

OPINION OF MR ADVOCATE GENERAL WARNER
DELIVERED ON 13 APRIL 1978

My Lords,

This is not, in my opinion, an easy case. But the facts of it, at least, are not in dispute.

Madame de Roubaix, the applicant, is a Belgian lady. She was born in 1918, and is a widow.

On 1 August 1959 she became, as a secretary, in Category C, a servant of Euratom, and was posted to the staff of the Supply Agency. On 1 December 1961 she was promoted to Category B. On 1 January 1962 she was established in Grade B 4. On 1 October 1964 she was promoted to Grade B 3, and then, with effect from 1 July 1968, to Grade B 2. Throughout her service she has performed the duties of Head Clerk of the Supply Agency. Successive Directors General of the Agency have had nothing but the highest praise for the way in which she has discharged those duties, duties which, it is common ground, appertain to the basic post of Principal Administrative Assistant, i.e. to Grade B 1.

Until 1976, however, there was no B 1 post in the Euratom Supply Agency.

In 1973 the then Director General of the Agency asked that a B 1 post should be provided for it in the Commission's budget for 1974. In a note dated 14 June 1973 (Annex 8 to the Application) he gave his reasons for that request in the following terms:

“Ce poste devrait permettre la promotion de la fonctionnaire qui, dès 1959, a permis la mise en activité administrative et commerciale de l'Agence, à une époque où l'Agence ne disposait pas pour des raisons politiques notamment, d'un personnel suffisant ni en nombre ni en compétences.

Cette fonctionnaire est toujours responsable de toute l'organisation administrative et commerciale de l'Agence, dont le développement est lié à l'accroissement du volume de transactions qui ressort de la compétence de l'Agence et qui est lui-même lié au développement de l'énergie nucléaire.”

The “fonctionnaire” in question was of course the Applicant.

At the same time the Director General asked for a B 3/B 2 post in order to enable the transfer from the establishment of the Directorate General of Energy to that of the Agency of a B 2 official, Monsieur J. J. M. Marchal, who was on the staff of the Delegation to the United States in Washington and who was employed full time there on Agency business.

It so happens that Mr Marchal is also a Belgian. He is 10 years younger than the applicant and was 2½ years her junior in Grade B 2.

The Director General's requests were rejected.

For the 1975 budget he asked for two B 1 posts, one for the Applicant and one for Mr Marchal. The increase in the latter's grade would, in the opinion of the Director General, be justified in view of the way in which contractual relations with the United States Atomic Energy Commission were developing and of the difficulties attending them — see his note of 26 March 1974 (Annex VII to the Rejoinder).

Again the Director General's requests were rejected.

The minutes of a meeting of the Commission on 8 January 1975 record that at that meeting the Commission took note of a statement by one of its Vice-Presidents, Mr Simonet, who was

at the time responsible for energy matters and in particular for the Euratom Supply Agency, in the following terms:

“M. Simonet souligne les mérites tout particuliers de M. Joseph Marchal, fonctionnaire de la catégorie B, membre de la délégation de la Commission aux Etats-Unis, qu’il s’est acquis dans le domaine de la conclusion au nom de l’Agence d’approvisionnement d’Euratom de contrats d’enrichissement de l’uranium. Il souhaite que la Commission ne manque pas de tenir compte des mérites de ce fonctionnaire, lorsque l’occasion s’en présentera.”

In a note dated 25 March 1975 to the Director General of Personnel and Administration (Annex VIII to the Rejoinder) the Director General of the Agency put forward his requests for the 1976 budget. He stated that he did so in agreement with the Private Office of Vice-President Simonet. Among those requests was one for a B 1 post. As to this the Director General said:

“Le poste B 1 est destiné à affecter au budget de l’Agence le poste — (B 3/B 2) actuellement occupé par M. Joseph Marchal — détaché à la Délégation de Washington par la DG XVII: en effet, les travaux exécutés par le titulaire de ce poste le sont pratiquement au bénéfice exclusif de l’Agence.

En outre, le niveau de responsabilité qu’implique ces travaux ainsi que le développement des relations contractuelles avec The Energy Research and Development Administration, l’industrie privée, et leur complexité, justifient pleinement la création d’un poste B 1. Monsieur Simonet, d’ailleurs, a demandé que la Commission tienne compte des mérites de M. Joseph Marchal ‘lorsque l’occasion s’en présentera’.”

