JUDGMENT OF THE COURT (Third Chamber)
12 February 1987 *

In Case 233/85

Anna Bonino, an official of the Commission of the European Communities, residing in Brussels, represented by Edmond Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, avocat, 83 boulevard Grande-Duchesse Charlotte,

applicant,

and

Union Syndicale — Service public européen — Bruxelles [European Public Service Union, Brussels], whose headquarters are in Brussels, represented by Edmond Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, avocat, 83 boulevard Grande-Duchesse Charlotte,

intervener,

v

Commission of the European Communities, represented by its Legal Adviser, Dimitrios Gouloussis, and Marie Wolfcarius, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of 19 October 1984 concerning the appointment of a head of the Economics and Finance Translation Section in Division IX. D.9 (Italian Translation) and rejecting the applicant's candidature for that post,

THE COURT (Third Chamber)

composed of: Y. Galmot, President of the Chamber, U. Everling and J. C. Moitinho de Almeida, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 13 November 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 January 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 24 July 1985, Anna Bonino, an official in Grade L/A 4 occupying a post of reviser in the Italian Translation Division of the Commission of the European Communities, brought an action for the annulment of the decision of 19 October 1984 rejecting her application for the post of Head of the Economics and Finance Translation Section (Career Bracket L/A 5/L/A 4) and appointing C. Tutzschky to that post.

2 Reference is made to the Report for the Hearing for the facts of the case and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

3 The vacancy notice for the post in question was published following a decision to reorganize the structure of the language divisions by creating specialized sections. Before that notice was published, the Commission appointed Mrs Bonino and Mr Tutzschky to carry out in turn for a trial period of six months the duties of Head of the Economics and Finance Translation Section.

4 It is necessary first to reject Mrs Bonino's argument to the effect that the contested decision is vitiated by the fact that it does not contain a particularly detailed statement of the reasons on which it is based, which Mrs Bonino considers necessary where the candidature of a female official is not accepted in circumstances in which there is an imbalance between the number of male and female officials. By analogy with what the Court has decided in regard to decisions on promotion adopted under Article 45 of the Staff Regulations of Officials (see the judgment of 13 July 1972 in Case 90/71 *Bernardi* v *European Parliament* [1972]

ECR 603, and the judgment of 30 October 1974 in Case 188/73 *Grassi* v *Council* [1974] ECR 1099), Article 25 does not require the appointing authority to give reasons for a decision assigning an official to a new post, either to the official appointed, who cannot be adversely affected by the decision, or to unsuccessful candidates, who might be harmed by such a statement of reasons. The presence of women among the candidates for the post in question and the principle of equal treatment for men and women have no bearing on the matter.

5 Under Article 7 of the Staff Regulations of Officials the appointing authority must choose the official to be assigned to a vacant post, following a vacancy notice, solely in the interests of the service. In making such a decision the appointing authority has a wide discretion in assessing the interests of the service and the suitability of the candidates for the post in question. According to the settled case-law of the Court (see, most recently, the judgment of 4 February 1987 in Case 324/85 *Bouteiller* v *Commission* [1987] ECR 529, 544), the Court's review must be limited in such cases to consideration of the question whether, having regard to the considerations which have influenced the administration in making its assessment, the latter has remained within reasonable bounds and has not used its power in a manifestly incorrect way. The Court cannot therefore substitute its assessment of the candidates' suitability or of the interests of the service for that of the appointing authority.

6 It can be seen from the argument before the Court that in this case the appointing authority accepted that, having regard to the applicant's qualifications and experience in the area of economics and finance as well as her linguistic knowledge, the applicant might appear to be better qualified than Mr Tutzschky. However, it considered that Mr Tutzschky was better qualified to perform the duties in question because of his greater management skills. It is common ground that the appointing authority reached that conclusion on the basis of the trial periods during which each candidate performed the duties of head of section.

7 Such considerations do not of themselves exceed the limits of the appointing authority's discretion in choosing the candidate best suited to the post concerned.

8 Contrary to the applicant's view, such considerations are not contradicted by the fact that the applicant had in fact already served as head of the section and that the Commission subsequently offered her a post as head of another section concerned with automated translation. Without casting doubt on the applicant's general ability to perform the duties of head of section, the appointing authority was entitled to conclude, in the light of its practical experience of the candidates performing the duties, that Mr Tutzschky was better suited to this particular post.

9 Finally, it cannot be considered that such considerations are the expression of a general prejudice against women and are therefore contrary to the principle of equal treatment for men and women. Mrs Bonino supported that allegation only with general statements and produced no specific evidence. In the same context, it is not necessary to consider the argument, put forward solely by the intervener, that the candidatures of women should be given preference, because the intervener itself stated that this was to apply only where the appointing authority had to choose between a man and a woman whom it regarded as being equally suitable and qualified for the post in question, a situation which, as can be seen from the foregoing, does not arise in this case.

10 However, it should be noted that the only document capable of substantiating the considerations which determined the appointing authority's choice was a memorandum from the Head of the Italian Translation Division to the Head of the Personnel Division in which the former proposed the appointment of Mr Tutzschky after describing and comparing the results of the trial periods undergone by the two candidates in the performance of the duties in question. It is common ground that, as Mrs Bonino claims, that memorandum was not brought to her attention and it was not placed in her personal file.

11 In that regard, it must be pointed out that Article 26 of the Staff Regulations of Officials provides that the personal file of an official is to contain 'all reports relating to his ability, efficiency and conduct' and 'any comments by the official on such documents' and that, according to Article 43 of the same regulations, the periodical report on the ability, efficiency and conduct in the service of each official is to be communicated to the official, who is 'entitled to make any comments thereon which he considers relevant'. As the Court held in its judgment of 28 June 1972 (Case 88/71 *Brasseur* v *European Parliament* [1972] ECR 499), the

purpose of those provisions is to guarantee an official's right of defence by ensuring that decisions taken by the 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. The consequence of those provisions is that a decision based on such matters is contrary to the guarantees contained in the Staff Regulations and must be annulled because it was adopted on the basis of a procedure vitiated by illegality (see the judgment of 3 February 1971 in Case 21/70 *Rittweger* v *Commission* [1971] ECR 7).

12 It is true that in this case the memorandum from Mrs Bonino's superior contained, as well as the description and assessment of the result of her trial period, the result of Mr Tutzschky's trial period, a comparative assessment of the two trial periods and the proposal to appoint Mr Tutzschky. Neither reports concerning another official nor matters forming part of the actual appointment procedure, such as a comparative assessment of the qualifications and merits of several candidates or a proposal made by the superior concerned, should be brought to the knowledge of candidates.

13 However, it was contrary to Articles 26 and 43 of the Staff Regulations for the report on Mrs Bonino's trial period to be included in the same memorandum as the comparative assessment of the two candidatures without that report being placed on Mrs Bonino's personal file and without her having an opportunity to comment thereon. Since the appointing authority had no other document on its file to substantiate its assessment that Mr Tutzschky was the most suitable candidate, the report on Mrs Bonino's trial period, contained in the memorandum in question, had a decisive influence on the contested decision.

14 It follows that the contested decision is unlawful and that the application is well founded.

Costs

15 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Annuls the Commission's decision of 19 October 1984, adopted as a consequence of Vacancy Notice COM 1059/84, appointing C. Tutzschky Head of the Economics and Finance Translation Section in the Italian Translation Division and rejecting Mrs Bonino's application for that post;

(2) Orders the Commission to pay the costs.

Galmot Everling Moitinho de Almeida

Delivered in open court in Luxembourg on 12 February 1987.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber