

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
13 December 1990 *

In Case T-20/89,

Heinz-Jörg Moritz, an official of the Commission of the European Communities, residing at Bridel (Luxembourg), represented by Victor Biel, assisted by Aloyse May, both of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Mr Biel, 18 A, rue des Glacis,

applicant,

v

Commission of the European Communities, represented initially by Christine Berardis-Kayser, a member of its Legal Department, subsequently by Henri Étienne, also a member of its Legal Department, acting as Agent, assisted by Barbara Rapp-Jung, avocat, Brussels, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 2 July 1986 relating to the appointment of an official to an A 2 post and for compensation for the material and non-material damage allegedly suffered by the applicant,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

composed of: H. Kirschner, President, C. P. Briët and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and following the hearing on 8 May 1990,

gives the following

* Language of the case: German.

Judgment

The facts

- 1 Until the end of January 1990, when the entered retirement, the applicant was an official in Grade A 3 at the Commission of the European Communities where he occupied a post of head of division in Directorate-General XVIII (Credit and Investments). The applicant applied for the Grade A 2 post of Director of Investments and Loans in Directorate-General XVIII (Notice of Vacancy COM/24/86).
- 2 In Notice 17/86 of 22 April 1986 the Consultative Committee on Appointments to Grades A 2 and A 3 at the Commission (hereinafter referred to as 'the Consultative Committee'), before which lay applications from the applicant and another Commission official, decided that neither of the candidates possessed all the required qualifications.
- 3 At its meeting on 30 April 1986 the defendant, having regard to Article 29(1)(a) of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations'), which concerns the filling of vacant posts by promotion or transfer within the institution, examined the two applications together and decided not to fill the vacant post.
- 4 The defendant then decided to have recourse to Article 29(2) of the Staff Regulations, according to which a procedure other than that provided for in Article 29(1) may be adopted by the appointing authority for the recruitment of Grade A 1 and A 2 officials.
- 5 At its meeting held on 27 June 1986 the Consultative Committee decided that the application submitted pursuant to Article 29(2) of the Staff Regulations by Mr Dieter Engel, who at that time was not an official of the European Communities, had to be considered. On 2 July 1986, the defendant appointed Mr Engel, who at that time possessed Canadian nationality, to the post in question after a comparative examination of the merits of the three applicants. On 14 July 1986, Mr Matutes, the member of the Commission responsible for appointments within DG XVIII, informed the applicant of that decision.

- 6 By letter of 13 October 1986 the applicant lodged a complaint seeking the annulment of the decision appointing Mr Engel to the post in question. That complaint was dismissed by a decision of the defendant of 7 May 1987.

Procedure

- 7 By application lodged at the Court Registry on 12 August 1987, the applicant brought this action against the defendant seeking the annulment of the Commission's decision of 2 July 1986 appointing Mr Engel and of the decision rejecting his complaint about that appointment, and for compensation for the material and non-material damage which he has allegedly suffered.
- 8 The written procedure was conducted entirely before the Court of Justice. By order of 15 November 1989 the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.
- 9 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.
- 10 The hearing was held on 8 May 1990. The representatives of the parties presented oral submissions and answered questions asked by the Court of First Instance.
- 11 The applicant claims that the Court of First Instance should:
 - (i) immediately order certain documents to be lodged;
 - (ii) declare the application admissible;
 - (iii) declare it well founded;

- (iv) annul the decision on the complaint;
- (v) annul Mr Engel's appointment as irregular;
- (vi) order the defendant to pay the costs;
- (vii) order the defendant to pay compensation for both material and non-material damage.

12 The defendant contends that the Court of First Instance should:

- (i) dismiss the application;
- (ii) order the applicant to pay the costs.

The claim for annulment

- 13 The application, made on the basis of Articles 90 and 91 of the Staff Regulations, is primarily directed against the defendant's decision of 2 July 1986 appointing a person other than the applicant to a Grade A 2 post and against the defendant's decision of 7 May 1987 rejecting the applicant's complaint of 13 October 1986.
- 14 At the hearing on 8 May 1990, the defendant explained that after the conclusion of the written procedure the applicant had entered retirement. Relying on the case-law of the Court of Justice, the defendant contended that for that reason the applicant no longer had any legal interest in seeking the annulment of the appointment of another candidate.
- 15 It is indeed established case-law that in order for an official or a former official to be able to bring an action under Articles 90 and 91 of the Staff Regulations for the annulment of a decision of the appointing authority making an appointment, the official or former official concerned must have a personal interest in the annulment

of the contested decision (see the judgment of the Court in Joined Cases 81/74 to 88/74 *Marenco and Others v Commission* [1975] ECR 1247, in Case 111/83 *Picciolo v Parliament* [1984] ECR 2323 and in Case 126/87 *Del Plato v Commission* [1989] ECR 643).

- 16 Since the applicant acknowledged at the hearing that he recently retired after reaching the age-limit of 65 years, which also emerges from his personal file forwarded to the Court in accordance with the last paragraph of Article 26 of the Staff Regulations, he may no longer effectively lay claim to the post in question because he no longer belongs to the institution within which the post filled by the contested decision was vacant. It follows that he no longer has any legitimate interest in having the appointment of the candidate appointed to that post annulled.
- 17 Consequently, the claim for annulment submitted by the applicant must be dismissed as inadmissible.

The claim for compensation for the damage allegedly suffered

- 18 Although the applicant retired during the course of the procedure before the Court of First Instance so that he may no longer effectively lay claim to the post in question and although therefore he no longer has any legitimate interest in having Mr Engel's appointment annulled, he still has an interest in seeking a ruling on that appointment in connection with a claim for compensation for the damage, material and non-material, which he considers that he has suffered owing to the defendant's conduct.
- 19 In order for the applicant to be able to claim compensation for the damage allegedly suffered, he must demonstrate a fault committed by the institution, the unquestionable existence of quantifiable damage and a causal link between the fault and the alleged damage. It is therefore necessary to consider first of all whether the appointing authority committed a fault by proceeding to appoint Mr Engel and then to examine the submissions advanced by the applicant in support of his claim that that appointment is unlawful.

The fault allegedly arising from an error of assessment or a misuse of power

- 20 The applicant claims that the vacancy notice matched his qualifications and field of work 'perfectly'. For him it is thus incomprehensible that the Consultative Committee could come to the conclusion that he did not possess 'all the required qualifications'.
- 21 He also asserts that his qualifications (technical knowledge and professional experience) were much higher than those of the candidate finally chosen by the Commission. He refers in this regard to his eight years of service as head of the 'Loans' division and his contacts, both within undertakings in the coal and steel industry and in the relevant departments of the Commission. He points out that the candidate chosen, on the other hand, is only a 'mere head of department' in a German bank 'in charge of investment banking in Asia', having only brief experience as a co-director of a bank established in Luxembourg but dissolved some years later. In the applicant's view, all those factors go to show that the Consultative Committee, and then the defendant, committed either an error of assessment or a misuse of power.
- 22 In his view, the error of assessment may arise from the fact that, despite the incompleteness of his personal file, due to the absence of his periodic reports for the periods 1973-75, 1975-77 and 1983-85, the Consultative Committee was satisfied with hearing the views of his Director-General and not of the applicant himself and may therefore have received wrong information. As regards the misuse of power, he raises the question whether his superiors favoured the application of his 'fortunate' competitor and whether 'the knowledge and experience required in the vacancy notice really counted' or whether 'the most important thing was to be a colleague' of one of his superiors, 'to address him in familiar terms upon taking up his duties (and thus even before then) and to owe his career to him'.
- 23 The applicant requested the Court to allow him to prove his allegations by ordering the defendant to produce a number of documents. The defendant had already furnished a number of the documents he sought, namely the Minutes of the meetings of the Consultative Committee of 22 April and 27 June 1986 concerning the various applications, and the 'special' report of the Commission's meeting of 2 July 1986 but the applicant observed that those documents were

incomplete. He pointed out that it was necessary for him to know what his Director-General was able to say on his behalf before the Consultative Committee and that in this regard the principle of hearing the parties had been disregarded during the procedure followed by that committee; nothing on this matter was to be found in the Minutes of the meetings, the names of the participants were not indicated and above all no reasons were stated for the Committee's proposals; likewise, the special report of the meeting of the Commission indicated only that the Commission accepted the opinion of the Consultative Committee; no mention was made of the fact that the candidate chosen was not a national of one of the Member States at the time of his appointment.

- 24 The applicant again requested the production of his competitor's individual file and candidature as well as of a note 'which may damage his reputation in the service'. According to that note, which was mentioned in a conversation with him, he was greatly assisted at the time of his recruitment by a former vice-president of the Commission and he had caused the departure of a director-general a few years later. In the applicant's view, the refusal to disclose those documents to him constitutes a breach of the principle of the transparency of administrative decisions and the duties of loyalty and good faith owed by the Commission.
- 25 In reply, the defendant states that, according to the established case-law of the Court, the appointing authority has a wide discretion when comparing the merits of candidates and that consequently its decision as to whether a candidate satisfies the required conditions cannot be called in question save in the case of manifest error. The applicant is essentially claiming that his competitor had less practical experience than he has; however, it is also for the appointing authority to decide whether theoretical knowledge and the ability to perform certain functions, such as management functions, should carry more weight than practical experience in order for a person to be appointed to a specific post.
- 26 The Commission also submits that the points made by the applicant about the possible acquaintance between his Director-General and the candidate chosen do not warrant the conclusion that an error of assessment tantamount to discriminatory treatment was committed or that the disputed appointment was made out of prejudice against him on his superior's part.

- 27 The Commission states that the candidate appointed 'was and is particularly suited for the post in question' and that 'there is nothing to support the view that the appointing authority used its power of discretion in a manifestly wrong way when assessing the qualifications and abilities of the applicant in relation to those of other candidates'. In its view, the applicant has not advanced any argument capable of supporting the conclusion that the appointing authority committed such a manifest error in this case.
- 28 As regards the production of the documents sought by the applicant, the Commission objects first of all that it does not have the right to disclose individual files and that, secondly, the applicant has not adduced evidence of the existence of a note concerning him which might injure his reputation in the service. Moreover, the appointing authority is not obliged to state the reasons for its appointment decisions. Contrary to the applicant's assertions, his claim for the production of the individual file and candidature of the candidate chosen was made for the first time in the reply and must therefore be rejected as being out of time.
- 29 The Court would observe that the post in question was a Grade A 2 post (director). As the defendant rightly points out, the appointing authority has a wide discretion when comparing the merits of candidates for such a post which entails great responsibility and in assessing the interests of the service. The review to be undertaken by the Court must accordingly be confined to the question whether, having regard to the various considerations which have influenced the administration in making its assessment, the administration has remained within reasonable bounds and has not used its power in a manifestly incorrect way or for purposes other than those for which it was conferred upon it (see in particular the judgment of the Court in Case 324/85 *Bouteiller v Commission* [1987] ECR 529 and in Case 140/87 *Bevan v Commission* [1989] ECR 701).
- 30 As is apparent from the documents before the Court, after the vacancy notice for the post in question had been published, the applicant and another official applied for that post. Under the procedure provided for in Article 29(1)(a) of the Staff Regulations, the Consultative Committee for appointments to Grades A 2 and A 3 of the Commission examine the applications and individual files of the candidates. After hearing the views of the Director-General of the Directorate-General for Credit and Investments, who on the basis of the vacancy notice specified the quali-

fications required of the occupant of the post to be filled, that committee came to the view that the candidates did not possess all the qualifications required. After the Commission had also examined the applications, it decided not to fill the vacant post and to proceed according to the procedure laid down in Article 29(2) of the Staff Regulations by inviting applications from external candidates. After again hearing the views of the Director-General, the Consultative Committee came to the conclusion that Mr Engel's application should be taken into consideration. After carrying out a comparative examination of the three applications submitted, the Commission decided to fill the vacant post by appointing Mr Engel on the basis of Article 29(2) of the Staff Regulations.

- 31 As far as the regularity of the procedure followed in this case before the Consultative Committee is concerned, the following points are to be made: where high-level posts are to be filled and the appointing authority has decided to fill them according to the procedure laid down in Article 29(2) of the Staff Regulations, which leaves it a very wide margin of discretion, the mere fact that the Director-General, Mr Cioffi, was heard by the Consultative Committee in the absence of the applicant, cannot constitute, in the circumstances of this case, a breach of the principle of the right to a fair hearing; firstly, it is clear from the Minutes of the Consultative Committee's meeting of 22 April 1986 that Mr Cioffi confined himself to explaining, on the basis of the vacancy notice, the qualifications required of the occupant of the post and, secondly, that the applicant has not brought forward any factor to support his assertion that the Director-General may have expressed unfavourable views about him which may have influenced the Consultative Committee.
- 32 As regards the manifest error allegedly committed by the appointing authority in proceeding to appoint Mr Engel, it must be noted that the defendant has pointed out, without being contradicted on this point by the applicant, that Mr Engel has studied finance and economic sciences at the University of Montreal, that he has worked in high positions in various Canadian and European banks and that he has command of four Community languages.
- 33 Moreover, it does not emerge from the documents placed on the file nor has the applicant satisfactorily demonstrated to the Court that the defendant in appointing Mr Engel to the post to be filled committed a manifest error of assessment, exceeded the limits of its own competence or used its powers for purposes other than those for which they were granted.

The wrongful act allegedly arising from a breach of Articles 27 and 28 of the Staff Regulations

- 34 The applicant points out that at the time of his appointment the candidate chosen did not have the nationality of a Member State, contrary to Article 27 in conjunction with Article 28 of the Staff Regulations.
- 35 The defendant points out in this regard that Mr Engel, who originally possessed German nationality but had become a naturalized Canadian, had re-acquired his German nationality before taking up his duties, as the defendant had itself required. It also points out that this complaint does not concern the applicant personally.
- 36 It is to be noted that Mr Engel, originally a German national but who assumed Canadian nationality, had re-acquired his German nationality before taking up his duties, as the Commission had required of him. In those circumstances, Mr Engel's appointment did not take place in contravention of Articles 27 and 28 of Staff Regulations.

The wrongful act allegedly arising from a breach of the duty to have regard to officials' interests and of the duty of loyalty

- 37 Finally, the applicant points out that, by preferring a person from outside the Community institutions and much younger than himself, the Commission acted in breach of its duty owed to him, and to every official, to have regard to his interests and to show loyalty.
- 38 The Commission observed that the duty to have regard to officials' interests cannot confer on officials a right to promotion, since any decision concerning a promotion must take account above all of the interests of the service.
- 39 It must be pointed out in this regard that the filling of each post must be based primarily on the interests of the service (see the judgment of the Court in Case

123/75 *Küster v Parliament* [1976] ECR 1701). The administration's duty to have regard to the interests of its staff reflects the balance of reciprocal rights and obligations established by the Staff Regulations in relations between the public authority and civil service employees. That duty requires the authority to take account not only of the interests of the service but also of those of the officials concerned (see the judgment of the Court of Justice in Case 321/85 *Schwiering v Court of Auditors* [1986] ECR 3199). In evaluating the interests of the service and of the candidates concerned, the appointing authority has a wide discretion and the review undertaken by the Court must be confined to the question whether the appointing authority remained within the bounds of that discretion and did not use it in a manifestly wrong way.

- 40 In the present case, it is apparent from the documents before the Court that the appointing authority undertook an objective comparative assessment of the merits and qualifications of the candidates for the post to be filled. The fact referred to by the applicant that a candidate from outside the Community institutions was preferred to him and that that candidate was much younger than himself cannot constitute *per se* a breach of the duty to have regard to his interests and to show loyalty towards him.

The maladministration allegedly consisting in the late preparation by the appointing authority of the applicant's periodic report

- 41 In this regard it is sufficient to note, without there being any need to examine whether the delay alleged by the applicant actually took place, how long it lasted and who was responsible for it, that it does not emerge from the documents and the applicant has not shown that he would have had a greater chance of being appointed to the post of Director of Investments and Loans if during the procedure to fill that post his personal file had contained his periodic report for the period 1983-85, in its finalized version (see the judgment of the Court of Justice in Case 1/87 *Picciolo v Commission* [1988] ECR 711 and in Case 346/87 *Bossi v Commission* [1989] ECR 303). It is clear from an examination of that final periodic report, as produced to the Court, that it contains only quite minor changes compared with the initial draft report submitted to the applicant and that those changes, which do not affect the general tenor of the periodic report, could not have any effect whatsoever on the applicant's chances of being promoted to the post in question.

- 42 It follows from all the foregoing considerations that none of the complaints advanced by the applicant in order to demonstrate the existence of a wrongful act committed by the Commission can be upheld. The claim for compensation for material damage must therefore be dismissed.

The claim for compensation for non-material damage

- 43 As the applicant has submitted without being contradicted and as appears from his personal file, his periodic report for the period from 1 July 1983 to 30 June 1985 — against which he later appealed and sought a revised report — was drawn up on 10 February 1987. On 31 July 1986, that is to say after the expiry of the time-limit laid down in the first paragraph of Article 6 of the General Provisions for the Implementation of Article 43 of the Staff Regulations, which in this case was 30 November 1985, the applicant's immediate superior proposed that his report for the period 1981-83 should be extended to cover the abovementioned period; that proposal was expressly rejected by the applicant on 26 November 1986, that is to say nearly four months after the proposal had been made to him.
- 44 The Commission points out that in order to determine whether such delay constitutes maladministration, it must be ascertained in particular whether the delay is attributable, if only partially, to the conduct of the official concerned. Furthermore, any maladministration can give rise to an obligation to pay compensation only in so far as the applicant shows that he has suffered damage (judgment of the Court of Justice in Case 1/87 *Picciolo v Commission*, cited above). However, such damage has not been proved in this case, nor has the applicant shown that he has suffered damage owing to the fact of his personal file being incomplete. The Commission argues alternatively that the calculation of damages proposed by the applicant, according to which he must be put in a position as if he had been appointed Director, amounts to an inadmissible fetter on the Commission's discretion in filling vacant posts.
- 45 In its judgment delivered today in Case T-29/89 *Moritz v Commission* [1990] ECR II-787, the Court of First Instance pointed out that Article 43 of the Staff Regulations provides for a periodic report to be drawn up at least once every two years on the ability, efficiency and conduct in the service of each official. The periodic report must compulsorily be drawn up for the good administration and

rationalization of the services of the Community and in order to safeguard the interests of officials. One of the bounden duties of the administration is therefore to ensure that reports are drawn up periodically on the dates laid down by the Staff Regulations and that they are drawn up in proper form (judgment of the Court of Justice in Joined Cases 156/79 and 51/80 *Gratreau v Commission* [1980] ECR 3943). The administration has a reasonable period at its disposal in which to do this and any failure to act within that period must be justified by the existence of special circumstances (judgment of the Court of Justice in Case 207/81 *Ditterich v Commission* [1983] ECR 1359).

- 46 Furthermore, all officials owe a general duty of loyalty and cooperation to the authority to which they belong, in particular in the procedure for drawing up the periodic report (judgment of the Court of Justice in Case 3/66 *Alfieri v Parliament* [1966] ECR 437). An official cannot therefore complain of delay in the drawing up of his periodic report when that delay is attributable to him, if only partially, or where he contributed considerably to the delay.
- 47 Finally, the Court of Justice has consistently held that delay in the drawing up of staff reports may in itself be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions affecting them are taken (judgment of the Court of Justice in Joined Cases 173/82, 157/83 and 186/84 *Castille v Commission* [1986] ECR 497).
- 48 In the aforesaid judgment delivered on the same day, the Court found that the delay in the procedure for drawing up a periodic report for the period 1983-85 was due not only to lateness with which the applicant's immediate superior proposed to him, on 31 July 1986, that his periodic report for the period 1981-83 should be extended to cover the period 1983-85 but also to the dilatory response of the applicant who waited until 26 November 1986 before replying to that proposal. The applicant thus contributed considerably to the delay of which he complains.
- 49 As the Court also held, the applicant was bound under the aforementioned duty of loyalty and cooperation to respond within reasonable time to his immediate superior's proposal to extend his periodic report; he was in breach of that duty by

waiting nearly four months before reply to that proposal. Consequently, the alleged delay cannot, in the circumstances of this case, constitute non-material damage, although the period of eight months taken by the applicant's immediate superior to propose the extension of his periodic report is in itself at the limit of what may be considered to be a reasonable period.

- 50 As far as the absence of periodic reports for the periods 1973-75 and 1975-77 is concerned, it is to be noted that the applicant raised this argument for the first time in support of the claim for damages, that is to say more than nine years after the last-mentioned periodic report. It is quite clear from the documents before the Court that the absence of those periodic reports for periods in the distant past did not cause the applicant any non-material damage on which he could effectively base any claim in the present action.
- 51 In those circumstances, the claim for compensation for non-material damage must be dismissed.
- 52 It follows from all the foregoing considerations that the action must be dismissed in its entirety.

Costs

- 53 Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, according to Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions brought by officials or other servants of the Communities are to be borne by institutions. Each party must therefore be ordered to pay its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- (1) Dismisses the application;**
- (2) Orders the parties to bear their own costs.**

Kirschner

Briët

Biancarelli

Delivered in open court in Luxembourg on 13 December 1990.

H. Jung
Registrar

C. P. Briët
President