JUDGMENT OF THE COURT (Third Chamber)
23 October 1986 *

In Case 26/85

Louis Vaysse, an official of the Commission of the European Communities, residing at 23 Esselaar, 1630 Linkebeek, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Dimitrios Gouloussis, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of a decision appointing an official,

THE COURT (Third Chamber)

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

Advocate General: C. O. Lenz
Registrar: J. A. Pompe

having regard to the Report for the Hearing and further to the hearing on 11 March 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 26 June 1986,

* Language of the Case: French.

gives the following

JUDGMENT

1 By an application lodged at the Court Registry on 31 January 1985, Louis Vaysse, a lawyer-linguist at the Commission of the European Communities, brought an action for the annulment of the Commission's decision of 16 May 1984 appointing Henry Dubois head of the French Translation Division and for the annulment of the Commission's decisions of 24 October and 7 November 1984 confirming that appointment and rejecting his complaint.

2 Mr Vaysse joined the Language Service of the Commission in 1958. He was promoted to Grade L/A 4 in 1962 and appointed head of a section in that service with effect from 1 February 1981. Between 1 May and 30 September 1981 and between 1 June and 24 October 1982 he acted as temporary head of the French Translation Division; he also carried out the duties of head of division from 20 January until 16 May 1984.

3 On 17 February 1984 the Commission published Vacancy Notice No COM/407/84 concerning the post of Head of the French Translation Division. Mr Vaysse applied for that post, as did 10 other candidates. On 16 May 1984 the Commission decided to fill the vacant post by promoting one of the candidates, Mr Dubois, who had also been head of a section until that time.

4 On 25 June 1984 Mr Vaysse submitted a complaint pursuant to Article 90 (2) of the Staff Regulations seeking the annulment of the decision appointing Mr Dubois and of the implied decision rejecting his candidature, primarily on the ground that during the consideration of the comparative merits of the candidates his most recent periodical report was not on his personal file.

5 By a letter of 7 November 1984 the Commission informed Mr Vaysse that on 24 October 1984 it had carried out a further examination of the comparative merits of the candidates, and in so doing had also considered the said report. That second examination had led it to conclude that the vacant post should indeed be filled by the promotion of Mr Dubois; it had therefore 'confirmed its decision of 16 May 1984 and decided that there were no grounds for annulling the appointment' of the successful candidate. Following the rejection of his complaint Mr Vaysse brought these proceedings.

Admissibility

6 The Commission disputes the admissibility of the action. It argues in substance that the applicant's complaint made on 25 June 1984 concerned the fact that his most recent periodical report was not on his personal file when the appointing authority considered the comparative merits of the candidates. Since the Commission subsequently re-examined the merits of the candidates, and in so doing took into account that report, the complaint ceased to have any basis. Consequently, the only act adversely affecting the applicant was the decison of 24 October 1984, against which he did not submit a complaint.

7 In that regard it need merely be pointed out that it is clear from its wording that Mr Vaysse's complaint of 25 June 1984, directed against the decision of 16 May 1984, concerns the fact that the Commission appointed Mr Dubois to the vacant post and thus implicitly rejected his own application for that post. Since the Commission did not alter the contested decision but in fact confirmed it, the applicant's grounds for complaint remain, and he could therefore legitimately consider that the decision of 16 May 1984, confirmed by the decision of 24 October 1984, adversely affected him for the purposes of Articles 90 and 91 of the Staff Regulations. He was therefore entitled to bring these proceedings without being obliged first to submit a complaint against the confirmatory decision.

8 It follows that the application is admissible.

Substance

9 In support of his conclusions the applicant submits that the Commission contravened Article 45 of the Staff Regulations on the promotion of officials, acted *ultra vires* and committed a misuse of its powers. In substance these submissions correspond to two types of claim, that is to say irregularities in the procedure leading to the contested measures and an error of assessment in that the Commission did not select the official most suitable for the post to be filled.

Procedural irregularities

10 Attention must first be given to the applicant's argument to the effect that the matter was not properly referred to the advisory committee responsible for examining applications for posts in Grades A 2 and A 3 (the 'Group Noël') before the contested decisions were adopted.

