JUDGMENT OF THE COURT (FIRST CHAMBER)
10 DECEMBER 1969[1]

Gustav Wonnerth
v Commission of the European Communities

Case 12/69

Summary

Officials — Recruitment — Rationalization of the administration following the Merger Treaty — Voluntary transfer to a post corresponding to career bracket immediately below that applicable to grade — Nature — Priority right of the official concerned to be transferred to any post corresponding to his grade — Guarantees — Suitability of candidates having priority — Consideration — Statement of reasons — Duties of the administration — Reference to the merits of candidates not entitled to priority not permissible.

(Regulation No 259/68 of the Council, Article 8)

The voluntary acceptance by certain servants of transfer under Article 8(1) of Regulation No 259/68 constitutes an essentially temporary measure which is justified by the short-term requirements of the service following the merger of the Executives and cannot be prolonged to the detriment of the official concerned.

In view of the quite exceptional and temporary nature of such transfer and in order not to disregard the obligations arising under Article 8(2), it is necessary to provide the officials concerned with strict guarantees regarding their priority right.

The implementation of such guarantees requires that the suitability of the candidates having priority be considered independently of any reference to the possible merits of those who have no such right.

A consideration of the suitability of these candidates must be based on concrete factors which are capable of review; these factors must appear in the minutes of the Commission.

In Case 12/69

GUSTAV WONNERTH, an official of the Commission of the European Communities, residing in Luxembourg at 13 Rue Schoenfels, Bridel, represented by Ernest Arendt, advocate of the Luxembourg Bar, 34 b rue Philippe-II, Luxembourg,

applicant

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, with an address for service in Luxembourg at the Chambers of Émile Reuter, 4 boulevard Royal,

defendant,

1 — Language of the Case: French.

Application:

(1) for the annulment of the decision, taken in pursuance of Vacancy Notice No COM/161, to appoint Mr Günter Arning to the vacant post of Head of Division F/2, Work Safety, in the Directorate-General for Social Affairs, of which the applicant was informed by Publication No 2/1969 of 16 January 1969;

(2) for the annulment of the decision informing the applicant on 30 January 1969 that it had not been possible to entertain his application in respect of Vacancy Notice No COM/161;

(3) to the extent necessary, for the annulment of the implied decision of rejection arising from the administration's failure over more than two months to reply to the complaint through official channels lodged by the applicant on 19 December 1968.

THE COURT (First Chamber)

composed of: R. Monaco, President of Chamber, A. M. Donner and J. Mertens de Wilmars (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The applicant, an official of the ECSC in Grade A3, is a qualified engineer and was Head of the Division for Technical Research on Coal at the High Authority.
On the merger of the Executives this Division was absorbed into the Directorate-General for Energy and abolished in the new detailed list of posts.
In pursuance of Article 8 of Regulation No 259/68, the applicant accepted transfer to a post corresponding to the career bracket immediately below that applicable to his grade, in this case to a post in Grade A4.
Under Article 8(2) he had a priority right of transfer to any post corresponding to his grade which might fall vacant or be created, provided that he was suitable for the post in question.
On 25 October 1968 the applicant applied for a vacant post in Grade A3 which formed the subject of Vacancy Notice No COM/161. This was a post

of Head of the Division for Work Safety, which formed part of the Directorate-General for Social Affairs.

The applicant found himself competing with two other officials in the same position in Grade A3, and with eight officials of a lower grade.

By decision of 18 December 1968 the Commission appointed Mr Arning, one of the eight officials of lower grade, to the post in question after finding that none of the officials in Grade A3 who had accepted transfer pursuant to Article 8(1) was suitable.

II—Conclusion of the parties

(a) In his application the *applicant* claims that the Court should:

I — Declare that the present application is admissible;

II— Declare that it is justified as regards the substance of the action;

(1) *Principally*

— Declare that, as regards the equal or even greater merits of other candidates, the priority right provided for in Article 8(2) of Regulation No 259/68 confers on the official who enjoys it a well-established and absolute right to preference, provided that he can show that he is suitable for the post in question;

— Declare that the applicant is suitable for the post forming the subject of Vacancy Notice No COM/161;

And accordingly declare that the applicant had a well-established right to be appointed to the post in question;

Consequently: annul, on the ground that it infringes Article 8(2) of Regulation No 259/68 and the contractual undertaking given by the defendant on 12 May 1968, the decision of the Commission:

— refusing to appoint the applicant to the post referred to in Vacancy Notice No COM/161;

— appointing Mr Günter Arning to that post;

(2) *In the alternative*

— Declare that by refusing to appoint the applicant to the post referred to in Vacancy Notice No COM/161, the Commission has infringed the provisions of Article 5(3), the first paragraph of Article 27 and Article 45 of the Staff Regulations;

— And accordingly, annul the decision of the Commission on the ground that it infringes the abovementioned provisions:

— refusing to appoint the applicant to the post referred to in Vacancy Notice No COM/161;

— appointing Mr Günter Arning to that post;

(3) *To the extent necessary:*

Declare that the defendant must produce the following documents at the hearing:

(a) the report submitted by Mr Vinck, Director-General of the Directorate for Social Affairs at the Commission, containing the proposals concerning the applications made by the Directorate-General in relation to the post referred to in Vacancy Notice No COM/161;

(b) The extract from the minutes of the Commission of 18 December 1968 concerning the appointment to the post referred to in Vacancy Notice No COM/161;

(c) The personal file containing the periodic reports on Mr Günter Arning, who was appointed to the post referred to in Vacancy Notice No COM/161 (Head of Division V/F/2, Work Safety) at the Directorate - General for Social Affairs;

(4) Declare that Mr Günter Arning must intervene in the action so that joint judgment may be given;

(5) Order the defendant to pay the costs of the action.

The *defendant* contends that the Court should:

— dismiss as inadmissible the conclusions claiming the annulment of an alleged decision of the Commission of the European Communities refusing to appoint the applicant to the post referred to in Vacancy Notice No COM/161;
— Dismiss the entire application as unfounded;
— Order the defendant to pay the costs.

In his reply the *applicant* claims that the Court should:

1. Set aside the submission of inadmissibility put forward by the defendant; Declare that the present application is admissible in its entirety;

2. As regards the substance of the action, declare that it is well-founded, accept the applicant's conclusions set out in his application commencing the proceedings under I — 1, 2, 4 and 5, refer the case back to the Commision for further action to be taken and for the Court's decision to be put into effect by declaring that recruitment to a post for which a priority has been established must be made on the basis of precise and definite rules capable of review by the Court and either that the Court shall itself define at least the general nature of these rules, or that it shall order the Commission to adopt, subject to *a posteriori* review by the Court, those rules which it shall consider appropriate;
Take note that the applicant does not adhere to his conclusions set out under II — 3(a) and (b) of his application commencing the proceedings.

In its rejoinder, the *defendant* contends in addition that the Court should:
— dismiss as inadmissible the fresh conclusions submitted by the applicant in his reply, page 16, paragraph 2.

III — Submissions and arguments of the parties

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

A — *Admissibility*

1. The *defendant* considers that the application is inadmissible inasmuch as it refers to the Commission's refusal to appoint the applicant to the post referred to in Vacancy Notice No COM/161.
According to the defendant, the measure by which the administration informs a candidate that his application has not been accepted cannot be contested, unlike the decision to appoint a competitor and the implied decision rejecting the complaint brought by the unsuccessful candidate. On this point the defendant refers to the case-law of the Court in Case 16/64 (Judgment of 31 March 1965, *Rauch* v *EEC* [1965] E.C.R. 144).
The *applicant* considers that the decision which rejects—that is to say, which does not appoint—an official who has a priority right within the meaning of Article 8 of Regulation No 259/68 constitutes a decision which may be contested in the same way as the positive decision to appoint, by way of promotion, an official who has no such right. In the opinion of the applicant the priority right referred to in Article 8 excludes any consideration of the comparative merits of the officials who have accepted transfer under Article 8(1) with those officials who are eligible for promotion. When a decision is taken to promote an official in Grade A4, despite the existence of officials in Grade A3 who have a priority

right, a subjective right of the latter is infringed and the decision which thus sets his application aside is clearly capable of affecting him adversely.
The applicant considers that it is thus mistaken to refer to the case-law of the Court in matters of promotion and that an analogy is rather to be sought in the case-law concerning the obligations of the authority as regards the reserve for future recruitment, such as were brought out in the Judgment in the *Serio* Case of 15 December 1966 (Case 62/65 [1966] E.C.R. 561).
The *defendant* replies that the distinction drawn by the applicant between cases of promotion in the normal sense and those occurring within the context of Article 8 of Regulation No 259/68 is completely artificial.
As is the case in the appointment of a servant as a result of promotion or a competition, the reintegration provided for by Article 8 of Regulation No 259/68 only takes place after a vacancy has occurred. In both cases it is the appointment of a competitor which adversely affects the unsuccessful candidate.
Consequently, the applicant could not contest an alleged decision refusing to appoint him, but only the decision to appoint the candidate who was finally successful.

2. The *defendant* considers that in any event the conclusions set out by the applicant in his reply under (2) are inadmissible, as in violation of Article 38(1)(d) of the Rules of Procedure, they are set out for the first time in the reply and, in addition, as their purpose is to compel the Commission, through the Court, to take action incompatible with Article 176 of the Treaty.

3. Finally, the *defendant* considers that the conclusions claiming the intervention of Mr Arning are inadmissible on the ground that the Rules of Procedure do not recognize a concept of compulsory intervention.

B — *Substance*

1. Legality of the Commission's decision of 18 December 1968

(a) The *applicant* claims that when the administration is dealing with an application from an official who has accepted transfer under Article 8(1) and who is invoking the priority right conferred on him by paragraph (2) of the same Article, the only criterion which it may take into consideration is the suitability of such official to hold the post in question. If the reply to this question is in the affirmative, the authority is no longer entitled to refuse to appoint the candidate.
The applicant maintains that since it is accepted that he is suitable—as is shown *inter alia* by the opinion expressed on this point in relation to all the candidates by the relevant Director-General—the Commission was not justified in refusing to appoint him to the post to which he had a priority right. Finally, he observes that the wording of the decision of 18 December 1968, in particular, Point (b) thereof, showed that the Commission had made a comparison of the files of all the candidates including those of the candidates not having a priority right. The Commission was only entitled to compare the files of the three candidates in Grade A3 with those of the candidates in Grade A4 if, at an earlier stage, it had rejected the candidates who had accepted transfer under Article 8(1) on objective and verifiable grounds of inadequacy.
The decision taken was thus illegal since it did not allow the applicant to enjoy the different treatment to which, in relation to officials merely entitled to promotion, he was entitled as an official with a priority right of transfer to a post corresponding to his grade. This difference in treatment lies in the use of techniques of selection based upon guarantees capable of external review.
The *defendant* replies that within the

context of Article 8(2) of Regulation No 259/68, the suitability of the applicant for the post in question must alone be considered, except that, where applications are received from several suitable candidates who have accepted transfer under (Article 8(1), they should be considered *inter se* as to their merits.

In the opinion of the defendant no procedural irregularity took place during the meeting of 18 December 1968 which could infringe the rights of the applicant in this respect.

Point (b) of the minutes of this meeting merely states that the Commissioners heard first a general statement by the Commissioner dealing with the matter, without any comparison's being made of the various candidates in different grades. Moreover, there is nothing in Article 8 of Regulation No 259/68 to prevent all the applications' being taken simultaneously, including those from the candidates without priority, and being examined during a single meeting held to consider the files of the candidates in all grades. Any other method would needlessly encumber the selection procedure.

(b) The *applicant* then maintains that the statement of reasons with which the Commission justifies its view that none of the officials in A3 was suitable for the vacant post, does not satisfy the requirements of a lawful statement of reasons for an act adversely affecting an official. On this point the applicant refers to the Judgments in *Serio* of 15 December 1966, Case 62/65 [1966] E.C.A. 561 and *Gutmann* of 5 May 1966, Joined Cases 18 and 35/65 [1966] E.C.R. 166.

In the opinion of the applicant the discretionary power of the administration must be based on *objective* criteria which are *capable of review*. It is thus insufficient to refer in the abstract to university education and training, experience in appropriate employment and the general personality of the official, since, contrary to the requirements in matters of promotion, sufficient reasons must be given for a decision rejecting an official who has a priority right to apprise him of the basic reasons for the Commission's refusal to appoint him.

The *defendant* replies that even if the conclusions on this point were to be considered admissible, the submission based on the absence of reasons for the decision could not be accepted.

It is only an individual decision concerning the applicant personally and dealing with his particular case which must, according to the case-law of the Court, contain evidence of its own legality, that is, which must satisfy the requirements of an express statement of reasons (Judgment of 5 May 1966, *Gutmann* v *Commission of the EAEC*, Joined Cases 18 and 35/65 [1966] E.C.R. 116).

The defendant maintains that the submission is only directed against the decision to appoint Mr Günter Arning, which, in accordance with the principle laid down in the Judgment of 15 December 1966 (*Serio* v *Commission of the EAEC*, Case 62/65 [1966] E.C.R. 561) did not require any express statement of reasons. It is sufficient for the Commission to be able to demonstrate before the Court of Justice that the grounds on which it based its action are justified in law.

In its oral arguments the defendant adds that no reasons need be given even for the decision not to appoint the applicant —if indeed there was any decision. The priority right provided for by Article 8(2) of Regulation No 259/68 can only be exercised through the medium of Article 29 of the Staff Regulations. By appointing a candidate without priority rather than one having such a right the Commission merely intended to reject the candidates who were in one of the situations, in this case availability for transfer, referred to in Article 29. This means that the position of the applicant is that of a servant available for transfer

and that, in accordance with the requirements of Article 29, the possibility of filling the post by means of transfer must first be taken into consideration, before the possibilities of promotion and then of an internal competition can be examined. The decision not to transfer but rather to promote one official does not, according to the case-law of the Court, require a statement of reasons to be given (Judgment of 31 March 1965, *Ley* v *Commission of the EEC*, Joined Cases 12 and 29/64 [1965] E.C.R. 107). Furthermore, it might be possible for a statement of reasons to prove prejudicial to the interests of the unsuccessful candidate (Judgment of 19 March 1964, *Raponi* v *Commission of the EEC*, Case 27/63 [1964] E.C.R. 138).

(c) Finally, the *applicant* contends that the contested decision is illegal in that it distorts the meaning of the words 'is suitable' by failing to take into account the parity of the qualifications required by Vacancy Notice No COM/161 and those of the applicant.

In this instance, the training and experience of the applicant exactly fit the description of the vacant post appearing in the vacancy notice. The qualifications necessary—engineer or legal expert, knowledge of legislation on work safety, ability to act as chairman of international meetings and certain linguistic requirements—were amply fulfilled by the applicant (a multi-lingual engineer specializing in work safety).

The appropriate Director-General, whose opinion was regarded by the Commission in its letter of 12 December 1968 as the most valuable, had considered all the A3 candidates, including the applicant, to be 'in the field' with the result that it is not clear what objective reasons could have led the Commission to the opposite conclusion that none of the A3 candidates was suitable.

The *defendant* replies that it was by taking into consideration, in the light of the applicant's file, his university education and training, his experience in appropriate employment and his general personality that the Commission was led to conclude that he did not show the qualities necessary for appointment to the post in question.

In the opinion of the defendant the assessments and the value-judgment which the appointing authority was able to make of the candidates are not capable of objective verification and it is not for the Court to substitute for them its own assessement and value-judgment.

The defendant adds that it can bring evidence before the Court to show that the applicant's abilities acquired from his training were not those required for the post in question.

Vacancy Notice No COM/161 required a thorough knowledge of the legislation and regulations in the field of work safety, from the point of view both of prevention of accidents and compensation for them. It is clear from the qualifications listed by the applicant that they were in the main *technical* rather than legal qualifications in the field of work safety.

In these circumstances, the conditions as to qualifications required by the vacancy notice were not fully satisfied.

2. Alternative submissions

The *applicant* claims, in the alternative, that even apart from any priority right under the Staff Regulations, the refusal to consider his application infringes Article 5(3), the first paragraph of Article 27 and Article 45(1) of those Regulations.

In this connexion he maintains that in any case his position under the second paragraph of Article 8(1) can only be temporary and that, in accordance with Article 5(3) of the Staff Regulations, he still retains the right to a career under conditions identical to those of the other A3 officials.

Secondly, he maintains that no genuine

comparison of his merits with those of the candidate appointed was undertaken, having regard both to his education and training and his experience and the right—at least a moral one—of preference to which he is entitled. For this reason the contested decision is vitiated as *ultra vires*, if not on the ground of misuse of powers.

The *defendant* replies that it does not clearly understand the scope of this alternative submission, since the dispute cannot be resolved by applying general law to an exceptional situation which is expressly governed by special provisions.

IV — Procedure

The written procedure followed the normal course.

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

The parties presented their oral arguments at the hearing on 14 October 1969.

The Advocate-General delivered his opinion at the hearing on 12 November 1969.

Grounds of judgment

1 The main purpose of the application is the annulment of the decision of the Commission appointing Mr Arning to the post of Head of the Work Safety Division which forms part of the Directorate-General for Social Affairs, and rejecting the candidature of the applicant for that post.

2 The defendant considers that the application is inadmissible to the extent to which it relates to the refusal of the Commission to appoint the applicant.

3 The appointment of Mr Arning necessarily implies a refusal to apply to the applicant in this instance the benefit of Article 8(2) of Regulation No 259/68, with the result that this decision affects him adversely.

4 The application for annulment is admissible.

5 The applicant requests the Court to give rulings on certain points.

6 The purpose of his seeking these rulings is either to obtain acceptance of the validity of certain of the submissions put forward in support of the application for annulment, or to induce the Court at this stage to give instructions to the authority responsible for enforcing the judgment to be delivered in this instance.

