

This course of action is to be taken if the annulment sought would constitute an excessive penalty for the irregularity committed whilst the

award of damages best meets both the applicant's interests and the requirements of the service.

In Case 24/79

DOMINIQUE NOËLLE OBERTHÜR, an official of the Commission of the European Communities, residing at Sint-Stevens-Woluwe, represented by Marcel Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34/B/IV, Centre Louvigny, Rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Denise Sorasio, of its Legal Department, acting as agent, assisted by Daniel Jacob, of the Brussels Bar, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for annulment of the procedure for promotions to Grade B 2 in 1978 and for the annulment of the Commission Decision of 13 November 1978 rejecting the applicant's complaint made on 20 July 1978,

THE COURT (First Chamber)

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

Advocate General: H. Mayras

Registrar: H. A. Rühl, Principal Administrator

gives the following

## JUDGMENT

### Facts and Issues

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

with effect from 1 June 1972 she was promoted to the post of assistant in Grade B 3 and assigned to Directorate-General VII, department A-4, Transport, Harmonization of Social Legislation.

#### I — Facts and written procedure

1. Dominique Noëlle Oberthür, born on 5 February 1930, of French nationality, has been an official of the Commission since 1959; she is at present with the Directorate-General VII — Transport in the secretariat of the Director-General.

She has, since 1959, been assigned to several departments of the Commission. After being appointed, with effect from 28 June 1959, as secretary in Grade C 12 (corresponding to the present Grade C 4) and, from 1 October 1966, as a clerical officer in Grade C 2, the applicant was promoted with effect from 1 January 1967 to Grade B 5 following a competition. By decision of 29 May 1972

The applicant was then assigned temporarily with effect from 1 June 1975 to the Environment and Consumer Protection Department while the definitive posting was to be decided after a trial period of six months. Then with effect from 1 October 1975 she was assigned temporarily to the Directorate-General V, Employment and Social Affairs department C, at first also for a trial period of six months. Finally, by a decision of 29 November 1976, rectified by a decision of 13 December 1978, the applicant was once again assigned with effect from 1 December 1976 to Directorate-General VII, this time to the Secretariat of the Director-General. At the same time that decision terminated the temporary nature of the previous assignments. The applicant did not in fact take up her duties in Directorate-General VII until April 1977 because of the difficulty of finding an office without air conditioning. In fact the reason for the frequent changes of posting is that as a result of an illness of relatively long standing, which does not however affect her fitness for work, the applicant cannot work where there is air conditioning. Consequently she had to have an office in buildings with normal ventilation.

2. In 1978 the applicant was included in the list of officials who had completed the minimum period required by Article 45 (1) of the Staff Regulations for promotion from Grade B 3 to Grade B 2, which list was published in Administrative Notices No 191 of 10 March 1978. On reading Administrative Notices No 196 of 26 April 1978 she found, however, that in contrast to three other officials of Directorate-General VII her name had not been put forward by her Director-General to the relevant Promotion Committee for promotion to Grade B 2. Subsequently the provisional list of officials considered to be most deserving of promotion as drawn up by the Promotion Committee and published in Administrative Notices No 205 of 17 July 1978 and the list of officials promoted to Grade B 2 by decision of the appointing authority and published in Administrative Notices No 208 of 23 August 1978 mentioned only one official from Directorate-General VII.

3. On 20 July 1978 the applicant submitted a complaint under Article 90 of the Staff Regulations because she had not been proposed or recognized as one of the officials most deserving of promotion to Grade B 2. She included a summary of certain of her qualifications comparing them with those of her colleague who had been promoted.

After being informed by letter dated 13 November 1978 of the Commission's rejection of her complaint, the applicant wrote a letter dated 30 November 1978 to the Member of the Commission responsible for staff matters drawing his attention to certain aspects of the question. The reply from the latter's office dated 1 December 1978 informed her that her observations had been noted.

