JUDGMENT OF THE COURT (Second Chamber)
7 October 1985 *

In Case 128/84

Erik van der Stijl, an official of the Commission, represented by F. Herbert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of N. Decker, 16 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by D. Gouloussis, a Legal Adviser of the Commission, and by M. A. Coninsx, a member of the Commission's Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for:

Primarily

(a) The annulment of the decision rejecting the applicant's candidature for a post of Head of Division (Grade A3) at the Commission and of the decision appointing another candidate to that post;

(b) An order requiring the Commission to pay to the applicant nominal damages of one franc;

In the alternative

Should the claim for annulment be dismissed, an order requiring the Commission none the less to pay to the applicant nominal damages of one franc;

In the further alternative

Even though the claims for annulment and for damages are dismissed, an order requiring the Commission to pay the costs under the second subparagraph of Article 69 (3) of the Rules of Procedure,

* Language of the Case: French.

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

after hearing the Opinion of the Advocate General delivered at the sitting on 10 July 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 16 May 1984, Erik van der Stijl, an official of the Commission of the European Communities, brought an action for (i) the annulment of the implied decision rejecting his candidature for a post of Head of Division (Grade A 3) at the Commission and the decision appointing another candidate to that post pursuant to Article 29 (2) of the Staff Regulations of Officials, and (ii) an order requiring the Commission to pay him nominal damages of one franc in compensation for the non damage allegedly suffered by him in consequence of those decisions.

2 The applicant, who is a Netherlands national, entered the service of the Commission in 1962 as an Administrator in Euratom's Directorate-General for Industry. He was appointed a Principal Administrator in 1964 and since 1971 has held a Grade A 4 post in the Safeguards Directorate, Division F 1 (Inspection). From 1982 to 1983 the applicant was called upon to serve as a replacement for the head of Division F 1, Mr Bommelle, a French national, who was ill.

3 From documents before the Court and from explanations supplied at the hearing by the Director-General, Mr Audland, it appears that the possibility of finding a French national to succeed Mr Bommelle was raised as early as 1982 in discussions between Mr Audland and officials of the French Atomic Energy Commission, which forwarded the *curricula vitae* of two potential candidates. They were interviewed by Mr Audland amongst others. On the basis of those interviews, Mr Audland on 22 March 1983 sent a memorandum to the Vice-President of the Commission, Mr Davignon, which stated that 'should the Commission decide to follow the procedure under Article 29 (2) of the Staff Regulations (publicizing the post outside the institutions)', the candidature of one of the persons proposed, Mr Math, 'appears likely to be adopted in view of his competence and the impression he has given of having the management qualities required for the duties which he will be called upon to carry out on the more practical side of the work of the division in question'.

4 Mr Bommelle's post fell vacant on 1 April 1983 and the procedure for filling the post was initiated by Vacancy Notice No COM/963/83 of 19 May 1983, which stated *inter alia* as follows:

'*Description and nature of post*:

Management and organization of the work of Division F 1 (Inspection) with responsibilities within the Euratom Safeguards sector for:

supervision and coordination of the planning and carrying out of inspections;

supervision of the recording and treatment of information acquired in the course of inspections and supervision and following-up of inspection reports;

supervision of the preparation of specific inspection measures and of the preparation of the specimen forms for each installation;

participation in negotiations with national and international authorities;

Where necessary, conducting inspections pursuant to Chapter VII of the EAEC Treaty.

Qualifications required:

(1) ...

(2) Thorough knowledge of the nuclear production cycle and the management of nuclear material;

(3) Knowledge in the field of nuclear safeguards;

(4) ...

(5) Thorough knowledge relevant to the nature of the post.

Knowledge of languages:

Thorough knowledge of one of the official languages of the Communities;

Satisfactory knowledge of another official language of the Communities.'

5 It appears that between 25 May and 7 June 1983 nine officials of the Commission including the applicant submitted applications for the post in question by requesting promotion under Article 29 (1) (a) of the Staff Regulations. According to the explanations supplied by Mr Audland at the hearing, three of those candidates were short-listed, one of them being judged very competent and fully qualified for the post. It appears from the opinion of the Consultative Committee on appointments to Grade A 2 and A 3 posts dated 30 June 1983 that it too came to the conclusion that that official should be given special consideration.

