JUDGMENT OF THE COURT (FIRST CHAMBER)
15 DECEMBER 1982 [1]

John Philip Cowood
v Commission of the European Communities

(Official — Decision not to promote)

Case 60/82

Officials — Promotion — Decision not to promote
(Staff Regulations, Art. 45 (1))

In Case 60/82

JOHN PHILIP COWOOD, an official of the Commission of the European Communities, residing in Brussels, represented by Pierre Legros of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Gaston Vogel, Résidence Verlaine, 5 Rue C.-M.-Spoo,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Bernard Paulin and Hendrik Van Lier, respectively Chief Adviser and a member of the Legal Department thereof, acting as Agents, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 19 March 1981, rejecting the applicant's application for a post as head of a translation group and for compensation for the non-material damage suffered as a result of that rejection,

1 — Language of the Case: French.

THE COURT (First Chamber)

composed of: A. O'Keeffe, President of Chamber, G. Bosco and T. Koopmans, Judges,

Advocate General: G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

The applicant, Mr Cowood, entered the service of the Commission on 1 April 1974 and is at present an official in Grade LA 4 in the Directorate General for Personnel and Administration, English Translation Division. On 19 November 1980, the applicant applied for a post as head of a translation group.

On 22 January 1981 Mr Ciancio, the Director for Translation, Documentation, Reproduction and Library, informed the Director of Personnel of his nominations for the vacant post. He noted that Mr Cowood was in competition with another group coordinator whom he considered more suitable on the ground of seniority.

On 23 January 1981 the applicant was appointed by the Central Staff Committee as staff representative on the LA Promotion Committee. At the first meeting of that committee on 17 January 1981, an incident occurred which involved, in particular, Mr Cowood and the Director General for Personnel and Administration in connection with the possible promotion of another official, (Mr C.).

On 19 March 1981, the applicant was informed that his application for the vacant post as head of a translation group had not been accepted. On 22 June 1981 the applicant lodged a complaint under Article 90 (2) of the Staff Regulations against that decision. The Commission rejected the complaint by decision of 27 October 1981, which was notified to the applicant on 16 November 1981.

This action was commenced by an application lodged at the Court Registry on 11 February 1982. Upon hearing the report of the Judge-Rapporteur and the

views of the Advocate General, the Court (First Chamber) decided not to open the oral procedure until the applicant had complied with the following request:

"It is apparent from Mr Ciancio's memorandum of 22 January 1981 that the recommendation to the Director of Personnel which led to the disputed decision was based on the consideration that as there were two candidates of equal merit, preference should be given to the candidate with the greater length of service and seniority in Grade LA 4 as a reviser.

The applicant is requested to submit written proof or to indicate any witness evidence which might show that the Commission, in making the disputed decision, allowed itself to be influenced by other considerations, regarding in particular his union activity or the attitude adopted by him in the proceedings of a promotion committee."

The applicant proposed that witness evidence should be heard from participants in the meeting of the Promotion Committee held on 17 February 1981.

The Court (First Chamber) then decided to open the oral procedure without any further preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Annul the decision adopted against him on 19 March 1981, informing him that the appointing authority had been unable to accept his application for a vacant post as head of a translation group;

2. Annul the rejection notified to the applicant on 16 November 1981 following the application lodged by him on 22 June 1981;

3. Order the Commission to pay the applicant such compensation as may be allowed by the law for the non-material damage which he has suffered;

4. Order the Commission to pay the costs.

The *defendant* claims that the Court should:

1. Dismiss the application as inadmissible in so far as it concerns the annulment of the decision whereby the applicant's complaint was rejected;

2. Dismiss the application as unfounded;

3. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *applicant* relies on three grounds:

1. Infringement of Article 1 of Annex II to the Staff Regulations;

2. Infringement of the second paragraph of Article 13 of the Agreement of 20 September 1974 on Relations between the Commission and Trade Unions and Staff Associations;

3. Breach of the general principles of law, in particular by reason of the attack on the principles governing freedom of opinion as regards thought, politics and trade unions.

In his application the applicant claims that the decision not to promote him is closely linked to an incident which

occurred at the meeting of the Promotion Committee held on 17 February 1981. On that occasion the applicant proposed that the name of an official, Mr C., should be entered on the list of officials suitable for promotion. However, that proposal was refused by the Director General of Personnel, because Mr C. was "well known as a trade unionist" and because he was a trade-union representative on various bodies concerned with staff representation which prevented him from devoting sufficient time to his translation work. The applicant's subsequent insistence that the grounds for the rejection should be entered in the minutes of that meeting created further difficulties.

The applicant considers not only that the incident described above shows the existence of bias within the Promotion Committee but also that it was the basis on which the decision not to accept his application for the vacant post was made.

In its defence the *defendant* raises an objection of inadmissibility as regards the applicant's second claim. It refers to the well-established case-law of the Court according to which confirmatory acts may not be distinguished from the disputed decision (in this case that of 19 March 1981) and it submits that the decision rejecting the complaint does not of itself constitute a measure which may be challenged.

As regards the facts, the defendant emphasizes that Mr Ciancio's note of 22 January 1981 established that Mr Cowood was in competition with another very experienced group coordinator. Mr Cianco considered the other candidate more suitable because he had greater length of service and seniority in Grade LA 4 as a reviser. Thus, the disputed decision derived from a state of affairs which existed before the incident of 17 February 1981.

In relation to that incident the defendant notes that the Director General pointed out to the applicant that, for his part, he did not accept the latter's interpretation of the remarks concerning Mr C.'s trade-union activity. Moreover, the fact of that activity was well known to all the Committee and was never mentioned as an obstacle to promotion. The defendant emphasizes that the fact that the two procedures for the filling of posts, one for the head of a group and one for the promotion of LA officials, took place during the same period was purely fortuitous. It follows that the connection which the applicant seeks to establish between the rejection of his application and the work of the Promotion Committee does not exist.

In his reply, the *applicant* notes as regards the objection of inadmissibility, that the decision of 22 June 1981 rejecting his complaint did more than merely confirm the rejection of his application for the vacant post. In his opinion that decision amounts to an attempt by means of false allegations to conceal the true motives for that rejection.

As regards the facts, the applicant repeats that certain senior officials of the Directorate General for Personnel and Administration display an unfavourable attitude to all trade-union activity. That allegation can be proved by hearing evidence from those who participated in the meeting of the Promotion Committee at which the incident involving the proposal to enter Mr C. on the list of officials suitable for promotion occurred. The applicant adds that all the former coordinators of the specialized groups in

the English Translation Division have been appointed heads of translation groups with the exception of himself.

In its rejoinder the defendant reiterates the view that the plaintiff has not been able to establish any connection between the work of the Promotion Committee and the rejection of his application. As regards the incident which occurred during the meeting of that committee the defendant notes that in the meantime Mr C. has also brought an action (now pending) and that his interests have therefore been protected.

IV — Oral procedure

The parties presented oral argument at the sitting on 11 November 1982.

The Advocate General delivered his opinion at the sitting on 2 December 1982.

Decision

1 By application lodged at the Court Registry on 11 February 1982, John Philip Cowood, an official of the Commission of the European Communities in Grade LA 4, brought an action for annulment of the decision of 17 March 1982 appointing another official as head of a group in the English Translation Division of the Directorate General for Personnel and Administration and for an order that the Commission pay him compensation for the non-material damage which he has suffered.

2 The contested decision is one of seven decisions appointing officials to the seven posts which were declared to be vacant by Vacancy Notices Nos COM/915/80 to COM/921/80. The applicant was among the thirteen candidates for those posts.