4. On 2 February 1979 the applicant brought the present action which was registered at the Registry on 9 February 1979.

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

## II — Conclusions of the parties

In her originating application the applicant claims that the Court should:

“— Annul the procedure for the promotion to Grade B 2 of the officials listed at page 5 of Administrative Notices No 208 of 23 August 1978 including all stages of that procedure and in particular the opinions of the Promotion Committee and the decisions of the appointing authority;

— Declare null and void the express rejection of the applicant's complaint by the Commission on 13 November 1978;

— Order the Commission to pay the costs.”

In her reply the applicant claims in addition that the Court should:

“— Order the opposite party to produce:

(a) The scale ('grille') which the Promotion Committee used;

- (b) The documents relating to the decision taken by the appointing authority for the purpose of the promotions in question;

- Order that the following facts be proved by witnesses;

At a meeting of the Promotions Committee the name of the applicant was mentioned, as were those of other officials eligible for promotion but not put forward, but the applicant's file was not compared with those of the officials whose names were put forward.

The applicant proposes as witness R. Vork, the Staff Representative."

The *defendant* claims that the Court should:

- " Dismiss the action as unfounded;

- Order the applicant to pay the costs."

### III — Submissions and arguments of the parties

In her application the *applicant* relies on two submissions based on the infringement of Article 45 (1) of the Staff Regulations and a submission based on non-compliance with the last sentence of Article 24 of the Staff Regulations. In reliance on Article 42 (2) of the Rules of Procedure she puts forward two new submissions in her reply based on infringement of Article 25 of the Staff Regulations.

#### A — First Submission

First of all the *applicant* claims that the decision to promote other officials to Grade B 2, in so far as it was taken before her complaint of 20 July 1978, was contrary to Article 45 (1) of the Staff Regulations. Consideration of the comparative merits of the officials did not take place with knowledge of the facts since the appointing authority did not consider the comparative summary annexed to her complaint. In that summary the applicant established that as regards the criteria taken into account (seniority, training, experience and publications) she possessed better qualifications than Mrs S, the only candidate from Directorate-General VII promoted to Grade B 2.

The *defendant* observes that there is no basis in that submission. The decision of the appointing authority, which was published on 23 August 1978, was in fact taken after 20 July 1978 so that the Commission had the comparative table before the date of the decision.

Alternatively the defendant observes that the submission would still be unfounded if the appointing authority had taken the decision in question before the complaint was made. All the facts taken into account in the comparative table drawn up by the applicant are included in a much more comprehensive form in the personal files of the officials eligible for promotion and those files are available to the Promotion Committee and the appointing authority.

As regards the applicant's claim that her qualifications are better than those of Mrs S, the defendant refers to the discretion which the appointing authority has under Article 45 (1) of the Staff Regulations (judgment of 8 July 1965 and the opinion of Mr Advocate General

Roemer in Joined Cases 27 and 30/64 *Fonzi v Commission* of the EAEC [1965] ECR 481 at pp. 500 and 512). In any event the criteria put forward by the applicant are not the only ones to be taken into consideration and they disregard in particular the importance of the recommendations of the Directorates-General (cf. the opinion of Mr Advocate General Reischl in Case 62/75 *De Wind v Commission* [1976] ECR 1167 at p. 1180).

As for the points of comparison relied on by the applicant, the defendant stresses the temporary post in Grade B 3 which Mrs S occupied, her greater length of service in Category B and her experience. The Commission concludes that the recommendation by Directorate-General VII confirmed by the Promotion Committee and ratified by the appointing authority is in any event not vitiated by patent error or misuse of powers.

In her reply the *applicant* observes that the list of officials considered most eligible for promotion must in point of fact have been drawn up before her complaint. As regards the promotions themselves she admits that the formal decisions by the appointing authority may well have been subsequent to 20 July 1978, although the defendant does not reveal the date on which the decisions were actually taken. However, she maintains that the Commission, to whom the complaint was submitted on 20 July 1978, failed to give sufficiently serious consideration to the comparative table, although a measure as important as promotion ought to be preceded by thorough consideration of the respective qualifications, (cf. judgment of 19 March 1964 in Case 27/63 *Raponi v Commission of the EEC* [1964] ECR

129). The argument that the factors contained in the comparative table are included "in a much more comprehensive form in the personal files ..." had no foundation in fact; the applicant offers to show that her case was not even fully considered.

In the present case the Promotions Committee had not used the promotions scale, a specimen of which had been supplied to it by the Commission. The Committee had either confined itself to the proposals of the Directors-General or refrained from considering the applicant's case in the absence of the most recent staff report.

As regards the role of the opinions of the Directors-General in consideration of the comparative merits of candidates, the applicant maintains that they may be taken into account but nevertheless the staff report, although confined to certain headings, is an indispensable instrument and must form the corner-stone of the assessment by the appointing authority.

The applicant stresses that she has no personal quarrel with the candidate who was promoted. She had been led to compare her qualifications with those of Mrs S solely because there was apparently only one vacant post in Directorate-General VII.

As regards the points of comparison raised by the defendant the applicant considers that Article 45 of the Staff Regulations does not provide that account should be taken of a temporary

posting or of the establishment in Grade B 5 some 15 years before the promotion in question.

Moreover, she complains that the defendant makes no mention of the fact that she has obtained a certificate. While the defendant makes a point of the experience of Mrs S concerning libraries it neglects the applicant's work since 1967 in the Central Library and the Central Documentation department and during her subsequent postings.

In its rejoinder the *defendant* confirms that the decision by the appointing authority on promotions to Grade B 2 was taken on 24 July 1978 so that the submission in question has no foundation because the complaint was lodged on 20 July 1978. For the first time in her reply the applicant maintains that it is in fact "the list of officials considered to be most deserving of promotion" which for the same reasons infringes Article 45 (1) of the Staff Regulations. That argument cannot be accepted since it is a fresh issue within the meaning of Article 42 (2) of the Rules of Procedure.

Alternatively the defendant observes that a complaint made under Article 90 of the Staff Regulations has no suspensory nature and that the appointing authority was under no obligation to consider the question of the promotion of the applicant in relation to the comparative table she supplied.

As regards the argument that the applicant's case was not fully considered, the Commission comments that in fact "the Committee has considered the position of all officials eligible for promotion and has paid special attention

to those who, whether proposed or not, are older than the maximum age referred to in the age brackets".<sup>1</sup>

Moreover, the applicant's statement does not show to what she alludes in speaking of a "scale" ("grille"); in its task the Promotion Committee had at its disposal guidelines which contain certain criteria but which serve only as a guide.<sup>1</sup>

As regards the grounds put forward by the applicant for drawing up a comparative table, the defendant observes that promotion to Grade B 2 constitutes promotion within a career bracket and in no way implies that quotas are assigned to Directorates-General. There is therefore no "competition" between officials eligible for promotion in the same Directorate-General. From that point of view the comparison put forward is irrelevant.

As regards the relevance of the period Mrs S has been in the grade, the defendant considers that although temporary occupation of a post at a higher level gives the person concerned no right to be re-classified it may be "a factor to be borne in mind in connexion with promotion" (judgment of 17 December 1964 in Case 102/63 *Boursin v High Authority of the ECSC* [1964] ECR 691; judgment of 16 June 1971 in Case 77/70 *Prelle v Commission* [1971] ECR 561; judgment of 12 July 1973 in Case 28/72 *Tontodonati v Commission* [1973] ECR 779; judgment of 19 March 1975 in Case 189/73 *Van Reenen v Commission* [1975] ECR 445; and the judgment of 11 May 1978 in Case 25/77 *De Roubaix v Commission* [1978] ECR 1081). Nor does Article 45 (1) of the

<sup>1</sup> — Guidelines adopted by the Promotion Committee — Category B — for the 1978 financial year.

Staff Regulations rule out taking account of period of service in the category.

*B — Second submission*

The *applicant* alleges that the decision in question infringes Article 45 (1) of the Staff Regulations for two other reasons:

(a) Neither the Promotions Committee nor the appointing authority has been informed that the applicant had written a paper at the end of her studies on "The use of waste in road construction";

(b) The Promotion Committee and the appointing authority had not had knowledge of the applicant's staff report for the period 1 July 1975 to 30 June 1977, which had been made on 2 March 1978, whereas as regards the other officials eligible for promotion the Promotion Committee had the staff report for that period.

(a) The *defendant* replies first of all that the applicant's personal file, which was available to the Promotions Committee and the appointing authority, contains two letters sent to the applicant relating to the paper produced at the end of her studies.

The *applicant* doubts whether those letters were in the file when the Committee and appointing authority should have known of them.

In its rejoinder the *defendant* states that the applicant did not forward the letters in question to the administration until 20 February 1979, that is to say, after bringing the action.

(b) The *defendant* admits that the staff report in question, which was according to the applicant drawn up on 2 March 1978, was not available at the first meeting of the Promotions Committee on 23 May 1978. That state of affairs was because the applicant's postings had frequently been changed as a result of her delicate health which made it difficult to find a posting reconciling the interests of the department with the medical exigencies.

In her reply the *applicant* stresses that it is almost impossible to make a comparative assessment without the staff report in question.

The changes in the applicant's posting in no way justify the unacceptable delay in drawing up the staff report in question. On that issue the guide to staff reports provides for all possibilities and the problem could easily have been resolved if all concerned had shown good will. In that respect the applicant maintains that the report drawn up at Directorate-General V was not forwarded to Directorate-General VII because of the refusal of a certain official for reasons of personal animosity and she asks the Court to order such inquiry on that issue as it considers appropriate.

The *defendant* stresses that it is unacceptable for the personal integrity of certain officials to be called in question without the slightest evidence.

In addition it considers that the absence of the staff report in question should not be regarded as decisive in view in particular of the facts available to the

Promotion Committee. The minutes of the first meeting of the Committee list them. In that respect the defendant refers to the judgment of 12 October 1978 in Case 86/77 *Dittrich v Commission* where the Court took the view that:

"In view of all these circumstances the fact relied on by the applicant, namely that his personal file was incomplete in that it did not contain the periodic reports relating to the periods 1971 to 1973 and 1973 to 1975, cannot be held to support a finding that the promotion list in question was irregular in relation to Article 45 of the Staff Regulations. Even without those periodic reports the members of the various committees had in fact at their disposal the very widest powers to obtain all the information necessary to undertake a comparative examination of the merits of those eligible" ([1978] ECR 1855 paragraphs 18 and 19 of the decision at p. 1864).

The *applicant* denies that that judgment applies to the present case. The situation of which she complains is very different from that in Case 86/77. Moreover, the defendant is neglecting the fact that the power to "choose" given to the appointing authority can be exercised only provided that two conditions are respected: that the comparative merits of officials are considered and that the reports relating to them are considered.

In stressing that the comparative merits of the officials were considered by the Promotion Committee the *defendant* states in substance in its answer that since the absence of staff reports does not involve the annulment of the draft list drawn up by the Promotions Committee such absence also cannot involve annulment of the list subsequently drawn up by the appointing authority or the subsequent decision in relation to promotion.

### C — *Third submission*

The *applicant* alleges infringement of the last sentence of Article 24 of the Staff Regulations in that neither the Promotions Committee nor the appointing authority took account of the courses of study followed by the applicant over six years of further training as a result of which she obtained certificates for librarianship and documentation in 1975.

The *defendant* alleges that that submission lacks a factual basis since there is a photocopy of the certificate in the applicant's personal file. In that respect, however, the *applicant* draws attention to the difficulty of checking when certain documents have been placed in the personal file. In its rejoinder the *defendant* states that the letter dated 25 August 1976 from the establishment which the applicant attended confirming the award of the certificate was not forwarded to the administration until 8 February 1979, that is when the action was brought.

In its defence the *defendant* mentions moreover the reference in the applicant's staff report for 1971-1973:

"The training of the person concerned is adequate for the tasks entrusted to her. She is moreover taking steps to continue further training".

In reply the *applicant* however states that there is no mention there of the certificate she obtained which should obviously have been mentioned in the staff report for the period from 1975 to



1977 which was not among the documents available. For the rest she admits, as the defendant says, that the last sentence of Article 24 cannot be interpreted as meaning that certificates have absolute precedence over experience at work and the nature of the duties performed. However she considers that it is just as unacceptable to take no account of them at all. At the very least the Promotions Committee and the appointing authority might be required in such a case to give special reasons for their choice.

#### *D — Fresh issues*

Referring to the documents produced and in particular Annex 23 to the defence and its annexes and in reliance on Article 42 (2) of the Rules of Procedure, the applicant puts forward two fresh submissions in support of her claim that Article 25 of the Staff Regulations was infringed.

Those submissions concern in particular the application of the following provisions:

— Paragraph 6 of the General Provisions for Implementing the Procedure for Promotion within a Career Bracket . . . , which is worded as follows:

“6. In order to assist them in their work the Committee shall also be given such budgetary information as may be required for drawing up the provisional lists of officials considered to be most deserving of promotion.

The number of officials to be entered on the provisional lists

shall be approximately 25 % higher than the number of posts likely to be available in each relevant grade.

However, the Committees shall be entitled to frame proposals, stating reasons, for promotion of numbers of officials above or below that number”.

— Paragraph 3 b of the Guidelines adopted by the Promotions Committee — Category B — for the 1978 Financial Year, which is worded as follows:

“3. The following are the various guidelines adopted in principle by the Committee for 1978:

3.b To Grade B 2

3.b.1 On the list for 1977;

3.b.2 Aged 48 or more and in general with at least 4 years' seniority in the grade;

3.b.3 Aged 37 to 48 and at least 4 years' seniority in the grade;

3.b.4 A percentage of some 15 % of officials of Grade B 3 to be promoted, either aged at most 37 or older but with no more than 4 years' seniority in the grade and specially recommended.”

#### *Admissibility of fresh submissions*

The defendant refers to Article 42 (1) of the Rules of Procedure and challenges the admissibility of these submissions since they are based upon matters of law

and fact known to the applicant before she brought the action.

The General Provisions for Implementing the Procedure for Promotion were published in Administrative Notices No 42 of 10 May 1975. The guidelines adopted by the Committee have their origin in the guidelines adopted by the Commission on 24 November 1976 and published in Administrative Notices No 132 of 10 January 1977.

#### The first fresh submission

The applicant draws attention to the power of the Promotion Committee to enter on the list it draws up a number of officials approximately 25 % higher than the number of posts "likely to be available". She refers in this respect to the statistical table on page 9 of Administrative Notices No 205 of 23 August 1978 based on paragraph 6 of the aforesaid General Provisions for Implementing the Procedure for Promotion. She claims that the Committee could have entered her name on the list of officials it proposed.

In this respect the applicant refers to Article 25 of the Staff Regulations and alleges that in not making use of that power the Committee was guilty of negligence adversely affecting her. Further, by not stating the reasons on which it relied the Committee made it impossible for the Court to check them and in particular to decide whether the interests of the service were disregarded or whether there was a misuse of powers.

The *defendant* considers that the submission is not well founded. It stresses the discretion which the

Committee has in the matter and points out further that the applicant has put forward no factor to suggest that if the opportunity had been used she would have been among the ten officials selected from the 229 officials eligible for promotion and not included on the provisional list.

The applicant's allegation of infringement of the second paragraph of Article 25 of the Staff Regulations is also incorrect since that provision concerns only decisions relating to specific individuals.

The defendant moreover considers that in any event the submission as put forward cannot be accepted; in forwarding to the appointing authority a provisional list containing the names of a number of officials equal to the number of promotions provided for in the budget the Promotion Committee has limited the discretion of the appointing authority and that does not adversely affect the applicant.

#### The second new submission

The *applicant* claims that if the aforesaid guidelines adopted by the Promotion Committee had been applied the applicant's name would have been included in the list proposed by the Promotions Committee. In fact she ought to have benefited from the rule under 3.b since she was born on 5 February 1930 and was aged 48 at the time of the first meeting of the Promotion Committee. Further, she had at least 4 years' seniority in the grade so that in any event she ought to have been able to benefit from the rule in 3.b.3. Even assuming that the Promotion Committee was not bound by the guidelines it had adopted and that it was not bound by the rule *patere legem* it

ought to have set out the reason why it did not follow those guidelines. By failing to do so it adversely affected the applicant in infringement of Article 25 of the Staff Regulations.

*Huybrechts v Commission* [1969] ECR 85, particularly paragraph 19 of the decision at p. 97; Case 90/71 *Bernardi v European Parliament* [1972] ECR 603, particularly paragraph 15 of the decision at p. 609).

Further by not stating the reasons the Promotion Committee made it impossible for the Court to check them and in particular to determine whether the interests of the service have been disregarded or there was a misuse of powers.

In answer the *defendant* says that the provisions cited are guidelines and that word sufficiently indicates their flexible and non-mandatory nature. It moreover stresses that the applicant is wrong in maintaining that the guidelines adopted by the Committee at 3.b.2 and 3.b.3 were not applied. The case of the applicant who was aged 48 and had at least 4 years' seniority in the grade was the subject of very special attention, as were those of all the officials whose age was greater than the maximum in the age brackets, as is shown by the minutes of the Promotion Committee. On the other hand, the criterion in 3.b.3 did not concern her since she was at the time 48 years old.

In any event Article 25 of the Staff Regulations concerns the statement of grounds only of decisions relating to specific individuals. Moreover the defendant considers that the Promotion Committee has no duty as against officials whose names are not entered on the provisional list to provide a statement of the reasons on which the decisions are based and moreover the recital of such a statement of reasons might be prejudicial to such candidates (Case 21/68

### *E — Reservations*

In her reply the *applicant* expresses reservations as to whether the Promotion Committee was properly constituted and in particular as regards respect of the rule that members of the committee for promotion to Grade B 2 should be at least of Grade A 4. The defendant has not shown that the proceedings were in order in this respect.

The *defendant* considers the applicant's contention surprising for three reasons:

- (a) No fresh submission may be made in the course of proceedings, and that applies *a fortiori* to the making of reservations in reply constituting a kind of potential submission raising the question when the applicant intends to raise it formally;
- (b) The reservations expressed are also surprising in view of the fact that the composition of the Promotions Committee for Category B was published in Administrative Notices No 198 of 11 May 1978 and was thus known to the applicant before the action was brought;
- (c) Finally, the reservations made are surprising in so far as they suggest that it is for the defendant to establish that the composition of the

Promotions Committee was in order; on the contrary attention is drawn to the fact that it is for the applicant to show that the composition of the Committee was not in order and that any irregularity was likely to affect her adversely.

#### *F — Measures to be taken*

The *applicant* seeks the annulment of the whole procedure for promotions to Grade B 2 for the 1978 financial year.

The *defendant* considers that, assuming the action is held to be well founded, such annulment would cause the officials promoted a wrong out of all proportion to the damage suffered by the applicant and that her rights could be guaranteed by more appropriate measures. (Cf. as regards competitions: judgment of 4 December 1975 in Case 31/75 *Costacurta v Commission* [1975] ECR 1563 in particular paragraph 17 of the decision at p. 1571; judgment of 30 November 1978 in Joined Cases 4, 19 and 28/78 *Salerno and Others v Commission* [1978] ECR 2403 and in particular paragraph 35 of the decision at p. 2418; judgment of 5 April 1979 in Case 117/78 *Orlandi v Commission* [1979] ECR 1613 and in particular paragraph 25 of the decision at p. 1622).

In her reply the *applicant* considers that only annulment of the promotions would enable satisfaction to be given to her claim. Moreover, annulment of promotions would not have the same effect as annulment of the results of a competition. In the case of promotions the appointing authority could re-appoint all the officials put forward since new posts become vacant from year to year, while in the other case the competition would have to be begun

again with all the risks which that would involve for those who had been successful.

In its rejoinder the defendant states that, in fact, annulment of the decision on promotions would seriously affect the 40 officials in question since it would delay their promotion to Grade B 2 for at least two years.

Further, while it is true that each year new promotions are decided it is also true that each year other officials complete the minimum period to enable them to be included in the list of those eligible for promotion.

#### *G — Evidence*

In her reply the *applicant* seeks the production of a number of documents which are missing, including in particular:

- The scale of promotions to which she referred in her reply in relation to the first submission; and
- The document relating to the decision taken by the appointing authority.

Finally the applicant offers to adduce oral testimony concerning the basic circumstances of the proceedings at the meetings of the Promotion Committee.

The *defendant* produces the Decision of 24 July 1978 by the appointing authority relating to the promotion of officials to Grades B 2 and B 4. It denies that there is a scale but refers to the General Provisions for Implementing the Procedure for Promotion within a Career Bracket and the guidelines adopted by the Commission on 24 Nov-

ember 1976 and published in IV — Oral procedure  
Administrative Notices No 132 of  
10 January 1977.

The parties presented oral argument at  
the sitting on 28 February 1980.

It also joins issue on the offer to adduce  
oral testimony since insufficient parti-  
culars are given.

The Advocate General delivered his  
opinion at the sitting on 27 March 1980.

## Decision

- 1 By application dated 8 February 1979, received at the Court the following day, the applicant sought the annulment of the procedure for promotions to Grade B 2 as a result of which the Commission promoted the officials whose names are listed in Administrative Notices No 208 of 23 August 1978 and the annulment of the Decision dated 13 November 1978 in which the Commission rejected the applicant's complaint relating to those promotions.
- 2 As part of the procedure for promotions for 1978 the applicant's name had been included in the list of officials satisfying the minimum seniority required for promotion from Grade B 3 to Grade B 2 under Article 45 (1) of the Staff Regulations. Subsequently, however, and unlike three other officials of Directorate-General VII in which she served, she was not proposed by her Director-General to the Promotions Committee. The name of only one of those three other officials was included by the Promotions Committee among the 40 officials considered to be most deserving of promotion. The list of officials promoted to Grade B 2 by the appointing authority was in accordance with that drawn up by the Promotions Committee.
- 3 In that complaint which she made the applicant made a comparison between her own merits and those of her colleague who was promoted and she concluded from that comparison that she was better qualified than the latter for promotion to Grade B 2. In her application the applicant complains that

the Promotion Committee and the appointing authority did not seriously consider the comparative merits of the two officials in question.

- 4 The applicant makes three submissions in her conclusions. The Court will consider, first of all, the second submission as to infringement of Article 45 (1) of the Staff Regulations. That provision stipulates *inter alia* that promotions to the next higher grade 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.
- 5 In the applicant's view that provision has been infringed in two respects: on the one hand the Promotion Committee and the appointing authority were unaware that the applicant had written a bibliographical paper at the end of her studies; in addition those two bodies were unacquainted with the staff report on the applicant for 1975 to 1977 whereas they had at their disposal the staff reports for that period on other officials eligible for promotion.
- 6 As regards first of all the staff report for 1975 to 1977 the applicant alleges that it was drawn up by her superiors on 2 March 1978. The Commission contested that fact. It observed that the staff report on the applicant for the period in question had not yet been drawn up when the Promotion Committee met and that such report could not therefore have been made available either to the Committee or to the appointing authority. Nevertheless during the oral procedure the Commission admitted that a document described as a "staff report" relating to the applicant was drawn up in March 1978; that document had however not been signed by the appropriate assessor but by officials in Directorate-General V who had been the applicant's superiors between 1 October 1975 and 1 December 1976, the date when she was re-assigned to Directorate-General VII. The Commission stated that the document in question was not in the applicant's personal file and that the appointing authority became aware of it only when the applicant lodged her complaint to which the said document was annexed. The

Commission stated at the hearing that a staff report for 1975 to 1977 was still at that time in the course of being drawn up by the assessors responsible.

- 7 As for the paper produced by the applicant at the end of her studies argument between the parties has not clarified whether the Promotion Committee and the appointing authority were aware of its existence. The Commission finally stated that two letters sent to the applicant which referred to the paper were not put into her personal file until after the Promotion Committee had finished its work.
- 8 Article 43 of the Staff Regulations provides that the periodic report shall be made at least once every two years. The report constitutes an indispensable criterion of assessment each time the official's career is taken into consideration by the administration. Thus pursuant to Article 45 (1) of the Staff Regulations officials may be promoted only after consideration of the comparative merits of the officials eligible for promotion and of the reports on them. The Court has already held in its judgment of 23 January 1975 (Case 29/74 *De Dapper v European Parliament* [1975] ECR 35) that consideration of the merits of candidates whose periodic reports had already been drawn up under Article 43 and of others in whose case this had not yet been done fails to meet the requirements of Article 45 with regard to consideration of the comparative merits of officials.
- 9 In the present case the Commission had not denied that the applicant's staff report for 1975 to 1977 had not yet been drawn up when the Promotion Committee dealt with the proposals for promotion whereas the staff reports for the same period on other officials eligible for promotion were submitted to that Committee and to the appointing authority. During the argument between the parties the Commission attempted to explain the reasons for the delay in drawing up the staff reports on the applicant; in that respect it cited in particular the frequent changes in the posting of the applicant because it was impossible for her to work in an air-conditioned office. Nevertheless the Commission has not succeeded in showing that the delay was caused by the applicant.

- 10 Nor has the Commission shown that the absence of the applicant's staff report was compensated for by other factors capable of informing the Promotion Committee and the appointing authority of the applicant's merits for the period in question. In particular the Commission did not show that it was possible for those two bodies to know of the existence of the bibliographical paper written by the applicant in 1975 at the end of her studies.
- 11 It is apparent from the foregoing that the Commission had been guilty of a wrongful act or omission in putting or leaving the applicant in a less favourable position than the other officials eligible for promotion. Accordingly the procedure for promotion to Grade B 2 for 1978 was irregular as regards the applicant.
- 12 Since the second submission in the application is thus upheld it is not necessary to consider the other submissions put forward by the applicant.
- 13 The Court considers that annulment of the promotions of the 40 officials who have in fact been promoted to Grade B 2 would constitute an excessive penalty for the irregularity committed and it would be arbitrary to annul the promotion of the only official from Directorate-General VII who was in fact promoted to Grade B 2.
- 14 Nevertheless since this case involves proceedings in which the Court has unlimited jurisdiction it has, even in the absence of proper conclusions to that effect, the power not only to annul but also, if need be, of its own motion to order the defendant to pay compensation for the non-material damage caused by a wrongful act or omission on its part. The award of such damages constitutes in the present case the form of compensation which best meets both the applicant's interests and the requirements of the department.
- 15 In assessing the damage suffered it is right to bear in mind that the applicant will be able to take part in the next promotion procedure which the



Commission will take care to conduct in accordance with the rules. In view of that fact the Court assesses the damage suffered *ex aequo et bono* and considers that the award of the sum of BFR 20 000 is sufficient compensation for the applicant.

Costs

- 16 Pursuant to Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. Since the defendant has been unsuccessful it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Orders the Commission to pay the applicant the sum of BFR 20 000 by way of damages in respect of its wrongful act or omission;
2. Dismisses the remainder of the claims;
3. Orders the Commission to pay the costs.

O'Keeffe

Bosco

Koopmans

Delivered in open court in Luxembourg on 5 June 1980.

H. A. Rühl

Principal Administrator

A. O'Keeffe

President of the First Chamber