

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 22 January 1987*

*Mr President,
Members of the Court,*

1. In order to select the heads of the translation sections set up within each language division under the decision to restructure its departments taken on 23 February 1983, the Commission of the European Communities decided, in regard to the departments established in Luxembourg, to apply a system of 'rotation of heads of section... on an experimental basis'.

An invitation to submit candidatures permitted each head of division to determine those among the revisers and principal translators (the post of head of section being at their level) who would be called upon to undergo a trial period of six months.

In the Economics and Finance Section of the Italian Language Division, only the applicant, Mrs Bonino, and Mr Tutzschky underwent the trial period, performing the duties of head of section in turn between 1 June 1983 and 31 May 1984.

Naturally, both submitted their candidatures following the publication in June 1984 of the vacancy notice for that post, which included among the qualifications required:

'2. A thorough knowledge of the problems concerning the management of the work of a translation team'.

As can be seen both from the memorandum from the Head of the Italian Language Division of 12 July 1984 and from that, of a

later date, from the Head of the Directorate for Personnel, Administration and Translation, the decisive factor in the choice of Mr Tutzschky was his 'managerial' qualities in regard to the section concerned, which were considered superior to those shown by Mrs Bonino.

2. In support of her application for annulment of the appointment of Mr Tutzschky, Mrs Bonino puts forward essentially two series of submissions, the first alleging a breach of essential procedural requirements and the second alleging that the decision adopted by the Commission in its capacity as appointing authority is without foundation.

Before considering those submissions, it must be borne in mind that, for the purposes of filling a vacant post, the appointing authority has a wide discretion in evaluating both the interests of the service and the merits of the various candidates. That solution, adopted essentially in regard to decisions on promotion and frequently reaffirmed in the Court's case-law,¹ appears to be applicable to transfers when, as in this case, they involve a comparative consideration of the merits of the various candidates.

The Court's review must therefore be confined, as the Court pointed out in its recent decision in *Vaysse*,

'to the question whether, regard being had to the bases and procedures available to the administration for its assessment, it remained within the proper bounds and did not use its authority in a manifestly

¹ — See, most recently, the judgment of 23 October 1986 in Case 26/85 *Vaysse v Commission* [1986] ECR 3131, paragraph 26.

* Translated from the French.

incorrect manner’.

In other words, to adopt the views of Mr Advocate General Dutheillet de Lamothe in *Marcato v Commission*,² the Court refuses to review the administration’s assessment of the suitability of the candidates and reviews only:

- (i) the propriety of the procedure which has led to the contested decision;
- (ii) the material accuracy of the facts on which the administration based its assessment and whether its assessment of the facts was manifestly incorrect;
- (iii) and finally the existence of any error of law or misuse of power.

It is in that context that the applicant’s submissions must be considered.

Form

3. In essence, Mrs Bonino claims that, having regard to the ‘surprising’ nature of the appointment of Mr Tutzschky and the under-representation of female staff in posts of responsibility of the kind at issue, the appointing authority’s decision required a ‘particularly detailed’ statement of the reasons on which it was based. However, a statement of the reasons for the appointing authority’s choice, and in particular the aforementioned memorandum of 12 July 1984, was not officially communicated to her. The assessment contained therein may not be used against her because it was not previously communicated to her in accordance with the provisions of Articles 26 and 43 of the Staff Regulations.

The first complaint concerning the extent of the statement of reasons gives rise to no difficulty since the appointing authority has no obligation towards unsuccessful candidates to state the reasons on which its decision to appoint, by way of transfer, another official is based.

According to settled case-law:

‘The appointing authority is not obliged to give reasons for promotion decisions in so far as they affect candidates who have not been promoted; a statement of these reasons might harm some if not all unsuccessful candidates’.³

The appointing authority’s discretion implies that:

‘The factors on which this assessment is based, covering not only the efficiency and vocational aptitude of the applicants but also their character, behaviour and general personality, are ill-suited for inclusion in a statement of reasons and were they so included the statements might well prove prejudicial to the interests of the unsuccessful candidates.’⁴

The same principle must apply to decisions on transfers, adopted after consideration of the comparative merits of the various candidates.

Thus, without there being any need to consider whether the statement of reasons must be detailed, the applicant’s first complaint must be rejected.

4. The argument alleging that the appointing authority may not use the

³ — Case 188/73 *Grassi v Council* [1974] ECR 1099, paragraph 12.

⁴ — Case 27/63 *Raponi v Commission* [1964] ECR 129 at p. 138.

² — Case 29/70 [1971] ECR 243 at p. 249.

memorandum drawn up by the candidate's superior on 12 July 1984 against the applicant requires greater consideration. It concerns the *propriety of the procedure* which led to the contested decision and calls in question an essential principle of the Staff Regulations.