In the result such a post was included in the 1976 budget and, in the Spring of 1976, the Commission published

Vacancy Notice COM/267/76 in respect of it.

The contents of that Notice were, so far as relevant, these:

“*Department:* I — External Relations

Delegation of the Commission of the European Communities in the United States — Euratom Supply Agency

Place of employment: Washington

Nature of duties: Principal administrative assistant

Particularly difficult and complex office work, following general guidelines of the Head of the Delegation, namely:

- liaison with American authorities and suppliers concerning contracts concluded by the Supply Agency regarding the provision of nuclear fuels;
- passing on information and performing routine or other duties related to the administration of these contracts on instructions from the Agency;
- keeping the Supply Agency up to date on trends affecting the supply of nuclear fuels in the United States.

Qualifications required

- Advanced secondary education, with certificate, or equivalent practical experience.
- A thorough knowledge of the nuclear fuel industry.
- Wide business experience.
- Wide experience relevant to the post.”

There followed a statement of the knowledge of languages required of candidates for the post.

In response to the Notice three officials applied for the post, namely the applicant and Mr Marchal, each of whom had of course sufficient seniority in Grade B 2 to be promoted to it, and a B 1 official in the Directorate General

of Energy, who could be transferred to it.

The respective merits of the candidates were assessed in a note dated 16 June 1976 written by an official of the Directorate General of External Relations (Annex V to the Defence). Not surprisingly the conclusion was that Mr Marchal was the best qualified for the post, and he was in due course appointed to it.

At that time there was in existence an up-to-date set of periodic reports made under Article 43 of the Staff Regulations on Mr Marchal, but the last such report on the applicant was for the period 1 July 1971 to 30 June 1973. Her report for the period 1 July 1973 to 30 June 1975 had not been drawn up.

On 31 July 1976 the applicant submitted a complaint under Article 90 (2) of the Staff Regulations. In this she urged that the interests of the service called for her own promotion to Grade B 1 and for the release to the Directorate General of Energy of the Grade B 2 post belonging to it but occupied by Mr Marchal in Washington. Those interests did not, however, the Applicant said, call for the promotion of Mr Marchal to Grade B 1. A B 1 post having become available for the Supply Agency, a proper exercise of the appointing authority's powers would accordingly have led it to promote her to that post, thus releasing her B 2 post for Mr Marchal and in turn releasing his B 2 post for the Directorate General of Energy. She asked that that should be done.

There being no reply to that complaint, the applicant, on 22 February 1977, commenced the present action in this Court. In that action she claims a declaration that Vacancy Notice COM/267/76 was void and that so were the decision rejecting her candidature for the post thereby advertised and appointing Mr Marchal to it, and the implied decision rejecting her complaint.

Such are, in outline, the relevant facts. There is however a postscript to them. For 1977 the Commission adopted a new procedure for promotions from one career bracket to another in the B and C categories (see Annex IX to the Rejoinder). Under that procedure the Director General of the Euratom Supply Agency recommended the applicant for promotion to Grade B 1. His recommendation was not however accepted. This constitutes the subject-matter of a second action brought by the Applicant, Case 25/78, which is pending before the Second Chamber.

The Commission submits that the present action, in so far as it impugns the validity of the Vacancy Notice, is inadmissible. In support of that submission, the Commission puts forward two arguments, both of them, in my opinion, misconceived.

The first is that the publication of a vacancy notice is not an act capable of adversely affecting anyone, so that it is not open to challenge in this Court. That is plainly wrong: see Case 79/74 *Küster v Parliament* [1975] ECR 725, where the Court decided the contrary.

Secondly the Commission submits that what the applicant really challenges is not so much the Vacancy Notice itself but the decision to assign the newly created post to Washington. That decision, the Commission says was taken in the exercise of its discretion to organize its departments and services as it thinks fit, and so was not open to challenge at the suit of any official — a proposition for which the Commission cites Cases 109/63 and 13/64 *Muller v Commission* [1964] ECR 663 at p. 676 (Rec. 1964 p. 1292, at p. 1319). That case, however, was concerned, not with a decision relating to a specific post, but with the adoption by the Commission of a general rule — namely the rule that, in any division or department having only one post in Category A, the task of deputizing for its holder in his absence

should be performed by a Category A official from another division or department.

