Case 128/84

Erik van der Stijl
v
Commission of the European Communities

'Officials — Recruitment — Application of Article 29 (2) of the Staff Regulations — Statement of reasons'

Summary

Officials — Recruitment — Application of Article 29 (2) of the Staff Regulations — Strict conditions — Posts requiring special qualifications
(Staff Regulations of Officials, Art. 29 (2))

The special recruitment procedure provided for in Article 29 (2) of the Staff Regulations of Officials may, except for the recruitment of officials in Grade A 1 or A 2, only be adopted in exceptional cases, for posts which require special qualifications. Even when such qualifications are required, that procedure may only be applied in exceptional circumstances of such a nature as to render inappropriate the ordinary procedures laid down in Article 29 (1).

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 10 July 1985

My Lords,

Mr Van der Stijl has been employed in the Commission since 1962, when he began work in Euratom's Directorate-General for Industry. Since 1971 he has held an A4 post in Division 1 (Inspection) of the Directorate-General for Energy. He is a Dutch national. In 1982 Mr Bommelle, who was

his Head of Division and who is French, fell ill and the applicant acted as his replacement. On 1 April 1983, Mr Bommelle resigned by reason of his ill health and thereafter the applicant continued to fulfil the functions of Head of Division. It was not until 28 November 1983 that this position was formally recognized. By a decision of that date, signed by the Commissioner responsible, Mr Van der Stijl was appointed 'temporarily' to the post of Head of Division 'for the period from 1 April 1983 until the post is filled permanently and at the latest until 31 March 1984'.

The Commission had directed its mind to the problem of Mr Bommelle's replacement long before then. As early as September 1982 the Director General for Energy, Mr Audland, discussed the matter in Vienna with Mr Pecqueur of the French Commissariat à l'énergie atomique. In February 1983 he discussed it with Mr Ouvrieu, Director of International Relations of the Commissariat à l'énergie atomique. On 8 March 1983, Mr Ouvrieu sent telexes to Mr Audland and Mr Gmelin, the Director responsible for Euratom's safeguards, with a view to their interviewing two officials of the Commissariat à l'énergie atomique, Mr Math and Mr Guay, some time in March. These interviews in fact took place during that month.

On 22 March 1983, Mr Audland sent a note to Viscomte Davignon, the Commissioner responsible, mentioning the interviews with Mr Guay and Mr Math. He obviously formed the view that Mr Math was the better candidate, since he said:

'Should the Commission decide to follow the procedure under Article 29 (2) of the Staff Regulations (publicizing the post outside the institutions), Mr Math's candidature 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.'

On 28 April 1983, at a meeting of Heads of Division of Directorate F, Mr Van der Stricht, a colleague of the applicant, mentioned that at a symposium held in Versailles Mr Lecomte, a French official, had presented Mr Math as the successor to Mr Bommelle.

The procedure for filling the vacant post was instigated by Vacancy Notice COM/963/83 of 19 May 1983, which was duly circulated within the Commission. It would seem that the notice was also circulated in the other Community institutions, although this does not emerge clearly from the papers before the Court. At all events, the Notice stated that the following qualifications were required:

'(1) Knowledge to university standard, evidenced by a degree or equivalent professional experience;

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

(3) Knowledge in the field of nuclear safeguards;

(4) Proven ability to manage a substantial administrative unit;

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

Candidates were required to lodge their applications by 3 June 1983 but there was some delay in distributing the Notice in Luxembourg so that the deadline was extended.

Mr Van der Stijl lodged his application on 1 June 1983. There were eight other candidates. These included Mr Van der Stricht,

a Belgian. It seems that one of the candidates was French but that he was not considered to have the right qualifications for the post. All these candidates came from the Commission, there being none from other Community institutions.

The Consultative Committee on appointments to Grade A2 and A3 posts delivered Opinion 21/83, dated 30 June 1983 and signed by Mr Noël, Secretary-General of the Commission and President of the Consultative Committee. The Opinion states that on the previous day the Committee had heard Mr Audland explain the qualifications required for the post and the merits of the various candidates. It decided that special consideration should be given to Mr Van der Stricht, thereby endorsing Mr Audland's recommendations.

