

On those grounds,

THE COURT (Second Chamber)

hereby:

- (1) Annuls the assignment of the applicant to Directorate General II;
- (2) Dismisses the remainder of the application;
- (3) Orders the Commission to pay the whole of the costs.

Pescatore

Due

Bahlmann

Delivered in open court in Luxembourg on 27 January 1983.

For the Registrar

H. A. Rühl

Principal Administrator

P. Pescatore

President of the Second Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
DELIVERED ON 16 DECEMBER 1982

My Lords,

The Applicant, Harald List, is an official of the Commission in grade LA 4. At all material times he occupied the post of a reviser, in the Language Service. This

action (the second he has brought) concerns the period of his employment beginning on 1 October 1979. For the first part of that period Mr List was working in DG IX. He says that he was given no work to do and, when he

complained about this, he was put at the disposal of DG II as from February 1981. There also he was given very little work. Moreover the nature of what he was given was not commensurate with his grading. By a letter dated 26 February 1981, he made a formal complaint about this and asked to be assigned to a post that was outside the sphere of responsibility of his then superiors.

- (2) the annulment of his assignment to DG II and damages;
- (3) the annulment of the procedure for the appointments made under the vacancy notices, together with the appointments themselves, alternatively damages.

At about the same time he applied for a number of posts advertised in a series of vacancy notices (COM/895 - 934/80) but was told that his candidature had been rejected. By a letter dated 20 March 1981 he submitted a complaint against that decision and the validity of the appointments which were made. The basis of the complaint was the allegation that his periodic report for 1 July 1977 to 30 June 1979 had not been completed by his superiors and was not available to the appointing authority when it considered his candidature. He also referred to the fact that his superiors had not given him any work to do for over a year. A third complaint concerning the contents of the periodic report was made on 10 June 1981 but it is agreed that it was premature and is not covered by the present action.

So far as the first claim is concerned, it became clear in the course of the pleadings that Mr List's real complaint was not that he received no work to do but that he was entrusted with very little both in DG IX and in DG II. He says that at times, in one case for a period of a year, he had nothing to do. At others as, for example, in November 1980 when he was given three documents to translate, he was given far less than he ought to have been given, not least when in a Parliamentary answer, the Commission said that for its German translators the output in 1981 was 140 pages a month per translator (OJ C 188, 22. 7. 1982, p. 14).

The Commission did not reply to any of the complaints and so Mr List commenced proceedings before the Court. The relief sought can be considered under three headings:

The Commission has no record of what he did up to the date of his move to DG II on 20 February 1981 since the Head of the German Translation Service, who gave him the work directly, did not provide such details. It is not, however, challenged that this official did give some work to the applicant.

- (1) annulment of an alleged "disguised sanction" consisting in failing to give Mr List any work between 1 October 1979 and the date of the first complaint, alternatively damages;

Since his move he has been given, he says, on average, less than one and a half pages of translation to do each day. Moreover, the level of this work does not correspond to his grading. When asked to provide detailed information

concerning the amount of work entrusted to Mr List by DG II, the Commission admitted that he had been given 25 pages to translate into German in August 1982. This, it is accepted, is a fair indication of his general, average work-load. It seems that Mr List's two colleagues in DG II received, respectively, 23 and 33 pages to translate in July 1982, which the Commission again says is broadly representative of their work-load. The explanation given by the Commission was that, although low in comparison with the level of work in the Commission's translation sections, this was not abnormally low because of the type of work that is done by the translators attached to DG II. They are required to produce at short notice (sometimes of only five or six hours) translations of material that is often of a technical nature.

It is easy to understand that Mr List may have been bored or have felt aggrieved that his abilities and time were not being adequately used in his job. The mere fact however, that an official is not given much work to do, or that the work is not very demanding do not of themselves, establish that he is being punished or subjected to some kind of disciplinary or other sanction whatever else it may indicate. No other evidence has been produced which tends to show that the Commission had any intention to penalize him or that he was being penalized by the quantity and quality of work given to him. The first claim must, therefore, in my opinion, be rejected.

The second claim is based on two arguments:

- (i) according to Article 25 of the Staff Regulations, the decision to put Mr List at the disposal of DG II should have been communicated to him in writing
- (ii) the decision in substance demoted him from reviser to translator and should have given reasons.

It is common ground that the decision to move him was communicated to Mr List orally and never put in writing. According to the Commission, Mr List was fully informed of the reasons for the move in two interviews he had before the decision was taken; he consented to it and, as it did not affect either his rights under the Staff Regulations or his administrative position, it did not adversely affect him. Mr List, on the other hand, says that he did not realize that his functions in DG II would only be those of a translator until the move had taken place; he only agreed to it on the understanding that he would continue to perform the functions of a reviser.

Article 25 of the Staff Regulations provides, *inter alia*, "any decision relating to a specific individual which is taken under these Staff Regulations shall at once be communicated in writing to the official concerned". The Staff Regulations do not expressly mention putting an official "at the disposal" of a particular department in an institution. It is therefore, no doubt, arguable that such a decision is not "taken under these Staff Regulations" and does not have to be communicated to the official in writing; it does not, in theory at least, change the

official's post or grading and is simply a measure of internal organization.

necessary, the translation of texts with or without revision ("... chargé d'effectuer la révision de traductions et le cas échéant la traduction de textes avec ou sans révision ...").

If the failure to give written notice to Mr List of the decision to move him were the only reason for challenging it, I do not consider that the claim should succeed in this case.

A principal translator, in contrast, is entrusted with the translation of texts, normally without revision, and, where necessary, the revision of translations ("... chargé d'effectuer la traduction de textes, normalement sans révision, et le cas échéant la révision de traductions ...").

The second ground relied on, however, is one of substance. It turns on the questions whether the work Mr List is now doing is, taken as a whole, work which can properly be given to a reviser. There is no dispute that he was moved to DG II in response to a request for a translator and that the move entailed no change in his post or grading. The Commission appears to concede that there is no revision work for him to do there and both his colleagues are translators. The Commission's contention is that a reviser can properly be given translation work and nothing else, especially, it says, in the applicant's case, since it was not intended that a reviser should look at his translations.

For present purposes, the difference between the two posts is not that a reviser does nothing but revising and a principal translator nothing but translating. It is that the revision or checking of translations done by someone else is an essential or primary part of the post of reviser; in the case of a principal translator it is merely something which he may be called upon to do.

Mr List's career bracket, LA 4/5, comprises four different posts: head of a translation or interpretation group, reviser, principal translator and principal interpreter. Under Article 5 (4) of the Staff Regulations, each institution is to "define the duties and powers attaching to each basic post". The definition of the post of reviser adopted by the Commission at the material time, which is to be found in an administrative notice published on 11 October 1979, indicates, as far as the present case is concerned, an official who is entrusted with the revision of translations and, where

It is for the administration to determine, reasonably in the light of its needs, how much translating a reviser is asked to do, but he must be given essentially the work of a reviser and the Commission must respect its own description of the post of reviser. In the present case it cannot be said that Mr List is performing a reviser's functions, as defined, because it is conceded that there is no revising at all for him to do. If this were simply the result of a change or temporary fall-off in revising work, then Mr List could be called on to do translations. It is plain from the facts that this is not the position. DG II wanted a translator, not a reviser, and translation is all that the

applicant and his colleagues do. It seems to me clear that Mr List's duties do not correspond to the job description of a reviser.

interviews Mr List had before the decision was made.

In Case 66/75, *Macevicius v Parliament* [1976] ECR 593, the Court held (at paragraph 16 of the judgment) that, for a measure for the reorganization of departments to adversely affect an official "it is not sufficient that it should bring about a change or even any reduction in responsibilities, but it is necessary that, taken together, his remaining responsibilities should fall clearly short of those corresponding to his grade and post, taking account of their character, their importance and their scope". Applying that test to the facts of this case, it is my opinion that the decision placing Mr List at the disposal of DG II did adversely affect him and should have given reasons. Quite apart from that, the decision was also unlawful because it failed to respect Mr List's right "not only to remain in the same grade and receive the corresponding remuneration, but also to be entrusted with duties and powers which are as a whole in accordance with the post corresponding to the grade which he holds in the administration" (see Case 15/65, *Klaer v High Authority* [1965] ECR 1045 at page 1054 and Case 61/70, *Vistosi v Commission* [1971] ECR 535 at paragraph 15 of the judgment). For this reason I find it unnecessary to consider whether the obligation to give reasons was adequately discharged, as the Commission alleges, in the two

The Commission's suggestion that Mr List consented to the move and cannot now complain about it must in my view also be rejected. In the first place it is not clear that Mr List agreed with full knowledge of what his duties in DG II would entail. Even the Commission, in its Reply, pleaded only that Mr List *could have* obtained information about his duties. Secondly, any suggested inference of consent to a proposal made by a superior which infringes rights under the Staff Regulations must be looked at critically and is not in my view to be drawn here. Lastly, if Mr List had wanted to make a formal complaint about the move, he could only have done so after it had taken place; it is reasonable to infer from the fact that he did make such a complaint, six days after the move, that there was no consent to it.