In my opinion, on the footing that the relevant decision here was taken by the Commission in the exercise of the discretion to which it refers, it is nonetheless the law that, if that decision constituted a breach of any provision of the Staff Regulations or a misuse of powers adversely affecting the Applicant, she is entitled to have the Vacancy Notice, as the outward expression of the decision, set aside (consider Cases 18 & 35/65 *Gutmann v Commission* [1966] ECR 103, at pp. 117-118, Rec. 1966, p. 149, at pp. 169-171, and Case 17/68 *Reinartz v Commission* [1969] ECR 61, at p. 69).

So I turn to the substance of the matter.

As to that, the applicant's case is somewhat curiously formulated, in that it is stated to rest on a single ground, and then three are given:

- (1) Breach of Article 7 (1) of the Staff Regulations, in that the appointing authority did not act "solely in the interests of the service";
- (2) Misuse of powers, in that that authority exercised its powers for the improper purpose of securing Mr Marchal's promotion; and
- (3) Breach of Article 45 (1) of the Staff Regulations, in that at the time of the consideration of the comparative merits of the candidates for the post the applicant's latest periodic report was not available.

Grounds (1) and (2) are, I think, in reality, two ways of expressing the same charge, and I propose to deal with them together, first.

The case for the applicant is put, much as it was in her administrative complaint, on the basis that, if only one B 1 post could be made available for the

Supply Agency, it should have been awarded to her, who had been performing the duties of a B 1 official for 17 years, who was considerably older than Mr Marchal, and who was senior to him in Grade B 2. The circumstance that the post was in fact awarded to Mr Marchal must be attributed to a disregard of the interests of the service, or misuse of powers, consisting in the earmarking of the post for Mr Marchal.

In my opinion the case, as so put, cannot be sustained.

It has been laid down by this Court that although, under Article 7 (1), an official cannot be compelled to perform duties corresponding to a grade higher than his own, except on a provisional basis, the fact that he agrees to perform them, whilst it may be a factor to be borne in mind in connexion with promotion, does not give him the right to be reclassified: see Case 28/72 *Tontodonati v Commission* [1973] 2 ECR 779 (paragraph 8 of the Judgment) and Case 189/73 *Van Reenen v Commission* [1975] ECR 455 (paragraph 6 of the Judgment). In argument both sides cited an earlier authority, Case 77/70 *Prelle v Commission* [1971] 2 ECR 561, but that seems to me inconclusive.

It must be borne in mind that, at the time here material, the Director General of the Supply Agency, who manifestly was most favourably disposed towards the applicant (this appears not only from the evidence I have recited, but also from her periodic reports — Annexes 6 and 7 to the Application, Annex I to the Defence), had twice, in successive years, sought a Grade B 1 post for her and twice been rebuffed. We were told by the Commission, and I can well believe it, that, in the atmosphere of austerity that surrounded the preparation of the 1976 budget in all the Community Institutions, it would have been hopeless to try to obtain two B 1 posts for so small a department as

the Agency. The result indeed might have been that none would have been obtained. Thus, even apart from any intervention by Mr Simonet, the Director General would have had to decide, as between the two deserving officials for whom he had applied for B 1 posts the year before, which of them performed the more demanding duties. In was of course, in each case, the nature of the duties appertaining to the post, and not the age, seniority, length of service, or personal merits of the current incumbent, that he must take into account for that purpose. We have ample evidence, not only in the notes that I have referred to, but also in Mr Marchal's periodic reports (Annexes II, III and IV to the Defence) as to the nature of his duties. On that evidence, it seems to me that it was clearly open to the Director General to take the view, not only that those duties were appropriate to a B 1 post, but that they were more demanding than the duties of Head Clerk to the Agency, albeit that those too were appropriate to a B 1 post.

There is nothing to suggest that the Director General, and the Commission after him, did not honestly take that view except the circumstance that Mr Simonet had intervened on behalf of Mr Marchal personally and the circumstance that that intervention was referred to in the Director General's note of 25 March 1975. It is because of the existence of those circumstances that, in my opinion, the case is not an easy one. But I have, after some hesitation, come to the conclusion that they do not amount to enough to vitiate the decision to assign the post to Washington; and, if that decision was valid, the contents of the Vacancy Notice are not in my opinion susceptible of criticism.

I turn to the point on Article 45 (1) of the Staff Regulations.

