JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 1 JUNE 1978 [1]

Thomas J. Mulcahy
v Commission of the European Communities

"Official — Vacancy notice"

Case 110/77

Officials — Recruitment — Consideration of applications — Professional experience — Equivalence to university degree — Appraisal
(Staff Regulations, Article 5)

In the matter of promotion it is for the appointing authority to appraise whether professional experience is equivalent to university education evidenced by a degree.

In Case 110/77

TOMAS J. MULCAHY, an official of the Commission of the European Communities, represented by William A. Young, Solicitor in Dublin, with an address for service in Luxembourg at the Chambers of Victor Biel, Advocate at the Luxembourg Bar, 71 Rue des Glacis,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Trevor Townsend, with an address for service in Luxembourg at the offices of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg Plateau,

defendant,

APPLICATION principally for the annulment of the decision adopted by the Commission on 20 December 1976 appointing Mr L to the post of Head of the Technical Aspects of Transport and Traffic Division of the Directorate General for Transport.

1 — Language of the Case: English.

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, J. Mertens de Wilmars and A. O'Keeffe, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and issues and the arguments of the parties put forward in the course of the written procedure may be summarized as follows:

I — Facts and written procedure

On 4 October 1976 the defendant published Vacancy Notice COM/643/1976 concerning the post of Head of Division C 3 (Technical Aspects of Transport and Traffic) of the Directorate General for Transport (DG VII).

Under the heading "Nature of duties" the Vacancy Notice stated the following:

"To head the administrative unit" (and) ... "To provide the Director General with technical advice ...".

The qualifications required were as follows:

"University education, with degree or diploma in civil, mechanical or electrical engineering, or equivalent practical experience;

Knowledge of international transport organizations and of the common transport policy;

Thorough knowledge of technical transport problems;

Ability to direct a large administrative unit;

Proven experience relevant to the post".

The 14 candidates for that post were interviewed by the Director General of DG VII, Mr Le Goy, the Deputy Director General, Mr Wissels, and the Director of Directorate C, Mr Dousset. The purpose of those interviews was to evaluate candidates from the point of view of both their general suitability for the post and their specialized engineering competence.

That evaluation is set out in the memorandum drawn up by Mr Le Goy which states that seven candidates (including the applicant) were considered to possess some of the necessary attributes for the post and that the others (including Mr L) were adjudged to be less well qualified.

As none of the senior officials of DG VII was a professional engineer, a request was made to a group of three officials of other departments of the Commission who were professionally

qualified engineers to divide the applications into three categories; those from engineers which were suitable for further consideration, those from engineers which should not be further considered and those from candidates who were not qualified engineers and which it therefore did not seem possible to take into consideration.

The group in question placed three candidates (including the applicant) in the first category but noted that there was a "considerable divergence between the description of the post of Head of Division C 3 and the candidates who have been placed in the first category".

In its conclusion Mr Le Goy's memorandum states that no candidate can be regarded as particularly well qualified and proposes that the post be readvertised internally and also be advertised externally.

At its meeting on 20 December 1976 the Commission considered the files of the 14 candidates and the memorandum from Mr Le Goy and decided to appoint Mr L to the vacant post and to promote him to Grade A 3 with effect from 1 January 1977.

The candidate appointed, who holds a degree in Economics and Commerce from the University of Genoa, commenced service in DG VII in 1962 and has held various posts in the divisions dealing with General Affairs, with Infrastructure Charging, with Air and Sea Transport and, from July 1973 to July 1975, with Technical Aspects. By decision of 2 December 1974 he was promoted to Grade A 4 with effect from 1 January 1974.

It emerges from the staff report for the period from 1 July 1973 to 30 June 1975 that Mr L's training and aptitudes are in perfect conformity with the work assigned to him, his ability, efficiency and conduct are all considered to be above average, he very rapidly took on the new duties which had been assigned to him in spite of their very technical nature and had successfully deputized for his head of division who was often absent for reasons of health.

The applicant, Mr Mulcahy, who holds a degree in Civil Engineering from the National University of Ireland, entered Division C 2 of DG VII in 1974. Following the decision to appoint Mr L to the post in dispute he submitted a complaint under Article 90 (2) of the Staff Regulations on 10 February 1977. As he received no reply to his complaint during the stipulated period of four months the applicant brought the present action on 6 September 1977.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure without holding any preparatory inquiry.

II — Conclusions of the parties

The applicant claims that the Court should:

1. Annul the decision of the defendant taken on or about 22 December 1976 appointing Mr L to the post of Head of Division Technical Aspects of Transport and Traffic (VII C 3) of the Directorate General for Transport;
2. Direct a reconsideration of the appointment to the said post;
3. Grant such further relief as may seem proper to the Court;
4. Award the applicant the whole of his costs.

The Commission contends that the Court should:

1. Dismiss the application as unfounded;
2. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *applicant* maintains, first of all, that the Commission infringed the express terms of Vacancy Notice COM/643/1976 and, consequently, Article 7 (1) and Article 27 of the Staff Regulations of Officials. In addition it contravened the principle *"legem patere quam ipse fecisti"*. The defendant, having specified the qualifications required for the post in question, was bound to appoint a person having those qualifications. The contested appointment is not in the interests of the service, since the abilities and qualifications of the person appointed did not meet the requirements of the post. The defendant has contravened the rule, which it had adopted for itself, of selecting and appointing an official of the highest standard of ability.

The Commission infringed Article 45 of the Staff Regulations and misused its powers, as is shown by the great difference in merit between the applicant and the person appointed. The absence of a degree and of technical qualifications cannot be properly compensated in another manner. Familiarity or even experience can be helpful but they are not sufficient.

The decision also infringes Articles 3 and 45 of the Staff Regulations, since the candidate appointed did not have two years' actual seniority in his grade at the date of publication of the Vacancy Notice. In fact, he did not take up his duties in his Grade A 4 post until 20 November 1974.

As regards the first submission, the *defendant* replies that Mr L may be regarded as possessing the specified qualifications for the post.

He has, first of all, "equivalent practical experience". In accordance with the principles laid down by the Court in Joined Cases 18 and 19/64 *(Alvino and Others and Benoit and Others* v *Commission of the European Economic Community* [1965] 2ECR 789) and in Case 44/71 *(Marcato* v *Commission of the European Communities* [1972] 1 ECR 427) Mr L's experience was regarded as such that he would be able to fulfil the requirements of the post at issue, which was one which would normally be held by a qualified engineer. In that regard the most important consideration is the requirements of the post. It is a post of head of division, not that of engineer. It was not, therefore, necessary to inquire whether Mr L had practical experience in the whole of the engineering field or whether he had sufficient expertise to be employed in a purely engineering capacity. In fact, Mr L has shown over a period of two years to the complete satisfaction of his director that he has the ability to deal with highly technical matters.

As regards the other knowledge required by the Vacancy Notice, Mr L satisfied all the requirements (cf. in particular, his ability to direct a large administrative unit).

The interests of the service required the post to be filled by someone who possessed the necessary technical expertise for dealing with such matters but they also required the possession of administrative ability and knowledge of, and practical experience in, the detailed work attaching to the post. Technical knowledge was therefore only one requirement for the post.

Similarly, the allegation that the candidate appointed was not of the highest ability cannot be maintained.

The Commission continues to believe that although it was proper for it to take into consideration the views of the group of officials who were qualified engineers expressed in the memorandum by Mr Le Goy (who had considered the applicant and not Mr L to be qualified for the post), it was not bound by them. The said group examined only the

formal qualifications of the candidates. It was not qualified to pronounce on the question of "equivalent practical experience" since this could only be assessed in relation to the requirements of the service, about which they knew little.

Mr Le Goy's memorandum does not arrive at any definite conclusion and does not provide the Commission with any fully reasoned recommendations. That memorandum comprises, therefore, only one element to be taken into consideration in making the appointment. Mr Le Goy and the aforementioned group of officials cannot be regarded as equivalent to a selection board. It was the Commission itself which conducted a full examination of the comparative merits of the candidates. Its decision is therefore not in breach of the principles laid down by the Court in Cases 62/75 *(Serio* v *Commission* [1966] ECR 561) and 21/68 *(Huybrechts* v *Commission* [1969] ECR 85).

Furthermore, although the applicant regards his own merits as being necessarily superior to those of Mr L, the memorandum by Mr Le Goy casts doubt on his present administrative ability.

The promotion of Mr L to Grade A 4 with retroactive effect from the previous 1 January was in accordance with current practice in so far as promotions within a particular career bracket are concerned. That practice, which is explained by budgetary considerations, is not contrary to the provisions of Article 3 of the Staff Regulations, since at all material times the promoted official is entrusted with and performs the same duties, that is to say, the duties appropriate to the particular career bracket. Mr L therefore completed the minimum period of two years in Grade A 4 on 1 January 1976 and was accordingly eligible for promotion to Grade A 3 when the defendant's decision was adopted on 20 December 1976.

In his reply, the *applicant*, referring again to the facts, points out that the duration of the experience of Mr L stated by him to be equivalent to a university degree or diploma in engineering extended from 1 July 1973 to 1 April 1975, whereas it takes a period of at least four years' study to acquire an engineering degree. Furthermore, Mr L attached documents to his application contrary to the instruction set out at the top of page 1 of the form and accordingly contravened the said instruction.

As regards the first submission, the applicant emphasizes that each of the different qualifications set out must be taken into account in arriving at a decision and that no candidate may be appointed unless he shows that he possesses each of the qualifications, for each of them is "required". Mr L's practical experience in engineering — a period of 21 months in Division C 3 — is not equivalent to an engineering degree or diploma. The period was far too short to gain good sound practical experience. Therefore, the contention that Mr L was capable of providing the Director General of DG VII with technical advice is open to serious question.

The aforementioned *Alvino* and *Marcato* cases have no relevance to the matter at issue. Unlike that of the applicants in those cases, the practical experience of Mr L falls far below the normal period for university studies and the activities performed by him during that period were not at a level comparable to those performed by a person who has received a university education in engineering.

Cases 15/63 *(Lassalle* v *European Parliament* [1964] ECR 31) and 118/73 *(Grassi* v *Council* [1974] 2 /ECR 1109) clearly show that no person may be appointed unless he complies with the

requirements set out in a Vacancy Notice in their plain and ordinary meaning. Unlike many other Vacancy Notices, the one at issue in this instance mentions specifically a qualification in engineering.

As regards the second submission, the applicant observes that the Commission did not make a proper comparative study from similar sources. The memorandum by Mr Le Goy did not deal with Mr L although it expressed an opinion in respect of several other candidates. Not having all the necessary material, the defendant was under an obligation to refer the matter back to Mr Le Goy and, in the meantime, to defer making any appointment (cf. Case 27/63, *Raponi* v *Commission* [1964] ECR 129, Case 97/63, *de Pascale* v *Commission* [1964] ECR 515 and the aforementioned *Serio* case, which, so far from supporting the defendant's case, appears to add further support to the applicant's submissions: as Mr L's name is not mentioned in the memorandum drawn up by Mr Le Goy, the present case is not one of ignoring the precise order of merit as between different suitable candidates but rather of the appointment of a candidate whose name does not appear on the list of suitable candidates).

The applicant requests the Court to order the defendant to produce all the memoranda prepared by Mr Le Goy relating to the appointment of Mr L. Although they were made subsequent to the appointment, those memoranda would show what Mr Le Goy would have stated if he had been consulted by the defendant on all candidates.

The *Commission* replies that Mr L had acquired 21 years' experience in the area in question: he worked from 1956 to 1962 for a transport firm and from his entry into the service of the Commission he worked in the transport sector as an official in Grade A. In addition, the documents attached to his application form headed "supplementary information" concern the "nature of the duties" attaching to the more recent posts which he had held. Mr L could quite properly have included all that information on page 3 of the application form under the heading "nature of duties".

As regards the first submission, if the applicant's argument were correct, the only candidates eligible for the post in question, apart from formally qualified engineers, would be those who have worked as engineers but who have failed or have not attempted to obtain the requisite degree or diploma.

The question in the present case is whether the Commission was entitled to decide that Mr L was qualified by his practical experience not only to perform the above-mentioned duties but to perform them with such competence as would be expected from a qualified engineer. In that regard it is submitted that the requirements of public office are better satisfied by a person of Mr L's experience than by someone who has spent years working at a drawing board without obtaining any qualifications whatsoever.

The *Grassi* case referred to above is not relevant in this instance. On the basis of the *Alvino* case, the Commission was entitled to regard an official as having the requisite practical experience when he had had more than 14 year's experience in the field in question, had during the period from 1 July 1973 to 30 June 1975 performed the duties relating to a post which required technical knowledge at the level of an engineering degree or diploma and had performed those said duties very satisfactorily.

As regards the second submission, the memorandum by Mr Le Goy did not ignore Mr L, who was included among the candidates who were adjudged "less well qualified".

As regards evidence, no documents drawn up after Mr L's appointment to the post in question can be taken into consideration. Furthermore, it is immaterial to know what Mr Le Goy would have said if he had been consulted further by the Commission, since the only question at issue is whether the Commission was entitled to proceed on the basis of the terms of his memorandum. It is clear that all the candidates were interviewed by Mr Le Goy and the group of officials of DG VII and that his memorandum covers all of them. The subsequent memoranda which he drew up are confidential and are addressed solely to a member of the Commission, which should not be requested to produce them save for the most compelling reasons.

The applicant, represented by Mr W. Young, Solicitor in Dublin, the Commission for the European Communities, represented by its Legal Adviser, Mr T. Townsend, acting as Agent, presented oral argument at the hearing on 23 February 1978.

The Advocate General delivered his opinion at the hearing on 16 March 1978.

Decision

1 The present application, which was lodged on 6 September 1977, is principally for the annulment of the decision of the Commission of 20 December 1976 appointing Mr L to the post of Head of the Technical Aspects of Transport and Traffic Division of the Directorate General for Transport (DG VII) and in an alternative for the grant to the applicant of "such further relief as may seem proper to the Court".

2 The post in question was advertised in Vacancy Notice COM/643/1976 of 4 October 1976, which contained under the heading "Nature of duties": "to head the administrative unit" (and) . . . "to provide the Director General with technical advice . . .".

3 The qualifications required were as follows:

"university education, with degree or diploma in civil, mechanical or electrical engineering, or equivalent practical experience; knowledge of international transport organizations and of the common transport policy; thorough knowledge of technical transport problems; ability to direct a large administrative unit; proven experience relevant to the post".

4 The 14 candidates were interviewed by the Director General of DG VII, the Deputy Director General, and the Director of Directorate C in order to evaluate them as regards both their general suitability for the post and their specialized knowledge as engineers.

5 As none of the officials conducting the interview was a professional engineer a request was made to a group of three engineers of other departments to divide the applications into three categories: those from engineers which were suitable for further consideration, those from engineers which should not be further considered and those from candidates who were not qualified engineers and which it therefore did not seem possible to take into consideration.

6 This group of engineers placed three candidates (including the applicant) in the first category but noted that there was a "considerable divergence between the description of the post of Head of Division C 3 and the candidates who have been placed in the first category".

7 It was stated in a memorandum drawn up by the Director General on 6 December 1976 that seven candidates (including the applicant) possessed some of the necessary attributes for the post whilst the other candidates (including Mr L) were judged to be less well qualified.

8 In the Director General's memorandum it was stated that no candidate could be regarded as particularly well qualified and it was suggested that the post be re-advertised and that an internal and, if necessary, an external competition should be held.

9 At its meeting on 20 December 1976 the Commission, after consideration of the files of the 14 candidates and the memorandum by the Director General, decided to appoint Mr L to the vacant post and to promote him to Grade A 3 with effect from 1 January 1977.

10 The candidate appointed, who holds a degree in Economics and Commerce from the University of Genoa, commenced service in 1962 in DG VII where he held various posts in the divisions dealing with General Affairs, with Infrastructure Charging with Air and Sea Transport and, from July 1973 to July 1975, with Technical Aspects.

11 It emerges from the Staff Report for the period from 1 July 1973 to 30 June 1975 that Mr L's training and aptitudes were in perfect conformity with the work assigned to him and that he very rapidly took on the new duties which had been assigned to him in spite of their very technical nature and that he had successfully deputized for his head of division who was often absent for reasons of health.

12 On 10 February 1977 the applicant, who is an official in Division C 2 of DG VII and holds a degree in Civil Engineering from the National University of Ireland, submitted a complaint under Article 90 (2) of the Staff Regulations following the appointment of Mr L.

13 The failure of the Commission to reply to this complaint constituted, as from 10 June 1977, an implied decision rejecting it.

14 In support of his application the applicant maintains that the Commission has infringed the express terms of the vacancy notice in dispute and consequently Article 7 (1) and Article 27 of the Staff Regulations of Officials, and in addition that it has contravened the principle *"legem patere quam ipse fecisti"*.

15 Since the defendant has specified the qualifications required for the post in question it is bound to appoint a person having those qualifications.

16 The Commission considered that the candidate selected had obtained practical experience equivalent to the qualification acquired through university studies and evidenced by an engineering degree.

17 Thus the decisive issue in the present case is what may be regarded as "equivalent practical experience".

18 Whilst at first sight it is difficult to understand how a person who has never practised as an engineer can be held to have practical experience equivalent to skills of university level evidenced by a degree in civil, mechanical or electrical engineering it must nevertheless be noted that the post to be filled was not specifically an engineering post but rather that of head of a division at which level points of a technical nature were handled.

19 Mr L first worked a number of years in a large transport undertaking and in 1962 he entered the service of the Commission where he was engaged in a number of sectors of the common transport policy, including some highly technical ones.

20 During a period of two years (July 1973 to June 1975), which he spent in the Technical Aspects of Transport and Traffic Division he performed to the complete satisfaction of the director, the duties relating to a post which required technical knowledge to the level of that required for an engineering degree and he frequently deputized for his head of division.

21 The defendant's appraisal that Mr L had practical experience, with regard to the post in question, equivalent to the skills evidenced by an engineering degree is thus well founded.

22 Accordingly the first submission cannot be upheld.

23 The applicant claims furthermore that Article 45 of the Staff Regulations has been infringend and that there has been misuse of powers in that there is an appreciable difference between the merits of the applicant and those of the person appointed.

24 Consideration of the comparative merits of officials eligible for promotion, the method prescribed by the said Article 45, was duly effected at the meeting of the Commission on 20 December 1976 on the basis of the candidates' files and of the memorandum by the Director General after the examination undertaken by the officials with engineering qualifications.

25 This submission is thus unfounded.

26 Thirdly the applicant maintains that the candidate appointed did not have two years' actual seniority in his grade at the time when the vacancy notice was published.

27 Since the person appointed only took up his duties in Grade A 4 on 20 November 1974 Article 3 and Article 45 (2) of the Staff Regulations of Officials have, he submits, been infringed.

28 However, at the date when Mr L was promoted, 20 December 1976, the only relevant date with regard to Article 45 (2), the person concerned had in fact two years' seniority in Grade A 4.

29 The third submission must also be dismissed.

30 Since the alternative application is based on the same submissions as the principal application the foregoing considerations show that both must be dismissed as unfounded.

Costs

31 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

32 Nevertheless, under Article 70 of the Rules of Procedure, in proceedings brought against them by servants of the Communities, the institutions shall bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Bosco Mertens de Wilmars O'Keeffe

Delivered in open court in Luxembourg on 1 June 1978.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber