

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 9 December 1986 *

*Mr President,
Members of the Court,*

1. Mr Huybrechts, a Commission official who was deputy head, and subsequently acting head, of the 'Energy, Mining and Industry' Division from 1 September 1983 to 31 December 1984 is challenging the decision of 19 December 1984 whereby the Commission made a definitive appointment to that post, for which the applicant had applied, and awarded it to one of his colleagues, Mr Delorme, by way of promotion. From 1 December 1982 to the end of 1984, Mr Delorme had worked for Mr Pisani, who was then the Commissioner responsible for development, in the capacity of member of his cabinet, deputy chef de cabinet and chef de cabinet.

The applicant makes three submissions.

2. In the first place, he criticizes the appointing authority for not first considering the comparative merits of the various candidates.

Let me say immediately that it is incumbent upon the applicant to prove this alleged infringement of the Staff Regulations, by showing that the appointing authority was not in possession of the personal files of the candidates and in particular of all the staff reports. In that connection, the absence of a formal certificate evidencing the forwarding of the files is in no way decisive.

What is important is that it is absolutely clear both from Notice No 48/84 issued by the Advisory Committee on Appointments to Grades A 2 and A 3, which carried out the first selection, and from Special Minutes No 763 of 19 December 1984 concerning the meeting at which the appointing authority adopted its decision, both of which documents were produced by the Commission at the request of the Court, that the relevant documents from the personal files of all the candidates and, in particular, their staff reports were examined.

The first submission cannot therefore be upheld.

3. The applicant's second submission is based on the lack of a statement of reasons. According to him, an objective comparison of the merits of the two candidates involved would incontestably favour him. Moreover, it would show that the applicant had a greater interest in the promotion. Thus, the interests of the service and the appointing authority's duty to have regard to the applicant's interests called for a detailed statement of the reasons for the appointment of Mr Delorme.

It is common ground that the contested decision does not contain a statement of the reasons upon which it is based. The applicant was merely informed by the administration that his application for the post had not been successful.

* Translated from the French.

There is nothing unusual about that. As the Court has stated, the appointing authority

'is not obliged to give reasons for promotion decisions in so far as they affect candidates who have not been promoted; a statement of these reasons might harm some, if not all, unsuccessful candidates'.¹

As regards the decision rejecting the complaint made against the promotion decision, the Court held that

'as ... in the words of Article 45 of the Staff Regulations, promotion shall be "by selection", the reasons to be given will be concerned only with fulfilment of the legal conditions on which, under the Staff Regulations, the validity of the promotion depends'.²

Those dicta are fully justified. Any promotion decided upon after 'consideration of the comparative merits' and of the staff reports of candidates must be 'exclusively by selection', to use the wording of Article 45 (1) of the Staff Regulations. It is therefore based on a *value judgment* which, if expounded upon in detail in the appointment decision, might, to the detriment of the future career of those involved, highlight the reasons for which the appointing authority did not appoint them to the post.

As regards the Commission's decision dismissing the applicant's complaint, it is not confined to a mere reference to the requirements of Article 45, which has been held by the Court to be adequate, if concise.³ It contains a fuller statement of

reasons, in so far as it was adopted after 'a very careful review' of the applicant's situation 'compared with that of Mr Delorme', having regard, 'in particular, to the information' furnished by the applicant.

Those considerations are sufficient for the second submission to be rejected; it is not necessary to consider whether, as he claims, Mr Huybrechts was a more appropriate candidate for promotion than the candidate who was appointed, in so far as that argument was intended solely to justify the applicant's insistence upon a detailed statement of reasons, which the Commission was not obliged to provide.

Nevertheless, it is relevant to point out that in similar cases the Court has consistently held that

'in evaluating the interests of the service and the merits to be considered for the purposes of the decision provided for in Article 45 of the Staff Regulations, the appointing authority enjoys a wide margin of discretion'

so that

'the Court must restrict itself to consideration of the question whether, regard being had to the various considerations which have influenced the administration in making its assessment, the latter has remained within reasonable limits and has not used its power in a manifestly incorrect way'.⁴

1 — Case 188/73 *Grassi* [1974] ECR 1099, paragraph 12.

2 — Case 188/73, *supra*, paragraph 14.

3 — Case 188/73, *supra*, paragraphs 16 and 17.

4 — Case 26/85 *Veyse* [1986] ECR 3131, paragraph 26.

The Court cannot substitute its own assessment for that of the appointing authority in order to determine whether the latter's decision is justified.⁵ Even if a comparison of the merits of the two candidates involved were to show certain objective differences favouring the applicant, those differences would still be the subject of a value judgment, and that is a matter reserved to the appointing authority.

Having regard to the qualifications called for in the competition notice, it does not appear that, in considering suitability to manage an administrative unit and relevant experience or service record, the Commission exceeded its power of appraisal. Finally, it is important to note that the appointing authority's discretionary power is based on the interests of the service — which cannot be overridden by the interests of candidates — so that the complaint as to breach of the duty to have regard to the applicant's interests is irrelevant in the present case.

4. The last submission in support of the application for annulment is based on misuse of powers. In the applicant's view, in adopting the contested decision the Commission sought not to appoint the official most capable of discharging the duties of Head of Division but to make sure that there was a 'landing place' — hence the applicant's reference to the successful candidate's being 'parachuted' — for an assistant of a Member of the Commission, who, at the end of 1984, took up other duties.

In support of this allegation, Mr Huybrechts relies in the first place on the absence of a statement of reasons. I have already said that that submission cannot be upheld.

He then refers, *inter alia*, to a trade union circular dated 7 November 1984 which announced the forthcoming appointment of a candidate whose identity could only be that of Mr Delorme.

This second item of information cannot be accepted as proving the applicant's complaint. The accuracy of the forecast may be pure chance, or indeed confirmation of nothing more than an intuitive guess. It cannot, alone, substantiate the allegation of misuse of power.

Finally, the applicant perceives further evidence in the Commission's delay in publishing the vacancy notice. The applicant maintains that the delay is indicative of an attempt, with a view to Mr Pisani's impending departure, to reserve the post for the candidate who was ultimately appointed.

It is not disputed that the vacancy notice was published more than a year after the post was vacated by its previous holder, that is to say at a time very close to Mr Pisani's departure.

In that connection, as the applicant himself conceded at the hearing, in so far as the legal requirements of Article 45 of the Staff Regulations were complied with, the fact that one of the candidates came from the cabinet of a Member of the Commission cannot of itself substantiate the existence of misuse of powers. On the other hand, if it were to be found that the Commission knowingly delayed publication of the vacancy notice in order to be able to recruit a particular candidate, that would be a factor to be considered in support of the complaint made by the applicant.

But that is not what happened. The Commission stated that the post in question could not be declared vacant immediately

⁵ — Case 282/81 *Ragnus* [1983] ECR 1245, paragraph 13.

because it was initially reallocated to another division and subsequently, once it became 'free', on 1 April 1984, it could not be declared vacant because budgetary constraints prompted the administration to publish first the A 3 Grade vacancy notices which were considered to be of greater importance.

Those explanations, which have not been refuted by the applicant, are satisfactory. In the final analysis, Mr Huybrechts's alle-

gation is based only on a coincidence of dates.

In fact, the promotion in question does not appear,

'on the basis of objective, relevant and consistent evidence, to have been [made] for purposes other than those stated'.⁶

This last submission, like the others, cannot be upheld.

5. Mr Huybrechts's application must therefore be dismissed; under Article 70 of the Rules of Procedure, he must bear his own costs.

6 — Case 69/83 *Lux* [1984] ECR 2447, paragraph 30.