7 As regards these different points, the application must be declared inadmissible.

8 Finally, the application is also inadmissible to the extent to which it seeks the compulsory intervention of Mr Arning, as this form of legal action is not provided for in the Rules of Procedure.

The substance of the case

[9] The applicant alleges that the contested decision was taken in violation of Article 8(2) of Regulation No 259/68, whereby officials who, within the context of the merger of the Executives, have accepted transfer to a post corresponding to the career bracket immediately below that applicable to their grade, have a priority right of transfer to any post corresponding to their grade which may fall vacant or be created provided that they are suitable for the post in question.

[10] He maintains, first, that once it had been shown that he was suitable for the vacant post, he had a right to be appointed thereto without any need for his merits to be compared with those of the candidates not having a priority right.

[11] He states that the Commission was therefore required first to consider separately the suitability of the candidates entitled to the priority right provided for in Article 8(2).

[12] The parties acknowledge that, when a candidate who has this right demonstrates he is suitable, he must be appointed in preference to candidates not having a priority right, although the administration may still choose between the various priority candidates who are acknowledged to be suitable.

[13] The Commission maintains that it gave preliminary and separate consideration to the priority candidates.

[14] It states that although it is true that this consideration was given within the framework of a recruitment procedure concerning both these candidates and their competitors who had no priority right, this method of proceeding is normal in such cases and is justified by the desire not to encumber the recruitment formalities.

[15] As a result of this consideration, the Commission took the view that none of the three officials who had priority rights and who had applied for the post was suitable and that this assessment falls within the area of its sole discretionary power.

[16] The voluntary acceptance by certain servants of transfer under Article 8(1) of Regulation No 259/68 constitutes an essentially temporary measure which is justified by the short-term requirements of the service following the merger of the Executives and cannot be prolonged to the detriment of the official concerned.

[17] In view of the quite exceptional and temporary nature of such transfer, and in order not to compromise the reality of the obligations arising under Article

8(2), it is necessary to provide the officials concerned with strict guarantees regarding their priority right.

18 The implementation of such guarantees requires *inter alia* that the suitability of the candidates having priority be considered independently of any reference to the possible merits of those who have no such right.

19 The minutes of the meeting of the Commission of 18 December 1968 in fact state that the Commission 'first' considered the possibility of three officials' benefiting from the abovementioned priority right.

20 However, the same minutes show that this consideration was preceded by a detailed statement by the Commissioner concerned regarding the qualifications of all the candidates without distinction and that the opinion of the Director-General, which also dealt with all the candidates, had previously been considered. Moreover, the reports of all the candidates without distinction were known to the members of the Commission, who had also had a previous opportunity to study the files of both the non-priority and the priority candidates.

21 This method of procedure, which leads to comparisons between categories of servants, who, in this instance, could not compete with each other, does not fully guarantee to the officials who had voluntarily accepted provisional transfer under Article 8(1) the full benefit of the priority right conferred on them by Article 8.

22 Moreover, by reason of the priority to which such officials are entitled, a consideration of their abilities must be based on concrete factors which are capable of review, to the extent to which such a consideration might result in their being excluded in favour of candidates not entitled to such priority.

23 Such factors must only concern the qualifications required by the Vacancy Notice and must appear in the minutes of the Commission.

24 In this connexion, the minutes of the meeting of the Commission of 18 December 1968 only contain considerations which are so general that they do not satisfy the requirements indicated above.

25 For these reasons the decision infringes Article 8(2) and must be annulled.

Costs

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

27 As the defendant has failed in its submissions, it must be ordered to pay the costs.

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 Treaty establishing the European Economic Community, especially Article 173;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 25 and 91;
Having regard to Article 8 of Regulation No 259/68;

THE COURT (First Chamber)

hereby:

1. **Annuls the decision of the Commission of 18 December 1968 appointing Mr Arning as Head of the Division for Work Safety;**
2. **Orders the Commission of the European Communities to pay the costs of the action.**

Monaco Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 10 December 1969.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 12 NOVEMBER 1969[1]

Mr President,
Members of the Court,

Let me recall briefly the essential facts giving rise to the action before us today.
The applicant, Mr Wonnerth, entered the service of the High Authority of the European Coal and Steel Community in 1958. He was an official and headed the Technical Research Division which formed part of the Directorate for Production within the Directorate-General for Coal. After initial classification in Grade A5 he rose to Grade A4 in 1960 and was finally promoted to Grade A3 in 1962. On the merger of the Executives the Division of which the applicant

1 — Translated from the German.