At the hearing, Counsel for Mr List indicated that the claim should read, as I understand it, "annulment of the applicant's assignment to DG II, having regard to the conditions of work". This does not seem to me to alter the substance of the claim from the beginning. His claim under this second heading is not that he was sent to DG II but that what he was given to do when he got there was not what he was entitled to expect.

It has been suggested that Mr List has no real interest in the annulment of the assignment. This does not seem to me to be so. He has an interest in ensuring that the nature of the duties entrusted to him corresponds to both his grade and his post. If the Court finds that there has been a breach of his rights in the only work he has been and can be given, then it seems to me that his transfer should be annulled. This is the only really effective remedy open to the Court and in my view in this case it should be granted. It is then for the Commission to ensure that the work he is given is commensurate in the light of the authorities with his position as a reviser depending on work requirements, some translation obviously being included.

There is no evidence that Mr List has suffered any material loss as a result of the move to DG II so, in my opinion, annulment of the decision would be a sufficient form of relief. If the Court took the view that damages were to be awarded as well as annulment, a nominal amount would in my opinion suffice.

As far as the third claim is concerned, the Commission contended that the posts applied for were all in the same career bracket as that occupied by Mr List so that no promotion was involved and it was not, therefore, a breach of Article 45 of the Staff Regulations that Mr List's periodic report, which should have been made in respect of the period 1977—79, was not available at the time that his candidature was considered. So far as relevant, Article 45 (1) provides as follows: "Promotion shall be by decision of the appointing authority. It shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them." In Mr List's case none of the posts for which he applied would have involved a promotion, as so defined, if he had been appointed, because they are all in the career bracket LA 5/LA 4. None the less, since Article 45 would apply to candidates in grades lower than LA 4, equality of treatment would require that the Commission compare their periodic reports with those of the other candidates, including Mr List, before reaching a decision. Even if Article 45 were not applicable at all, the periodic report, as Article 43 of the Staff Regulations makes clear, comprises a formal assessment of the ability, efficiency and conduct of an official during a given period and, as was pointed out in Case 24/79, *Oberthur v Commission* [1980] ECR 1743, at paragraph 8 of the judgment, it "constitutes an indispensable criterion of assessment each time the official's career is taken into consideration by the administration". The report should therefore be taken into account by the administration when making an appointment, even where

there is no express provision in the Staff Regulations requiring it to do so and, where there are a number of candidates, it should look at the periodic report of each one of them, in order to ensure that there is equal treatment between them and a proper comparison of their merits.

Prima facie, this obligation to look at reports refers only to reports which have been made, and competitions cannot be held up indefinitely for reports yet to be made or to become definitive, in the former case if there is a valid reason for them not to have been made at the time a candidature falls to be considered. If on the other hand, reports are due and no valid reason is shown why they have not been made, fairness may require that the Commission obtain them before taking a decision.

In the present case no satisfactory explanation has been given as to why the report had not been produced before the heads of the German translation groups were chosen (COM/895-901/80; the others not in my view being relevant since they covered languages not Mr List's maternal language and any complaint in respect of them I understood his Counsel in the end to

have abandoned). On the other hand the Commission agreed that Mr List's application should be looked at afresh once his periodic report had been drawn up. The report, drawn up in April 1981, was amended following Mr List's comments in June 1981 and he asked for the matter to be referred to the Joint Committee on Staff Reports. Following his request, but before the Joint Committee met to consider Mr List's contentions, a recommendation was made to the Commissioner responsible that no change be made to the appointments proposed.

It seems clear that an undertaking to review Mr List's position in the light of his periodic report must refer to the definitive final version of that report which, so far as the Court is aware, has not yet taken place.

I assume that the Commission will carry out what seems to me to be the purport of their undertaking when that final definitive version is received and that they will do so fairly and with an open mind. In these circumstances it does not seem to me that Mr List's claim for the annulment of the procedure relating to the nomination of the heads of the translation groups should be acceded to.

For these reasons it is my opinion that

- (1) Mr List's first claim that a failure to give him any or any adequate work were disguised sanctions should be rejected;
- (2) the Commission's decision putting him at the disposal of DG II should be annulled;

- (3) the Court should make no order on the third claim that the procedure relating to the nomination of heads of translation groups under Notices of Vacancies COM Nos 895-901/80 be annulled, in view of the Commission's undertaking to review Mr List's candidature and should make no order in respect of Notices of Vacancies Nos COM 902-934/80;
- (4) the Commission should be ordered to bear its own costs of the action and two thirds of those incurred by Mr List.