment under appeal does not provide adequate reasons.

51. While it is true that the Court of First Instance did not explicitly rule on the

interpretation of the second paragraph of Article 8 of the Staff Regulations, it clearly did consider the appellant's essential contention that the appointing authority is obliged to 'reconstruct' a transferred official's career and must in that context examine the possibility of promoting him. Having held — in paragraph 42 of the judgment under appeal — that there was no support for that contention in the third paragraph of Article 8 of the Staff Regulations, the Court of First Instance concluded in general terms that '*le transfert du requérant n'a pas entraîné l'obligation, pour l'AEE, d'examiner la possibilité de le promouvoir dans les conditions prévues aux articles 8 et 45 du statut*'.²² In my view, it is implicit in — and sufficiently clear from — that concluding sentence that the Court of First Instance took the view that the wording and structure of Article 8 of the Staff Regulations as a whole (including its second paragraph) did not support the appellant's essential contention.

52. I would thus dismiss the appellant's second plea as unfounded.

²² — Paragraph 43 of the judgment under appeal.

Conclusion

53. Accordingly, I am of the opinion that the Court of Justice should:

- (1) dismiss the appeal;
- (2) order the appellant to pay the costs.