In Case 29/74 *De Dapper v Parliament* [1975] ECR 35, the Court, following earlier authorities (which I collected at pp. 44-45), annulled appointments made by way of promotion where up-to-date periodic reports on some but not all of the candidates had been drawn up at the time of the consideration of their comparative merits. The Court held that that process failed to meet the requirements of Article 45. In Case 61/76 *Geist v Commission* [1977] ECR 1419 the Court again emphasized the importance of a strict compliance by the Community Institutions with their duty under Article 43 of the Staff Regulations to ensure that reports on their officials are drawn up on the dates laid down. The facts of that case were such that there was there no decision that called for annulment, but the Court awarded substantial damages to the applicant, whose reports were in arrear, although he could not show that he had thereby suffered any material damage.

Whether, on those authorities, the applicant here would have been entitled to damages had she claimed them, it is not necessary to decide. She has not claimed them — very possibly because she feels hurt not so much financially as in her pride. Thus the only question is whether the fact that her latest report had not been drawn up at the time when the comparative merits of the candidates for promotion to the new post were being considered is a ground for declaring void Mr Marchal's appointment to that post.

On the face of it *De Dapper v Parliament* is clear authority for an affirmative answer to that question. A number of judgments of the Court establish, however, that, as a matter of principle, an official cannot, in challenging the validity of an administrative decision, rely on an irregularity in the procedure leading to that decision, unless he can show that, but for that irregularity, he might have been

in a better position. I collected the earlier authorities to that effect in my Opinion in Case 90/74 *Deboeck v Commission* [1975] ECR 1123 (at pp. 1141-1142), since when the principle has been re-affirmed by the Judgment in that case itself (paragraphs 11-15) and, more recently, in Case 9/76 *Morello v Commission* [1976] ECR 1415 (paragraph 11 of the Judgment). Of the earlier authorities, one that seems to me particularly to resemble the present case is Case 115/73 *Serio v Commission* [1974] 1 ECR 341, where the Court declined to annul a competition on the ground that a disappointed candidate's qualifications had not been fully placed before the appointing authority, because it did not appear that the omitted qualifications were of a kind that would have secured a decision in his favour (see paragraph 7 of the Judgment).

Try as hard as I will, I cannot bring myself to believe that, if, here, the applicant's report for 1973-1975, had been available at the time when the comparative merits of the candidates were being considered, it could have made the slightest difference to the result. Her earlier reports were highly

flattering, and the missing one could hardly have been more so. In fact, when it was finally produced, it was not (see Annex I to the Defence). On her behalf it was pointed out that it did mention the fact that some of the tasks that she had formerly performed had, in order to lighten her burden, been transferred in 1974 to a Category A official recruited for the purpose, it being added that "Ce transfert ne doit en aucun cas être interprété comme un désaveu des capacités de M^{me} De Roubaix". But it seems to me evident that the crucial qualifications for appointment to the Washington post included experience in dealing with American agencies and firms supplying nuclear fuels. That experience Mr Marchal had and the applicant did not have. It may be that the applicant could have acquired it, as Mr Marchal had had to do (see Annex II to the Defence), but it could not be in the interests of the service for the Commission to experiment as to that, when manifestly Mr Marchal was performing his duties to everyone's satisfaction.

In the result, whilst I have considerable sympathy for the applicant, I do not think that she is entitled to succeed in this action.

There remains the question of costs. The combined effect of Articles 69 and 70 of the Rules of Procedure of the Court is, I apprehend, that, in a staff case where the applicant is unsuccessful, each side normally bears its own costs. If however the applicant has unreasonably or vexatiously caused the defendant Institution to incur costs, he may be ordered to pay them. If the defendant, although successful in the result, has failed on some heads, it may be ordered to pay some of the applicant's costs, regardless of whether

or not its conduct of the case has been unreasonable or vexatious.

In the Case 54/77 *Herpels v Commission* (9 March 1978 — not yet reported), the Court was confronted with a situation where, in a staff case, one of the claims put forward by the applicant was vexatious, whilst on the other hand the defendant, which was successful in the result, had failed on some objections it had raised to the admissibility of the action. The Court set those two elements off, and left each side to bear its own costs.

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Yet no part of the applicant's claims was, in my opinion, vexatious, but, if Your Lordships share my view, the Commission's objections to the admissibility of the action were misconceived.

Your Lordships may accordingly think it right to order the Commission to pay (say) one-third of the applicant's costs.