2. Orders the parties to bear their own costs.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 14 July 1983.

J. A. Pompe
Deputy Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 19 MAY 1983 [1]

Mr President,
Members of the Court,

1. Introduction

In this case the Court is once again confronted with a number of questions relating to a promotion procedure. This time the case involves a vacancy notice for some seven posts of principal translator in Grade L/A 5-4 in the Danish translation division of the Commission. The applicants and the other persons named in the case have been working in that division since 1974 with differences of a few months. The candidatures submitted by the applicants were among those rejected by the Commission while those promoted to the above-mentioned vacant posts included Tilly Bye Rasmussen and Anker Rasmussen.

The applicants claim that the Court should annul the rejection, notified by the Commission by letter of 3 April 1981, of their candidatures for appointment as principal translators pursuant to the vacancy notice (COM/1134-1140/80). They further claim that the Court should order that they be appointed as principal translators, with seniority calculated from 1 March 1981, either by the permanent creation of two new posts of principal translator or by annulling the appointments of Tilly Bye Rasmussen and Anker Rasmussen. As there is no provision in Community law for making such an order the second claim must be regarded as inadmissible. I shall therefore confine my opinion to the first claim.

The applicants' principal submissions are substantially as follows:

1 — Translated from the Dutch.

Tilly Bye Rasmussen does not fulfil the requirements in the vacancy notice since her training is not equivalent to education of university standard culminating in a degree or to experience of a similar standard.

Anker Rasmussen does not fulfil the second requirement in the vacancy notice since he has only recently obtained a university degree and thus cannot subsequently have acquired long professional experience.

Finally, the applicants consider that they should have been appointed to the posts since they fulfil the requirements in the vacancy notice and are more suited to those posts than the above-mentioned persons who were appointed since, having regard to their level of education, they are better qualified.

As regards the facts and the course of the procedure I refer to the Report for the Hearing.

2. The vacancy notice

The relevant requirements in the vacancy notice (COM/1134-1140/80) are as follows:

"University education attested by a diploma, or equivalent professional experience;

Long experience of translation; experience of revision".

Thirteen candidates, including the applicants in these proceedings and Tilly Bye Rasmussen and Anker Rasmussen, applied for the seven vacancies. On 1 March 1981 Tilly Bye Rasmussen and Anker Rasmussen were promoted to Grade L/A 5 and appointed to the vacant posts. On the other hand, the applicants were, as I have stated, rejected.

3. Legal assessment

In essence the first submission, as I have said, is that Tilly Bye Rasmussen does not fulfil the first requirement in the vacancy notice since she does not have a university degree. It is further claimed that Anker Rasmussen does not fulfil the second requirement.

I must admit that I have difficulty in following the applicants' arguments. Even on a first reading of the vacancy notice it is quite clear that the requirement is a university diploma "or" equivalent professional experience. The requirements are thus stated in the alternative.

If the applicants are seeking to contest the requirements in the vacancy notice as such on the grounds that such a vacancy may be filled only by officials with a university diploma, as the latter are better qualified than persons having only professional experience, such an argument must be firmly rejected by reference to Article 5 (1) and (2) of the Staff Regulations. It is expressly stated in the second subparagraph of Article 5 (1) that Category A duties and, having regard to Article 5 (2), L/A duties as well, "require university education or equivalent professional experience". It is established by the judgments in Case 117/78 *(Orlandi* [1979] ECR 1613, at p. 1619) and Case 178/78 *(Szemerey* [1979] ECR 2855, at p. 2861) that the qualifications mentioned in Article 5 are to be understood as minimum requirements. As I stated in my opinion in Case 143/82 *(Lipman* [1983] ECR 1301) on 24 March 1983, the interests of the service must constitute the general guiding principle in deciding what requirements may actually be set in a vacancy notice. It is axiomatic that the appointing authority has a wide discretion in that respect.

4. The first submission

As regards the first submission, reference should first be made to the consistent

case-law of the Court according to which "the appointing authority has a wide discretion in comparing the candidates' merits and . . . its assessement as to whether a candidate fulfils the conditions of eligibility required by the vacancy notice may be questioned only in the event of manifest error" (Case 151/80, *De Hoe* [1981] ECR 3161, at p. 3173, paragraph 9). That case concerned an action in which it was alleged that the official who was appointed did not satisfy one of the conditions laid down in the vacancy notice.

Having regard to that case-law I consider it appropriate that the Court should not reject the submission *a priori* as the Commission has proposed. The allegation that the requirements in the vacancy notice were not met may, after all, be an indication of a manifest error.

But I do consider that the submission must in fact be rejected. In my view it is not necessary for the Court to scrutinize closely the information produced by the applicants in the written and oral procedure regarding the level of the various Danish courses of education. What must be remembered is that Tilly Bye Rasmussen and Anker Rasmussen have been working as translators in the Danish translation division of the Commission since as long ago as 1974. They were recruited in Grade L/A 7 and promoted to Grade L/A 6 in 1978. At the time of their recruitment their professional experience was plainly treated as equivalent to a university degree in accordance with Article 5 of the Staff Regulations since it is quite clear that they did not have a university degree at that time.

It cannot be maintained seven years later that the level of their professional experience is not equivalent to a university degree when they have been engaged on translation work of the requisite level during that period. In that connection I would refer to Joined Cases 18 and 19/64 *(Alvino and Others* [1965] ECR 789) in which it was stated that the fact that officials who do not possess a university degree but perform duties appropriate to Category A is in itself proof that those officials possess professional experience equivalent to a university degree. The requirement in the vacancy notice has not been infringed in this respect.

5. The second submission

The subsequent submission regarding Anker Rasmussen must be rejected for the same reason. The applicants claim that Anker Rasmussen obtained a university degree only in 1979 and that he could only acquire professional experience as from that time. For that reason, they claim, he did not satisfy the second requirement of long experience of translation work. In view of the fact that he has been engaged on translation work of L/A standard since 1974, his experience in that field has certainly been of the requisite standard from that date. The applicants' contention that the professional experience must be acquired after obtaining the university degree applies only when both a university degree and professional experience are required. On this point I again refer to my opinion in the *Lipman* case.

In conclusion, I take the view that both submissions should be rejected since it has not been shown that the appoint-

ments of Tilly Bye Rasmussen and Anker Rasmussen were made contrary to the requirements in the vacancy notice.

6. The third submission

The applicants go on to submit that if the Court, unlike the applicants, should consider that the officials appointed do indeed meet the requirements in the vacancy notice, the applicants should still be appointed to the posts concerned since they are better qualified than the officials in fact appointed. The applicants refer to the level of their education and the dates on which they completed it.

I shall first consider the legal argument in support of that submission, as expounded in particular in the oral procedure. The primary issue discussed was how far the consistent case-law of this Court regarding the appointing authority's wide discretion in comparing the qualifications in a promotion procedure is also applicable in this case. The applicants maintain that that case-law relates to promotion under Article 45 of the Staff Regulations but is not applicable to this case, which is based on Article 29 of the Staff Regulations.

Such reasoning cannot be accepted. Article 29 (1) lists the various procedures to be considered in filling vacancies. If, after considering the possibilities under Article 29 (1) (a), the appointing authority decides that the vacancy can be filled by promotion, this is then done on the basis of Article 45. I would refer in this regard to the Court's consistent case-law, *inter alia* in Case 123/75 *Küster* [1976] ECR 1701, at p. 1709) and more recently in Case 298/81 *Colussi* judgment of 24 March 1983 [1983] ECR 1131, paragraphs 17 and 20 of the Decision. In the judgment in the latter case the wide discretion enjoyed by the appointing authority in comparing the merits of candidates in the promotion procedure under Article 29 in conjunction with Article 45 is again expressly confirmed.

Nor is it possible to accept the further argument, in support of that submission, to the effect that the applicants have a better right to promotion than the officials actually appointed since their level of education is higher. Article 45 refers not to comparison of diplomas as a criterion for promotion but to consideration of the merits of the officials and of the reports on them. In answer to questions put to it by the Court, the Commission has confirmed that for promotion, after recruitment, wider-ranging criteria of assessment apply than diplomas. That policy was recently approved by the Court in its judgments in Case 298/81 *(Colussi, supra.)* and Case 280/81 *(Hoffmann,* judgment of 17 March 1983 [1983] ECR 889). In the latter judgment comparison of diplomas was rejected as the sole criterion for promotion and it was stated that for promotion account is taken of wider criteria for weighing up the merits of officials than just diplomas, including the general level of the duties performed for example. It seems to me obvious that the decisive factor in promotions must be the merits of the persons concerned, as shown in practice.

Finally, the applicants contended that their leave on personal grounds from 1 January 1976 until 1 July 1977 in fact worked to their detriment since there was no accrual in their seniority during that period and therefore other officials were appointed instead of them. They considered this to amount to an infringement of Article 24 since they spent that time in Denmark improving their level of education and the leave was therefore granted to them in the interests of the service.

The Commission does not deny those facts but takes the view that the non-accrual of seniority was not contrary to Article 24, particularly the fourth paragraph thereof, which merely states that training and instruction are to be taken into account for purposes of promotion. No obligation to allow seniority to accrue can be inferred from that provision. I would add that Article 40 of the Staff Regulations, which governs "leave on personal grounds", expressly provides in paragraph (3) *inter alia:* "During leave, an official shall not be entitled to advancement to a higher step or promotion in grade ...". In so far as seniority was relevant to the appointments, it is therefore quite proper that the applicants' seniority did not increase during their leave. In addition, the officials appointed were promoted to L/A 6 in 1978 whereas the applicants were promoted to that grade somewhat later, on 1 January 1979, again in accordance with Article 40. Furthermore it is my view that seniority should constitute a less important criterion of assessement than the merits of the candidates and would thus primarily come into play when various candidates are of equal merit.

7. Misuse of powers

Finally, in their reply, the applicants put forward the submission of misuse of powers on the part of the Commission based, they claim, on new information that only emerged from the Commission's defence. The Commission contends that the submission is inadmissible since, by virtue of Article 42 (2) of the Rules of Procedure, it was made out of time. The applicants have hardly enlarged upon that submission. They have also not stated on what new information it is based; or what allegedly improper purpose the appointing authority pursued in the promotion procedure. In my view therefore that submission must indeed be rejected as inadmissible under Article 42 (2) of the Rules of Procedure.

Furthermore, having regard to all the foregoing, the applicants have in no way shown that the appointing authority has acted in breach of any provision of the Staff Regulations or contrary to the interests of the service.

8. Conclusions

I therefore conclude that the applicants' submissions cannot succeed and the application should therefore be dismissed.

Pursuant to Articles 69 and 70 of the Rules of Procedure, the parties should be ordered to bear their own costs.