6 Mr Audland also stated in his evidence to the Court that he briefed the Vice-President, Mr Davignon, on the situation and Mr Davignon took the view that it was necessary to widen the field in order to take into account candidates from outside the institutions. Mr Audland stated to the Court that the importance and sensitive nature of the directorate concerned make it imperative to bear in mind the geographical balance among its staff. A large proportion of the nuclear material to be safeguarded is in France, and, following Mr Bommelle's retirement,

there were no French nationals among the senior staff of the directorate or among qualified candidates from within the institutions.

7 The two candidates put forward by the French authorities formally submitted applications on or about 15 July 1983. At its meeting on 20 July 1983 the Commission decided *not* to fill the vacant post at that stage, *not* to organize an internal competition under Article 29 (1) (b) of the Staff Regulations, to *open* the procedure under Article 29 (2) of the Staff Regulations and consider at that stage applications submitted under Article 29 (1) (a), and, finally, also to *refer* at that stage to the Consultative Committee for its opinion on any candidates applying under Article 29 (2).

8 That decision, which was entered in the minutes of the meetings of the Commission without being accompanied by a statement of reasons, was not published. Only the two applications which had already been received were forwarded to the Consultative Committee, which declared soon afterwards, on 22 July 1983, that they could be taken into consideration. Nevertheless, the Consultative Committee took the view that those candidates' qualifications and merits were not superior to those of the official recommended in the first opinion dated 30 June 1983. In that connection it should be added that, in reply to a question put to him by the Court at the hearing, Mr Audland described the qualifications of that official and those of Mr Math as being 'equivalent although different'.

9 Following the last-mentioned opinion of the Consultative Committee, the Commission decided at its meeting on 27 July 1983 to appoint Mr Math to the post. The decision was published in Staff Courier No 446 of 29 September 1983.

10 On 20 October 1983 the applicant submitted a complaint under Article 90 (2) of the Staff Regulations asking for the annulment of the implied decision rejecting his candidature and also for the annulment of the Commission's decision to appoint Mr Math to the vacant post.

11 By a decision dated 3 November 1983 the President of the Commission formally appointed Mr Math to the vacant post with effect from 28 September 1983.

12 The applicant's complaint was rejected by a letter from the Commission dated 7 February 1984. In that letter the Commission states in particular that the procedure for filling the vacant post was properly carried out and that the Commission is not required, where it rejects a candidature, to state the reasons for its decision, in view of the fact that that might prejudice the unsuccessful candidates.

13 The applicant puts forward a number of submissions in support of his application. He contends that the decisions to appoint Mr Math and to reject his own candidature are void for infringement of essential procedural requirements, infringement of the relevant provisions of the Staff Regulations, in particular Articles 7, 27 and 29, and misuse of powers.

14 The applicant and the Commission are agreed that the main issue raised by the application is whether the conditions for opening the special recruitment procedure provided for by Article 29 (2) of the Staff Regulations were fulfilled in this case or whether the Commission's decision to have recourse to that provision constituted a misuse of procedure. That issue should therefore be examined first.

15 On that point the applicant has pointed out that, as the Court has held in previous cases, the application of Article 29 (2) is subject to very strict conditions as to form and substance (see judgment of 26 May 1971 in Joined Cases 45 and 49/70 *Bode* v *Commission* [1971] ECR 465). Yet, he argues, in this case the post declared vacant did not in any way require special qualifications justifying recruitment under that extraordinary procedure and the Commission did not even state reasons for its recourse to that procedure.

16 According to the applicant, the decision to have recourse to Article 29 (2) in fact represented a misuse of procedure, by which it was sought to avoid consideration of the comparative merits and qualifications of the candidates. He states that before the post even fell vacant the appointing authority prejudged the nationality if not the identity of the person who was to hold it, as is shown in particular by the contacts that took place between the Commission and the French authorities

before the vacancy notice was drawn up and also by the summary manner in which the recruitment procedure was conducted. He submits that the Commission thereby infringed Article 7 and the third paragraph of Article 27 of the Staff Regulations, which prohibit the reserving of a post for nationals of any specific Member State.

17 The Commission emphasizes that it complied with the rules laid down in Article 29 by considering, in the appropriate order, whether the post could be filled by promotion or transfer within the institution and whether it should hold an internal competition and then, when no official had applied for a transfer, proceeding to the stage provided for by Article 29 (2) of the Staff Regulations. At that stage it also took into consideration the applications submitted under Article 29 (1) (a) of the Staff Regulations, including that of the applicant.