Nevertheless, Viscomte Davignon apparently thought it necessary or at least desirable to widen the field of candidates. Accordingly, when the Commission came to consider the matter on 20 July 1983, it decided on his proposal not to make an immediate appointment but to open the procedure under Article 29 (2) of the Staff Regulations and at that stage to consider the candidates who had applied under Article 29 (1) (a) of the Staff Regulations. The minute of the meeting records that the Commission had decided not to open an internal competition pursuant to Article 29 (1) (b) and that no applications had been received pursuant to Article 29 (1) (c) of the Staff Regulations.

The relevant parts of Article 29 read as follows:

'(1) Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by promotion or transfer within the institutions;

(b) whether to hold competitions internal to the institution;

(c) what applications for transfer have been made by officials of other institutions of the three European Communities;

and then follow the procedure for competitions ...

(2) A procedure other than the competition procedure may be adopted by the appointing authority for the recruitment of Grade A1 or A2 officials and, in exceptional cases, also for recruitment to posts which require special qualifications'.

In Article 29 (1) (a) 'institutions' in the English language version should be read as meaning the institution in question — the French text makes it clear ('au sein de l'institution') as does the structure of the Article as a whole.

Although discussions had taken place with the French authorities as to the filling of this post, the authorities of Member States other than France were not approached nor did they approach the Commission; it is said, however, that the fact that an appointment was to be made was well known.

It appears that Mr Guay and Mr Math in fact put in their applications on about 15 July, that is before the Commission's decision to follow the procedure under Article 29 (2). The Opinion of the Consultative Committee on them is dated 22 July, the working day immediately after the Commission's decision, 21 July being the Belgian national holiday. The Committee's Opinion, which was also signed by Mr Noël, was to the effect that the two French candidates 'could be taken into consideration' but that their qualifications and merits were not superior to those of Mr Van der Stricht.

Nevertheless, on 27 July 1983, the Commission decided, again on the proposal of Viscomte Davignon, to nominate Mr Math, subject only to his passing his medical examination.

Mr Math was formally appointed to the post as a probationer official by a decision dated 3 November 1983, which stated that the appointment had taken effect on 28 September 1983. Subsequently, he was confirmed in his post.

On 20 October 1983, the applicant submitted a complaint under Article 90 (2) of the Staff Regulations, which was rejected on 7 February 1984. This led him to lodge the application in the present proceedings, which was received by the Court on 16 May 1984.

He seeks the annulment of the decision appointing Mr Math and of the decision rejecting his own candidature. In addition, he seeks 1 franc in token damages. He advances a number of arguments which can be divided into three groups. These relate to the infringement of Articles 27 to 29 of the Staff Regulations, misuse of powers and procedural irregularities respectively.

Although the applicant was not apparently considered to be the strongest of the candidates applying under Article 29 (1) (a), his action is, and is accepted by the Commission to be, admissible.

The applicant contends that the Commission infringed Article 29 (1) of the Staff Regulations, that it was not entitled to proceed under Article 29 (2) at the stage it did and that the conditions justifying resort to that procedure were not satisfied. It is also said that no reasons were given for resorting to Article 29 (2). In any event, Mr Math did not have the necessary special qualifications.

The structure and ambit of Article 29 have been considered by the Court in a number of cases. Of particular relevance are cases 176/73 *Van Belle* v *Council* [1974] ECR 1361, p. 1370, and Joined Cases 45 and 49/70 *Bode* v *Commission* [1971] ECR 465, p. 476. In the former (Case 176/73) the Court held:

'... that an examination shall be made, in order of preference, first of the possibilities of filling the post by promotion or transfer within the institution where the vacancy has occurred, next of the possibility of holding competitions internal to that institution, and, thirdly, of applications for transfer made by officials of other institutions. It is only if these possibilities are seen to be inadequate that the procedure for competitions on the basis either of qualifications or of tests or of both qualifications and tests may be followed.'

Moreover, since the procedure in Article 29 (2) is intended to replace the competition procedure, it cannot be adopted earlier than the stage at which the procedure for competition could be followed. Thus the Commission may not resort to Article 29 (2) without first considering whether the post concerned can be filled in accordance with paragraph 1 of the Article.

For posts of grades other than A1 and A2 the procedure under Article 29 (2) cannot be used unless the case is 'exceptional' and the post requires 'special qualifications'. Unless these conditions are fully observed it is plain that the exceptional procedure provided could be too easily adopted, contrary to the plain intention of the Article. Thus in Cases 45 and 49/70 *Bode* v *Commission*, the Court held:

'The use of the expression "exceptional cases" shows that the application of this provision is subject to very strict conditions

as to form and substance, which moreover is in accordance with both the requirements of the service and the legitimate interest of officials. Therefore the institutions may only have recourse to the special procedure laid down in Article 29 (2) when they have examined with the greatest care whether the conditions of the application of that provision are fulfilled. Moreover, the decision to have recourse to that procedure must state the reasons on which it is based so that the Court may, if necessary, review the legality of that decision.'

In my view in the present case the procedure prescribed by Article 29 was not observed. In the first place I do not consider that the question whether the post could be filled by promotion or transfer within the institution for the purposes of Article 29 (1) (a) was fully considered. The Director-General had recommended a particular internal candidate as being well qualified. He had the requisite experience in the field covered by the notice of vacancy. The Consultative Committee, presided over by Mr Noël, thought that 'special consideration' should be given to that candidate — a formula I understand to mean that they considered him eligible and recommended him for appointment. The Commission did not take a decision under Article 29 (1) (a) before deciding to adopt the Article 29 (2) procedure — they merely transferred all the candidates to be considered in the context of the Article 29 (2) procedure.

In the second place it has not to my mind been shown that exceptional circumstances existed which justified the rejection of a competition procedure being followed, even assuming that no suitable candidate had been found under (a), (b) or (c) of Article 29 (1). If it was wished to widen the field, but to allow the candidates who had applied under Article 29 (1) (a), or even one or some of them, to remain as candidates, then a competition should have been organised, giving an adequate opportunity to candidates from any Member State of the Community to apply. It is abundantly clear in this case that Mr Math was not the only qualified candidate. Both the Director-General and the Committee clearly thought that Mr Van der Stricht, although having different experience and qualifications, was at least as good. Mr Guay also had strong claims. A competition might have attracted other candidates from France or other Member States. I do not consider that it has been shown here that there were exceptional circumstances which justified the replacement of the competition procedure by another procedure under Article 29 (2).

Thirdly, contrary to what the Court said in Cases 45 and 49/70 *Bode* reasons were not given for resorting to Article 29 (2).

I accept that the post was one which required special qualifications. Mr Van der Stricht clearly had those. It is argued that Mr Math's experience and linguistic ability did not satisfy the conditions laid down in the Notice of Vacancy. It seems likely that he did not have at the relevant stage the necessary knowledge of a second language. On the written pleadings there also seemed force in the applicant's contention that Mr Math's experience and qualifications, though at a high level, did not satisfy the particular requirements laid down in the Notice of Vacancy. However, having had the benefit of Mr Audland's explanation of what the post required and of Mr Math's experience, I would not accept the contention that Mr Math did not have the special qualifications required.

A major part of the applicant's case was that this post was all along reserved for a French national, contrary to Article 7 (1) and 27 (3) of the Staff Regulations. If that were so, it would *prima facie* fly in the face of the Court's judgment in Case 85/82 *Schloh* v *Commission* [1983] ECR 2105, where an appointment was annulled on the grounds that the successful candidate's nationality had been the overriding consideration throughout. The Court held that it was only where the merits of the two candidates were substantially the same that an institution could have regard to their nationality so as to maintain or reestablish a geographical balance amongst its staff.

Moreover, as a general rule, nationality cannot in my view be a special qualification for the purposes of Article 29 (2), though there may be a wholly exceptional case where a particular nationality could be justified as a special qualification for a post wholly to be performed in one Member State. I do not think that question arises in this case.

Here on the one hand, the facts which I have set out give weight to the applicant's argument that the intention all along was to appoint a French national, and in particular Mr Math, regardless of other considerations. On the other hand Mr Audland explained the desirability of having a French national in a senior post in this Division, largely because of the fact that 40 or 50% of the installations concerned were in France. I fully accept his explanation. Nonetheless, and even if it be accepted that there was no *a priori* decision that only a French national would be appointed, the desirability of having a French appointment did not in my view justify the Commission setting aside the competition procedure. If on a competition two or more candidates were substantially equal then, as *Schloh* indicates, the desirability of having a candidate from a particular Member State might be a relevant factor.

In the present case, since both the Director-General and the Committee thought that Mr Van der Stricht could have done the job, although not French, it seems to me even more important that a competition should have been held to test the qualifications of the candidates.

I would for my part annul the appointment made and the decision rejecting Mr Van der Stijl's candidature on the basis that the procedures prescribed by Article 29 were not followed in this case.

The applicant also contends that there was here a misuse of powers. The arguments advanced with respect to the misuse of powers substantially repeat in a different form arguments already discussed. Consequently, I do not deal with them separately.

The applicant has advanced a number of procedural arguments.

The applicant's first procedural argument is that the Commission failed to communicate to him in writing its reasoned decision to reject his candidature. He complains both of the absence of any written communication and of the lack of reasoning.

As the applicant rightly states, the source of these obligations is Article 25 (2) of the Staff Regulations which requires such a decision to be communicated 'at once'. I reject the Commission's argument that no individual decision was taken with respect

to the applicant so that he cannot complain of a breach of this provision. I agree with Mr Van der Stijl's submission that the decision to appoint Mr Math was separate in law from the decision to reject his own candidature. The latter was a decision relating specifically to Mr Van der Stijl to which Article 25 (2) applied. Moreover, even if that were not so, elementary considerations of courtesy and good administration would require the Commission to inform unsuccessful candidates of the rejection of their applications.

Although the Commission acknowledged receipt of Mr Van der Stijl's application, by its own account it never informed him in writing of the rejection of his candidature. It thus failed to comply with Article 25 (2).

However, this infringement cannot affect the validity of the decision appointing Mr Math, precisely because the two decisions are separate in law. Since it would obviously be pointless to annul the decision rejecting Mr Van der Stijl's candidature by itself, further consideration of the argument based on Article 25 (2) is unnecessary.

Finally, the applicant claims that the Commission failed to post the decision nominating Mr Math in the premises of the Commission and also failed to publish it in the Monthly Staff Bulletin. There can be no doubt that both steps must be taken 'at once' by virtue of Article 25 (3) of the Staff Regulations. Nevertheless as the Commission rightly contends, the applicant is not entitled to complain about these matters, since they did not and could not adversely affect him. He had an interest in being informed in accordance with Article 25 (2) of the rejection of his candidature, but his right to information went no further.

In any case, the Commission claims that Staff Courrier No 446 of 29 September 1983, which announced the decision appointing Mr Math, was posted up in its premises. The applicant is unable to prove the contrary but maintains that this did not occur before October 1983, if it occurred at all. Also, the appointment was announced in Monthly Staff Bulletin No 221 of June 1984.

Clearly, the Commission has failed to take the steps required by Article 25 (2) 'at once'. Nevertheless, the appointment should not in my view be annulled by reason of this delay: Case 125/80 *Arning* v *Commission* [1981] ECR 2539, p. 2552.

Conclusion

I therefore conclude that the decision appointing Mr Math and the decision rejecting Mr Van der Stijl's candidature should be annulled for the reasons given.

The applicant's request for 1 franc in token damages should be dismissed, since the annulment of the contested decisions suffices to repair any damage caused to his standing or personal feelings: see Cases 59 and 129/80 *Turner* v *Commission* [1981] ECR 1883, p. 1921.

The Commission should, in my view, be ordered to pay the applicant's costs.