3 The applicant states in his application that on 23 January 1981 he was appointed by the Central Staff Committee as staff representative on the LA Promotion Committee for the year 1980 and that at the first meeting of that committee on 17 February 1981 the applicant put forward the name of an official to be entered on the list of the candidates most deserving of promotion to Grade LA 4. He claims that the only objections raised to that proposal were those of the Director General of Personnel who alleged that the candidate in question was "well known as a trade unionist". The applicant further states that after his proposal had been put to the vote he expressed reservations about the wording of the minutes of the meeting of

the Promotion Committee which brought him into conflict with the chairman of the committee.

4 The applicant infers from those events that the decision not to promote him to head of a group is closely connected with the attitude he adopted at the meeting of the Promotion Committee in order to have the minutes of that meeting altered. He claims, therefore, that his application was rejected because of his trade-union activity within the committee.

5 On that basis, the applicant maintains that the contested decision infringes certain provisions of the Staff Regulations and certain general principles of law by reason of the attack on freedom of trade unions and freedom of opinion.

6 The Commission contends that the applicant's allegations are not supported by the facts as the decision to appoint another candidate to the vacant post was based on objective criteria entirely unconnected with the applicant's trade-union activities.

7 In that regard the Commission relies on a memorandum from the Director for Translation, Documentation, Reproduction and Library addressed to the Director of Personnel, which contained recommendations concerning the filling of certain posts, one of which is the subject of this action. That memorandum is dated 22 January 1981; it therefore antedates the applicant's appointment as a member of the LA Promotion Committee on 23 January 1981.

8 The memorandum of 22 January 1981 contains the following passage referring to the post at issue:

"Mr Cowood performed his duties as head of a group in an entirely satisfactory manner at a time when the English Division was organized in eight groups. As a result of the rationalization of the groups in all the linguistic divisions carried out in 1980 the latter have been re-organized into seven groups and it has become necessary to reduce the number of groups in the English Division by one. Mr Cowood is consequently in competition with another very experienced head of group. As the two candidates are of equal merit I consider the more suitable candidate to be Mr Schäfer, who has

greater length of service and seniority as a reviser in Grade LA 4. However, I should like to draw attention both to Mr Cowood's merits and to his good work."

9 It has been established that the above recommendation was sent by the Director General for Personnel and Administration to the member of the Commission with responsibility for personnel on 18 February 1981 with a memorandum to the effect that the Director General had no objection thereto.

10 The applicant has not disputed either the assessment of the qualities of the candidates or the facts on which the memorandum of 22 January was based.

11 In those circumstances, the Court (First Chamber) invited the applicant to submit written proof or to indicate any witness evidence which might show that the Commission, in making the disputed decision, was influenced by considerations other than those cited in the memorandum of 22 January 1981 and in particular by assessments regarding the applicant's trade-union activity or the attitude adopted by him within the Promotion Committee.

12 In his reply to that request, the applicant proposes that witness evidence should be heard from the people who were present at the meeting of the LA Promotion Committee on 17 February 1981, in the course of which the proposal to enter the name of another official on the list of the most deserving candidates was rejected, allegedly on the ground of his trade-union activities. In addition the applicant claims that certain senior officials in the Commission have an unfavourable attitude towards trade-union activity, although he has been unable to establish a precise link with his own case.

13 The facts regarding which the applicant offers proof do not affect the decision not to promote him. Even if they were proved, they would not support the conclusion that the contested decision was not based on the grounds cited by the head of the directorate in which the applicant worked in the memorandum of 22 January 1981, namely that as the candidates were of equal merit preference should be given to the candidate who had greater seniority, or the conclusion that it was founded on other considerations, in particular assessments regarding the applicant's trade-union activity.

14 It follows that the application must be dismissed.

Costs

15 Pursuant to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure costs incurred by the institutions in proceedings brought by servants of the Communities are to be borne by those institutions.

On those grounds,

THE COURT (First Chamber),

hereby:

1. **Dismisses the application;**

2. **Orders the parties to pay their own costs.**

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 15 December 1982.

J. A. Pompe
Deputy Registrar

A. O'Keeffe
President of the First Chamber