11 In that regard the applicant argues that that committee was not properly constituted when it met on 10 May 1984 in the course of the procedure which culminated in the decision of 16 May. According to the applicant, the committee is composed of three persons: the Secretary General of the Commission, the Director General for Personnel and Administration and the Director General for the Directorate General in which a post is vacant. Since in this case the vacant post was in the Directorate General for Personnel and Administration, the Director General for Personnel and Administration sat in a dual capacity, that is to say, as Head of Administration and as Head of the Directorate General in which a post was to be filled. The applicant also complains that the Commission did not provide for the participation of a staff representative in the work of the committee. Finally, he states that the committee was not consulted a second time during the preparation of the decision of 24 October 1984.

12 It appears from the documents before the Court, and in particular from the information provided by the Commission at the Court's request, that the 'Groupe Noël', established under a decision made in 1980, in fact has four members, who are appointed in their personal capacity: the Secretary General of the Commission, the Director General for Personnel and Administration, a director general or head of service appointed by the President of the Commission for a period of two years and a representative of the Member of the Commission responsible for Personnel

and Administration. The committee's task is to consider applications for posts in Grades A 2 and A 3 by way of promotion, transfer within the institution and transfer from another institution from the point of view of the candidate's abilities and aptitude in the light of the qualifications required for the post to be filled. It then submits an opinion on the applications to the Member of the Commission responsible for the sector concerned and to the Member responsible for Personnel and Adminstration.

13 In this case the Commission has stated that at its meeting on 10 May 1984 the 'Groupe Noël' was composed of the Secretary General of the Commission, the Director General for Personnel and Administration, the Director General of the Customs Union Service and a representative of the Member of the Commission responsible for personnel matters. On 10 May 1984 the committee thus constituted designated, in alphabetical order, five candidates of the 11 who had applied for the post as 'worthy of particular consideration'. Among those five candidates were the applicant and the person who was subsequently appointed. The committee did not however rank the candidates considered suitable for the post and did not express a preference for any one of them in any other way.

14 The applicant's argument based on the alleged improper composition of the 'Groupe Noël' at its meeting on 10 May 1984 cannot therefore be accepted. Since the members of the group are appointed in their personal capacity and there is no requirement that there should be a representative of the department in which a post is vacant, the fact that in this case the vacant post is in the Directorate-General for Personnel and Administration and the Director General for that department is therefore also the head of the department in which there is a vacant post cannot affect the propriety of the procedure.

15 Nor can the Commission be criticized for failing to provide for the participation of a staff representative in the work of the 'Groupe Noël'. It must be emphasized in that regard that decisions on promotion and transfer are a matter for the appointing authority alone. If, therefore, on its own initiative and without being required to do so by the Staff Regulations, the appointing authority involves a consultative committee such as the 'Groupe Noël' in the preparation of certain such decisions, it may determine the composition and responsibilities of that

committee as it sees fit. In particular, it may provide that the committee shall include representatives of the adminstration and not representatives of the staff.

16 The applicant cannot complain that the Commission did not consult the 'Groupe Noël' a second time, during the preparation of the decision of 24 October 1984. As appears from the Commission's observations, that committee's sole task was to assess the abilities and aptitude of the candidates in the light of the qualifications required for the post in question. There is no indication that it was to rank the selected candidates in any way or to recommend one of them as the most suitable for the post to be filled. Consequently, when in May 1984 it included the applicant among the candidates deemed worthy of particular consideration, the committee expressed the most favourable possible opinion in his regard. The failure to consult the committee a second time could not therefore adversely affect the applicant's legal position, since in October 1984 it was necessary only to reconsider, on the basis of that opinion, the question whether the appointment of Mr Dubois was justified in the light of the merits of Mr Vaysse.

17 The claim based on the assertion that the 'Groupe Noël' was not properly consulted must therefore be rejected.

18 The applicant also submits that in May 1984 the Commission was not able to carry out a complete and objective examination of the applications submitted since at that time his most recent periodical report, covering the period from 1 July 1981 to 30 June 1983, was not in his personal file. Consequently, the appointment of Mr Dubois to the vacant post by way of promotion and the accompanying rejection of the applicant's candidature were contrary to Article 45 of the Staff Regulations, under which officials may be promoted only 'after consideration of the comparative merits of the officials eligible for promotion and of the reports on them'. Since the decision of 16 May 1984 was therefore unlawful, the Commission could not subsequently confirm it.

19 The Commission admits that the applicant's most recent periodical report was not on his personal file when the decision of 16 May 1984 was being prepared.

However, the report was subsequently placed on his file and was taken into account during the second examination of the merits of the candidates prior to the decision of 24 October 1984. The legality of the latter decision, says the Commission, cannot be placed in question solely because it was referred to as confirmatory, when it was in fact a new decision.

20 It must be held that the decision of 16 May 1984 was indeed procedurally defective inasmuch as the applicant's most recent periodical report was not taken into account in the consideration of the comparative merits of the candidates. However, that irregularity could be cured by further consideration of the matter. It must therefore be determined whether, as it asserts, the Commission did re-examine the matter in October 1984 and in so doing take into account all relevant factors, since the legality of the decision of 24 October 1984 cannot be placed in question solely because its content is identical to that of the previous decision whose preparation did not follow the correct procedure.

21 In reply to a question put by the Court the defendant has stated in that regard that the Members of the Commission and their staff had the opportunity of examining the personal files of the candidates for several days prior to 24 October 1984 and that on that date the Secretariat General held all the files in question at their disposal. It also stated that at its meeting on 24 October 1984 the Commission ascertained that the applicant's periodical report was now on his personal file, carried out a further examination of the whole matter and decided, on the proposal of the Member of the Commission responsible for Personnel and Administration, to confirm the appointment of Mr Dubois.

22 In the light of that information it cannot be concluded that the decision of 24 October 1984 was not preceded by a further examination of the matter and that it was therefore improperly made.

23 That claim must therefore also be rejected.

Error of assessment

24 With regard to the claim based on an alleged error of assessment, the applicant argues that the official appointed to the vacant post had neither greater seniority in the service nor greater seniority in grade; nor has that official been the object of more favourable reports than the applicant. Furthermore, that official's health frequently obliges him to be absent from work, which suggests that the decison to appoint him disregarded the interests of the service.

25 The Commission replies that it took into account all the qualifications required for the duties in question, in particular the candidates' qualities of leadership, their sense of initiative and their organizational abilities. That assessment led it to choose Mr Dubois, whose periodical reports are equivalent to those of the applicant and whose seniority is only slightly less than that of the applicant. As for Mr Dubois's health, the Commission denies that it is such as to prevent him from carrying out his duties as head of division.

26 It must be pointed out that, as the Court held in its judgment of 3 December 1981 (Case 280/80 *Bakke-D'Aloya* v *Council* [1981] ECR 2887), in order to evaluate the interests of the service and the merits to be taken into account in connection with the decision provided for in Article 45 of the Staff Regulations, the appointing authority has wide discretion and that, in that respect, the Court's review must be confined to the question whether, having regard to the various considerations which have influenced the administration in making its assessment, it has remained within reasonable bounds and has not used its authority in a manifestly incorrect manner.

27 In the light of the candidates' seniority, their periodical reports and their ability to carry out administrative duties, it does not appear that the Commission made a manifestly incorrect assessment of their merits.

28 The applicant's arguments regarding the health of the official appointed do not justify the opposite conclusion. In the framework of its wide discretion in this domain, it is for the institution alone to judge whether the health of the successful candidate allows him to carry out his duties properly.

29 Since —none of the applicant's submissions has been upheld, the action must be dismissed as unfounded.

Costs

30 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, under Article 70 of the Rules of Procedure the institutions are to bear their own costs in proceeedings brought by officials of the Communities.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the parties to pay their own costs.

Galmot Everling Moitinho de Almeida

Delivered in open court in Luxembourg on 23 October 1986.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber