JUDGMENT OF THE COURT (SECOND CHAMBER)
12 MAY 1971[1]

Andreas Reinarz
v Commission of the European Communities

Case 55/70

Summary

1. *Officials — Recruitment — Transfer and promotion — Lack of priority — Difference of grade between candidates for a post — Non-decisive factor in the choice by the competent authority*
   (Staff Regulations of Officials, Article 29)

2. *Officials — Recruitment — Rationalization of departments as a result of the Merger Treaty — Voluntary transfer to lower grade — Priority right of person concerned to be transferred to a post corresponding to his grade — Strict application*
   (Regulation No 259/68 of the Council, Article 8)

1. Since Article 29 of the Staff Regulations treats transfer on a par with promotion, a difference in grade between candidates for a post cannot *per se* constitute a decisive factor in the choice which the competent administrative authority must make.
2. Article 8 (1) of Regulation No 259/68 of the Council derogates from the principle of equality of candidates eligible for promotion and transfer and cannot therefore be applied, having regard both to its very precise objective and its exceptional nature, in cases other than those to which it expressly refers.

In Case 55/70

ANDREAS REINARZ, an official of the Commission of the European Communities, residing at 3 Groenstraat, Tourneppe (Belgium), represented by A. J. Hammerstein, Advocate at the Arrondissementsrechtbank, Maastricht, with an address for service in Luxembourg at the Chambers of A. Elvinger, Advocate, 84 Grand-rue,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, assisted by H. Ph. Visser't Hooft, a member of the Legal Department of the Commission, with an address for service in Luxembourg at the office of its Legal Adviser, É. Reuter, 4 boulevard Royal,

defendant,

1 — Language of the Case: Dutch.

Application for an annulment of the decision of the Commission of 17 June 1970 by which Mr Dousset was appointed to the post of Director in the Directorate-General for Transport,

THE COURT (Second Chamber)

composed of: A. Trabucchi (Rapporteur), President of Chamber, P. Pescatore and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

The facts of the case may be summarized as follows:

The applicant, who entered the service of the ECSC in 1952, was appointed in 1959 Director of the Rates and Conditions Directorate of the Directorate-General for Transport of the Commission of the EEC. By decision of 20 March 1968, taken under the terms of the rationalization of departments, consequent on the merger of the executives, Mr Reinarz was appointed temporary Principal Adviser prior to having his services terminated on 26 June 1968 under Article 4 of Regulation No 259/68 by a decision which was to become effective on 1 October 1968. Following an action which the applicant brought on 29 July 1968 (Case 17/68) the Court by judgment of 6 May 1969 ([1969] ECR 62) annulled the decision of 20 March 1968 assigning the applicant to a post of Principal Adviser and that of 26 June 1968 terminating his service.

Meanwhile, having learned on 25 February 1969 of the promotion of Mr Dousset, who had been appointed Director in the Directorate-General for Transport by decision of 15 January 1969, the applicant, on 24 May 1969, lodged a complaint through official channels against this decision. On 18 June 1969, following the judgment of the Court of 6 May 1969, the Commission reinstated the applicant as an official in Grade A 2 with effect from 1 October 1968 and gave him a newly created post as Principal Adviser in Grade A 2 at the Directorate-General for Transport.

Following an action which the applicant brought on 26 September 1969 for the purpose of obtaining, *inter alia*, the annulment of the decision of 18 June 1969 by which the Commission had appointed him Principal Adviser and the decision of 15 January 1969 appointing Mr Dousset Director in the Directorate for Harmonization, Coordination and Financial Control of Infrastructures, the Court, by judgment of 13 May 1970 in Case 46/69 ([1970] ECR 275), dismissed the application against the decision of 18 June 1969 as inadmissible and annulled the aforementioned decision appointing Mr Dousset. The main ground of this

annulment was that, when the Commission appointed Mr Dousset, it made its choice without having at its disposal a factor which ought to have been taken into account for it to be able to exercise its discretion fully, since, as a result of its abovementioned decision of 26 June 1968, it had prevented the applicant from applying for the post to which Mr Dousset had been appointed.
By notice dated 28 May 1970 the Commission issued a new invitation for candidates to fill the post in question. Following this procedure the Commission at its meeting on 17 June 1970 decided to appoint once again Mr Dousset as head of the abovementioned Directorate. After making a complaint through official channels to the Commission against this decision, the applicant brought the present application for its annulment on 11 September 1970.
The written procedure followed the normal course.
The Court (Second Chamber), after hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure without any preparatory inquiry.
The parties presented oral argument at the hearing on 4 March 1971.
The Advocate-General delivered his opinion at the hearing on 1 April 1971.

II — Conclusions of the parties

The *applicant* claims that the Court should:
(1) Declare null and void or at least annul the decision of the Commission of unknown date appointing Mr Dousset Director in the Directorate-General for Transport;
(2) Order the Commission to pay the applicant's costs.
The *defendant* contends that the Court should:
— dismiss the application brought by Mr Reinarz as unfounded;
— make such order as to costs as is appropriate.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

The first complaint

The *applicant* complains that the Commission has infringed Article 7 (1) and the third paragraph of Article 27 of the Staff Regulations in attaching overriding importance to the concern to maintain a balance in the allocation on a geographical basis of posts of Director in the Directorate-General for Transport without regard to the interests of the service. The facts which have been established by the Court in the two previous judgments show the intention of the Commission from the outset to give the post in question to a director of French nationality. This intention has determined not only the decisions previously annulled by the Court but also the decision in question.
The defendant ignores the fact that the substance of the decision challenged constitutes a repetition of an irregular decision and that in these circumstances it is for the defendant to show that the second appointment of Mr Dousset has been made above all in the interests of the service.
It appears from the minutes of the meeting on 17 June 1970 that the Commission examined the reports of the candidates of Grade A 3 from the point of view of their ability, efficiency and conduct in the service but not that it made a similar examination with regard to the candidates of Grade A 2. Further, the documents of 12 June 1970 and 16 June 1970 show that only four applications were sent to the Commission, although there were six candidates in all mentioned in the said minutes. The applicant infers that the Commission did not con-

sider two applications; this corroborates his claim that the appointment of Mr Dousset was, from the Commission's point of view, fixed in advance.

Finally the applicant stresses that the post which he occupies at present, the duties of which are inversely proportionate to the detailed description which the Commission gives to it, was not declared vacant until after the Court, by its judgment of 6 May 1969, had compelled the Commission, irrespective of its own views, to re-establish the applicant in its service and in his duties as an official in Grade A 2. If this post met an objective requirement of the service, the Commission would already have appointed an official to fill it. It is thus through giving priority to the concern for allocation on a geographical basis in the Directorate-General for Transport that the Commission refused to transfer the applicant, whereas this appeared a normal measure and met the interests of the service. The financial and budgetary consequences of this method of proceeding on the part of the Commission confirms the validity of this complaint.

The *defendant* in answer states that in taking the decision challenged it had in view only the interests of the service and was in no way motivated by the criterion of geographical balance. To the applicant's argument that Mr Dousset had a lower grade than that of the applicant and therefore there could not be said to be a choice between candidates with roughly equal qualifications, the defendant states that in making an appointment the level of qualification cannot be solely determined according to the grade, since Article 29 of the Staff Regulations rules out any priority for transfer in relation to promotion.

Contrary to the applicant's contention that the post which he occupies is a sinecure, the defendant takes the view that the description of the tasks involved offers a very wide scope.

The applicant's reasoning is based on a confusion between measures arising from two different categories and without any relationship *inter se*: on the one hand, measures taken in the context of rationalization and, on the other hand, measures to fill a post which has subsequently become vacant.

There is no report on the applicant, since under Article 33 of the Staff Regulations no such report is made for officials in Grade A 2. It appears however from the minutes of the meeting of the Commission on 17 June 1970 that all candidates were in fact considered. The fact that the document of 12 June 1970 mentions only four applications is due to a simple copying error arising from the heading of the document in question which wrongly states 'Provision for a post of Grade A 3 vacant in the Directorate-General for Social Affairs', a post for which four people in fact applied.

The second complaint

The *applicant* maintains that the decision challenged is void because it did not appear that the Commission had had regard to the judgments of the Court of 13 May 1970 and 6 May 1969 and in particular to the criteria laid down in those judgments according to which, in the special circumstances arising from the Merger Treaty, on the one hand, the maintenance of career prospects must take precedence over the concern to maintain the broadest possible geographical basis and, on the other hand, an official may have a legitimate interest in preferring one post to another.

The applicant observes that the extract from the minutes of the meeting of the Commission on 17 June 1970 contains no note of the background of the case and in particular does not mention either the two judgments of the Court or the criteria laid down therein. It follows that the grounds of the decision challenged do not fulfil the minimum conditions which must be satisfied by a decision appointing an official of the Commission.

The *defendant* expresses its astonishment at the applicant's doubts.

It observes that according to the established case-law of the Court it is not bound to give reasons for a decision making an appointment. It follows moreover from the decision challenged that the defendant has necessarily had regard to the judgment given in Case 46/69.

The third complaint

The *applicant* maintains that the priority right contained in Article 8 (2) of Regulation No 259/68, according to which an official may be transferred to any post corresponding to his grade which may fall vacant, is likewise applicable to an official who under the Merger Treaty has been assigned to a post corresponding to his grade.

In maintaining that the applicant must be treated as an official in respect of whom no measure based on Article 4 (1) of Regulation No 259/68 is contemplated, the defendant is disregarding the fact that it was no longer free to choose between the application of this provision or of Article 8. When the Court decided that the duties of Director and Special Adviser were of the same grade, it did not rule on the priority right of which the applicant considers he is able to take advantage on the basis of the spirit of Articles 4 and 8 of Regulation No 259/68.

The *defendant* is of the opinion that the applicant's situation is quite different from that for which Article 8 of Regulation No 259/68 provided compensation in the form of a priority right.

This priority constitutes a temporary exception to the equality of applicants with prospects of promotion and transfer and has meaning and is justified only in cases of transfer to a lower grade. The similarity which the applicant seeks to establish between his position and the case referred to in Article 8 is incompatible with the judgment which the Court gave in Case 46/69 and in which it stated that the difference between the respective powers and duties of the posts of Director and Principal Adviser does not infringe the rule of equivalence between grade and post.

The fourth complaint

The *applicant* maintains that the decision challenged is contrary to a general principle of good administration according to which when an administrative body issues a decision it must repair as far as possible the fault or omission of which it has previously been guilty.

The Court has not to assess the interests of the service but to consider whether the Commission has exercised its discretionary power reasonably.

The *defendant* considers that to accept the applicant's argument would be tantamount to the Court's substituting its own assessment for the Commission's assessment of the interests of the service.

It wonders whether, when the choice of an official meets the interests of the service, it may still be required to prefer the appointment of the applicant on the ground that this is alleged to be reasonable and in accordance with justice. The defendant does not see either how it would be just and reasonable, having regard to the decisions which it has previously taken to fill the vacancy in question, for the applicant to be appointed.

Grounds of judgment

1 By application filed on 11 September 1970, the applicant has asked the Court 'to declare null and void or, at least, annul the decision of the Commission, of unknown date, appointing Mr Dousset Director in the Directorate-General for Transport.'

The first complaint

2 The applicant maintains that the decision challenged infringes Article 7 (1) and the third paragraph of Article 27 of the Staff Regulations and disregards the principles laid down by the judgment of 6 May 1969 and in Case 17/68 in view of the fact that the decision is inspired solely by the Commission's concern to maintain the balance on a geographical basis of the allocation of posts of Director in the Directorate-General for Transport, without regard to the interests of the service.

3 The applicant bases his complaint first on the fact that he was already established in Grade A 2, whereas the official chosen for the post of Director, which was the subject-matter of the procedure, had a lower grade.

4 Article 29 of the Staff Regulations treats transfer on a par with promotion and therefore a difference in grade between candidates for a post cannot *per se* constitute a decisive factor in the choice which the competent administrative authority must make.

5 In contrast to the case considered in the abovementioned judgment of 6 May 1969, there is nothing in the present case to show that the decision was determined by considerations relating to the nationality of those concerned.

6 The applicant maintains further that it appears from the minutes of the meeting of the Commission on 17 June 1970 that the Commission considered only the qualifications of candidates in Grade A 3 and that further the documents of 12 and 16 June 1970 relating to the same competition refer to four applications instead of the six actually lodged, which shows that the decision to appoint Mr Dousset had already been taken in advance.

7 Although at the time of the competition the Commission did not have a periodic report on the applicant, since such a report is not made in respect of officials of Grade A 2, it nevertheless appears from the minutes of the meeting on 17 June 1970, at which the decision in question was taken, that the Commission considered the comparative merits and qualifications of all the candidates, including those who were already classified in Grade A 2.

8 Accordingly this complaint is unfounded.

The second complaint

9 The applicant alleges infringement of an essential procedural requirement in that the decision challenged does not show whether the Commission took into

account the judgments given by the Court on 6 May 1969 and 13 May 1970 in the actions previously brought against it by Mr Reinarz.

10 The only obligation on the Commission under the Treaty was in the present case to comply with the judgments which have been given, and it is not disputed that this has been done.

11 On the other hand, there is no necessity to refer to it in the decision in question.

12 Accordingly this complaint is unfounded.

The third complaint

13 The applicant maintains that the decision challenged infringes Article 8 (2) of Regulation No 259/68 of the Council, from which there is to be inferred a priority right for the applicant to be appointed to the post in question.

14 This article provides that 'An official affected by a decision taken in accordance with the second subparagraph of paragraph (1) shall retain his grade and all rights relating thereto. He shall have a priority right of transfer to any post corresponding to his grade which may fall vacant or be created provided that he is suitable for the post in question'.

15 This provision, which is intended to compensate an official who under Article 8 (1) may have been transferred to a post corresponding to the career bracket immediately below that applicable to his grade, derogates from the principle of equality of candidates eligible for promotion and transfer and cannot therefore be applied, having regard both to its very precise objective and its exceptional nature, in cases other than those to which it expressly refers.

16 Since the applicant has been transferred to a post corresponding to his grade, he cannot avail himself of this provision.

17 Accordingly this complaint is unfounded.

The fourth complaint

18 The applicant maintains that the decision challenged is contrary to a general principle of good administration requiring the administrative authority to repair as far as possible the fault or omission of which it has been guilty.

19 The decision appointing Mr Dousset, dated 15 January 1969, was annulled by the Court because when the Commission made this appointment it did not have at its disposal all the factors which would have been taken into account if by its decision of 26 June 1968 concerning the termination of the applicant's services—a decision annulled by the judgment of 6 May 1969—it had not illegally prevented the applicant from applying for the post to which Mr Dousset had been appointed.

20 By initiating *de novo* the procedure to fill the post in question and by thus giving the applicant the opportunity to apply, the Commission did what was necessary to rectify the irregularity in procedure already found by the Court.

21 Accordingly this complaint is unfounded.

Costs

22 The applicant has failed in his application.

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

24 However, according to Article 70 of the Rules of Procedure the costs incurred by institutions in actions involving servants of the Communities are payable by the former.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaties establishing the European Communities;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 7, 27, 29 and 91;
Having regard to Regulation No 259/68 of the Council, especially Article 8;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as unfounded;**

2. Orders the parties to bear their own costs.

Trabucchi Pescatore Kutscher

Delivered in open court in Luxembourg on 12 May 1971.

A. Van Houtte
Registrar

A. Trabucchi
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 1 APRIL 1971[1]

Mr President,
Members of the Court,

Mr Reinarz has been Director in the Directorate-General for Transport of the Commission since 1959.

On the merger of the executives this Directorate-General was reorganized and it is with this reorganization that the career difficulties experienced by Mr Reinarz began.

Until the merger this Directorate-General had four Directors but in the new detailed list of posts it had only three.

The applicant's candidature for one of these Directorates was not accepted and in 1968 he was appointed Principal Adviser on a temporary basis and then some months later he was dismissed under the provisions of Regulation No 259/68, the purpose of which was to provide for personnel problems arising from the merger of the executives.

However by a judgment of 6 May 1969, to which I shall return later, the Court annulled the decision appointing Mr Reinarz temporary Principal Adviser and the decision terminating his service.

Following that judgment the Commission once again appointed Mr Reinarz as Principal Adviser but this time on a permanent and not temporary basis.

This decision however did not satisfy Mr Reinarz, especially as during the time of his irregular dismissal from the service, the Directorate which he had wanted to obtain had been given to another official, Mr Dousset.

Mr Reinarz then asked the Court to annul first his appointment as Principal Adviser and secondly the appointment of Mr Dousset as Director.

In its judgment of 13 May 1970, which I shall likewise mention later, the Court rejected the submissions of Mr Reinarz directed against his appointment as Principal Adviser, but on the other hand annulled the appointment of Mr Dousset as Director.

Following this second judgment, the Commission reconsidered the question and once again appointed Mr Dousset as Director. It is this appointment which the applicant is asking the Court to annul in the present application.

In support of his application he relies on numerous pleas which I think may be classified into three groups.

A — The first group of pleas relates to formal defects or procedural irregularities which are claimed to exist.

(a) First of all the applicant maintains that there are insufficient grounds for

1 — Translated from the French.