It can be seen from the file that the Head of the Italian Language Division chose between the two candidates on the basis of a comparative assessment of their performance as head of section during their trial period. However, the individual elements in that assessment, concerning the way in which each acquitted himself, were neither brought to their attention nor placed on their personal file at the end of the trial period with the result that neither of them was given an opportunity to comment thereon.

However, Article 26 of the Staff Regulations provides that:

'The personal file of an official shall contain:

- (a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
- (b) any comments by the official on such documents.'

It adds that

'the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed'.

Consequently, Article 43 of the Staff Regulations provides that

'the ability, efficiency and conduct in the service of each official... shall be the subject of a periodical report... communicated to the official [who] shall be entitled to make any comments thereon which he considers relevant'.

In the leading case of *Rittweger v Commission*, the Court applied those provisions to unfavourable assessments of an unsuccessful candidate made by the administration during an internal recruitment procedure which:

- (i) exercised a 'decisive influence on the content' of the appointment decision, and
- (ii) were 'neither inserted in her personal file nor brought to her knowledge' and differed 'strikingly from the opinion which appears from the periodical report on her'.⁵

As Mr Advocate General Dutheillet de Lamothé observed in his opinion in that case,

'if... for a promotion or a transfer it is not the reports which have properly been credited to officials and of which they are aware which are taken into account, but different and secret assessments, the guarantee which the authors of the Staff Regulations wished to afford to servants by Article 43 completely disappears'.⁶

As the Court stated in its decision in *Brasseur*, referring to Article 26:

'The purpose of these provisions is to guarantee an official's right of defence by ensuring that decisions taken by the

⁵ — Case 21/70 *Rittweger v Commission* [1971] ECR 7, paragraph 35 *et seq.*

⁶ — Case 21/70, cited above, p. 21.

appointing authority affecting his administrative status and his career are not based on matters concerning his conduct which are not included in his personal file'.⁷

Unless the requirements of Article 26 and those, obviously linked therewith, of Article 43 are to be deprived of all meaning, *transparency* is essential in such matters. The appointing authority is clearly not required to communicate the contents and result of the *comparative assessment* of the suitability of the various candidates which it carried out before arriving at its choice. That value judgment is the very expression of the discretion conferred on it in such matters and the communication thereof to unsuccessful candidates might, as I have pointed out, be damaging to them. On the other hand, the *individual assessment* made by the candidate's superior *of the way in which each candidate, taken in isolation, has performed his duties* must be made known to him before that comparative assessment is carried out not only in order to give the official the opportunity to make any observations but also to ensure that the appointing authority adopts its decision *with full knowledge of all the facts*. The appointing authority's discretion in regard to its final choice and the fact that it is not required to inform unsuccessful candidates of the reasons for its decision find their corollary in an obligation to be acquainted with the factors constituting the merits of each candidate, as assessed by his superior and brought to his knowledge and discussed with him before the internal recruitment procedure is commenced.

What occurred in this case? It is perfectly clear from the memorandum of the Head of the Italian Language Division that the *decisive* factor in the final choice of Mr Tutzschky was his abilities as 'manager' of the Economics and Finance Section, which were considered superior to those of the applicant. For the reasons set out above, that memorandum, in which the two candidates' superior compared their respective performances, did not have to be communicated to them. As far as the assessment of their individual performances made by their superior at the end of the trial period were concerned, this was not communicated to them. Although the appointing authority was entitled to recruit a head of the Economics and Finance Section exclusively on the basis of their personal files and, in particular, their periodical reports, without making them undergo the trial period, once each of the two candidates had in turn actually performed the duties, it was obliged to include, as part of this unusual procedure designed to provide a clear basis for its later choice, a written assessment of the performance of each candidate. In the absence of any such individual assessment, made essential by the nature and purpose of the method used, and hence in the absence of the timely communication of such an assessment to the applicant, the procedure permitted neither the applicant to make observations on the assessment nor the appointing authority, in the light of any such observations, to adopt a decision on the basis of all the relevant facts.

Mere verbal information of uncertain content provided *during the recruitment procedure and not at the end of the trial period* may not be regarded as meeting the

⁷ — Case 88/71 *Brasseur v European Parliament* [1972] ECR 499, paragraph 11.

requirements of Articles 26 and 43 of the Staff Regulations, which clearly require a formal exchange of information in writing.

By not complying with the essential principle of communicating to the official concerned, before the commencement of the recruitment procedure, the assessment of her performance as head of section during the six-month trial period, the appointing authority has committed a procedural irregularity which renders the contested decision unlawful. That decision must therefore be annulled.

It is thus only by way of alternative that I will consider the submissions adduced by the applicant and the intervener in support of their claim that the contested decision is not well founded.

Substance

6. The applicant makes three complaints alleging a manifest error, breach of the principles of equality of the sexes and of the protection of legitimate expectations.

In the first place, she claims that, by giving precedence to the superior 'managerial' abilities shown by Mr Tutzschky during the trial period, the Commission has committed a manifest error of assessment. Mrs Bonino is senior to her competitor and has higher qualifications and greater experience than him. Furthermore, she performed *de facto* the duties of head of a translation group specializing in economic and statistical translations, which preceded the Economics and Finance Section.

It does not appear to me that her argument, which she considers to be reinforced by the offer which was made to her to become head of another section, can be accepted. I have already emphasized that, according to established case-law, the appointing authority has a wide discretion in assessing the suitability of the various candidates for a vacant post. Even if, as the Commission admitted at the hearing, an objective comparison of the merits of the two candidates involved reveals certain differences in the applicant's favour, it is for the appointing authority and the appointing authority alone to assess the value of those differences, that is to say, to weigh up the factors in favour of and against each candidate in order to determine its choice in the interests of the service.

By ultimately according decisive importance to the ability to manage such a section — a criterion of selection implicitly accepted by the applicant, who took part in the rotation — it does not appear that the appointing authority exceeded its discretion, since that criterion expressly appears among the qualifications set out in the vacancy notice. The offer made to her to manage another section is in fact evidence of the appointing authority's concern to appoint as Head of the Economics and Finance Section the candidate most suitable to that post.

The method used for that purpose, namely the rotation of the candidates (each occupying the post to be filled for a trial period), is certainly open to discussion. It must be asked what, under such a system, is to become of an official who was not in a position to take part in that trial period but none the less submits his candidature after publication of the vacancy notice. Whatever assessment is to be made of that situation, it

does not arise here. The applicant took part in the trial, the vacancy notice made clear reference to the ability to manage the section at issue, Mrs Bonino expressly referred in an annex to her application to the trial period which she had undergone and the appointing authority took account of the results of that period.

Since the principle of the trial period is not at issue, the fact that the appointing authority, in order to choose between two candidates whose previous merits had been compared, based itself on their respective performances as head of section, tested during a trial period, reveals no manifest error.

7. The applicant's last two complaints concern the appointing authority's failure to respect, when it excluded Mrs Bonino (that is to say, a female official), the general principle of equality of the sexes in the Community public service and the undertakings given in that regard by the Commission, which thus disappointed the legitimate expectations of the applicant. Although those complaints raise a question of principle, both must be rejected.

The applicant has not proved that any discrimination on the basis of sex was committed against her by the Commission.⁸ It cannot be denied that the appointing authority assessed the merits of both candidates in accordance with the same criteria. Equal opportunity was thus respected and the successful candidate was chosen on the basis of his superior managerial abilities. The applicant's allegation that there is therein the expression of a

sexist stereotype is not based on any specific evidence and would appear to be too general to be accepted. Furthermore, it should also be borne in mind that Mrs Bonino was offered a post as head of another section, which excludes, in her case, any discrimination on the basis of sex.

With regard to the 'right of preference' referred to by the intervener, two observations must be made. As the latter admitted in its pleadings and at the hearing, it is an entirely new submission, in addition to those of the applicant.

However, the last paragraph of Article 38 of the Statute of the Court of Justice provides that:

'Submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties.'

Article 42 (2) of the Rules of Procedure provides that:

'No fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure.'

That is not so in this case.

In regard to an intervener, the latter provision is of particular importance. If fresh issues could be raised, it would open the way to a misuse of the intervention procedure. Those considerations should cause the Court to regard this submission as

⁸ — See on this subject Case 21/68 *Huybrechts v Commission* [1969] ECR 85, paragraph 20.

inadmissible. In any event, the 'right of preference' is based on the assumption that two candidates are equally suitable, which is not the case here. There is thus no need to consider whether a line of argument which is ultimately inapplicable to this case is well founded.

There remains the final complaint based on the legitimate expectation to which the undertakings given by the Commission

concerning the implementation of the principle of the equality of the sexes gave rise among its female staff.

The applicant cannot rely on a general statement of guidelines to deny that a particular choice made by the administration within the conditions laid down in the Staff Regulations and in the exercise of its discretion is not justified.

Consequently, I conclude that:

- (i) the appointment of Mr Tutzschky should be annulled since it is based on an error of procedure;
- (ii) the Commission should be ordered to pay the costs, except those of the intervener, which should be ordered to bear its own costs.