18 In justification of its decision to have recourse to the recruitment procedure provided for by Article 29 (2), the Commission states that it is for the appointing authority, subject to review by the Court, to decide upon the special nature of the qualifications necessary to fill a post, and that in this case the special qualifications required relate to the nuclear production cycle, the management of fissile materials and safeguards. According to the Commission, it is enough for one of the required qualifications to be considered special in order for recourse to the procedure under Article 29 (2) to be justified.

19 Finally, the Commission disputes the allegation that the post in question was reserved for a national of a specific Member State; it says that the facts cited by the applicant have the force of mere assertions unsupported by evidence. An objective examination of the qualifications of all the candidates did not require more time than was devoted to it, since, as is often the case for posts requiring special qualifications, the Commission had received applications from outside the institutions and therefore did not need to publicize the vacant post outside the institutions.

20 In reply to a written question in which the Court had asked it to state the reasons for its decision to apply the recruitment procedure provided for in Article 29 (2), the Commission has stated that it took that decision because 'the choice available to it under Article 29 (1) was limited'. Furthermore, it is clear from the explanations supplied by Mr Audland at the hearing that the wish to preserve a

geographical balance within the directorate in question played an important part in that decision. Since the decision, as set out in the Commission's minutes, does not contain any statement of reasons, which is in itself a breach of procedure, the Court's substantive review can only be addressed to the question whether the two reasons stated above are capable of justifying the recourse to the extraordinary procedure provided for by Article 29 (2).

21 In that regard, it should first be pointed out that under the terms of Article 29 (2) that procedure may, except for the recruitment of officials in Grade A1 or A2, only be adopted in exceptional cases, for posts which require special qualifications. It follows, as the Court held in its judgment of 5 December 1974 in Case 176/73 (*Van Belle* v *Council* [1974] ECR 1361), that even in the case of posts requiring special qualifications the extraordinary procedure may only be applied in exceptional cases. The question therefore arises whether the appointing authority was in this case faced with circumstances of such a nature as to render inappropriate the ordinary procedures laid down in Article 29 (1).

22 On that point the Court observes that the procedure laid down by Article 29 (1) (a) had already produced at least three candidates satisfying the requirement of special qualifications, one of whom was an official who was recognized as being very competent and particularly suitable for the post in question. In those circumstances, the special nature of the post in no way justifies the treatment of the case as exceptional within the meaning of Article 29 (2).

23 If in such a situation the appointing authority takes the view that it would be desirable to have a wider choice of candidates, including persons of various nationalities, the solution may be found within the framework of Article 29 (1). If the appointing authority finds that neither the holding of a competition internal to the institution nor the posting of a transfer notice will ensure the desired range of choice, there remains the possibility, under Article 29 (1), of holding an open competition in which all potential candidates, both internal and external, may participate.

24 It follows that the normal procedures would have been sufficient to satisfy all the requirements which apparently prompted the Commission to adopt the contested

decision and that it was therefore not faced with an exceptional case justifying recourse to the extraordinary procedure under Article 29 (2). Hence the procedure followed by the Commission in order to fill the post in question was vitiated by an infringement of the requirements laid down in that provision and the decisions arising from that procedure must be held void.

25 The decision of the President of the Commission of 3 November 1983 appointing Mr Math to the post of Head of the Inspection Division of the Euratom Safeguards Directorate in the Directorate-General for Energy must therefore be annulled. Consequently, without its being necessary to examine the other submissions put forward by the applicant, the decision of the appointing authority rejecting his candidature must also be annulled.

26 The annulment of those decisions constitutes appropriate reparation for any non-material damage which the applicant may have suffered. The claim for damages therefore has no purpose and it is not necessary to adjudicate upon it.

Costs

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

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Annuls the decision of the President of the Commission of 3 November 1983 appointing Mr Math to the post of Head of the Inspection Division of the Euratom Safeguards Directorate in the Directorate-General for Energy;

(2) Annuls the decision of the appointing authority rejecting the applicant's candidature for that post;

(3) Orders the Commission to pay the costs.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 7 October 1985.

P. Heim
Registrar

O. Due
President of the Second Chamber