

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)  
16 December 1993 <sup>\*</sup>

In Case T-20/89 RV,

**Heinz-Jörg Moritz**, a former official of the Commission of the European Communities, residing in Bridel (Luxembourg), represented by Matthias Mahlberg, Rechtsanwalt, Bonn, with an address for service in Luxembourg at the applicant's residence, 25A Rue de Schoenfels,

applicant,

v

**Commission of the European Communities**, represented by Götz zur Hausen, Legal Adviser, acting as Agent, assisted by Barbara Rapp-Jung, Rechtsanwältin, Frankfurt am Main, with an address for service in Luxembourg at the office of Nicola Anecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation for the material and non-material damage which the applicant claims to have suffered by reason of the rejection of his application for a post of Director (Grade A 2) and of the appointment of another candidate,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: A. Kalogeropoulos, President, R. Schintgen and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 28 September 1993,

gives the following

<sup>\*</sup> Language of the case German

## Judgment

1 This judgment is being delivered by the Court after the case was referred back to it by the Court of Justice (judgment of 17 December 1992 in Case C-68/91 P *Moritz v Commission* [1992] ECR I-6849, hereinafter ‘the judgment on appeal’) following an appeal by the applicant against the judgment of the Court of First Instance of 13 December 1990 in Case T-20/89 *Moritz v Commission* [1990] ECR II-769 (hereinafter ‘the judgment set aside’).

### Facts of the case and the previous proceedings

2 The background to the case and the course taken by the earlier stages in the proceedings are set out extensively in the above judgments, to which reference is made. These are mentioned or discussed hereinafter only in so far as is necessary for the Court’s reasoning in the present judgment.

3 The applicant entered the Commission’s service on 1 July 1967 and was, on his retirement at the end of January 1990, an official in Grade A 3, Step 8, holding the post of Head of Division in the Commission’s Directorate-General for Credit and Investment (hereinafter ‘DG XVIII’).

4 In January 1986, the Commission published Notice of Vacancy COM/24/86 with a view to filling a vacant Grade A 2 post, that of Director of Investments and Loans within DG XVIII.

5 The applicant, along with another Commission official, applied for that post pursuant to Article 29(1)(a) of the Staff Regulations of Officials of the European Communities (hereinafter ‘the Staff Regulations’).

6 The Commission's Consultative Committee on Appointments to Grades A 2 and A 3 (hereinafter 'the Consultative Committee'), to which the candidates' files were submitted, examined the applications in accordance with Article 29(1)(a) of the Staff Regulations. During that examination, the Consultative Committee heard the Director-General of DG XVIII, who detailed the qualifications required for the post to be filled, as referred to in the Vacancy Notice, as well as their scope. The Director-General also informed the Consultative Committee of his assessment of the candidates, in the light of the nature of the post to be filled, and indicated to the Committee the basis underlying his examination of their respective merits. In Notice 17/86, adopted on 22 April 1986, the Consultative Committee informed the appointing authority that its final conclusion was that neither of the candidates for the post 'possessed all the required qualifications'.

7 At its meeting on 30 April 1986, the Commission examined the two applications together and decided, at that stage, not to fill the vacant post pursuant to Article 29(1)(a) of the Staff Regulations but instead to have recourse to the appointment procedure provided for under Article 29(2) and seek once again the opinion of the Consultative Committee on the applications submitted.

8 On 27 June 1986, the Consultative Committee, after hearing the Director-General of DG XVIII anew, decided that an external application, submitted pursuant to Article 29(2) of the Staff Regulations, merited consideration and informed the appointing authority to that effect by Notice 32/86.

9 On 2 July 1986, the Commission, apprised of above Notice 32/86 from the Consultative Committee, decided to appoint the external applicant, Mr Engel.

10 The applicant was informed on 14 July 1986 of the Commission's decision of 2 July 1986. On 13 October 1986, he lodged a complaint, which was registered on 15 October 1986, against the rejection of his application and, consequently, against Mr Engel's appointment to the post. That complaint was rejected by a Commission decision of 5 May 1987.

- 11 On 12 August 1987 the applicant brought an action before the Court of Justice seeking, first, the annulment of the Commission's decision of 2 July 1986 and of its decision of 5 May 1987 rejecting his complaint, and, second, compensation for the material and non-material damage which he claimed to have suffered as a result of the rejection of his application and the appointment of another candidate.
- 12 On 18 March 1988, the applicant brought a second action before the Court of Justice against the rejection of a complaint, lodged on 13 August 1987, in which he sought the annulment of his periodic report for 1983-1985, on account of the delay in drawing it up, as well as compensation for the damage which he claimed to have suffered as a result of that delay.
- 13 By orders of 15 November 1989, the Court of Justice referred the two cases to the Court of First Instance pursuant to Article 14 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities. The two cases were registered in the Registry of the Court of First Instance as Cases T-20/89 and T-29/89 respectively.
- 14 In Case T-20/89, the applicant claimed that the Court should:
- order that certain documents be lodged forthwith;
  - declare the application to be admissible;
  - declare it to be well founded;
  - annul the decision on the complaint;

- annul the appointment of Mr Engel on account of an irregularity;
- order the defendant to pay the costs;
- order the defendant to pay compensation for both material and non-material damage.

15 The Commission contended that the Court should:

- dismiss the application;
- order the applicant to pay the costs.

16 In support of the form of order sought in Case T-20/89, the applicant relied on a number of pleas in law and arguments based essentially on the absence from his personal file, at the time of the appointment procedure and the adoption of the contested decision of 2 July 1986, of certain of his periodic reports, specifically those covering the periods 1973-1975, 1975-1977 and 1983-1985; the failure by the Consultative Committee and the appointing authority to hear him orally in considering his application when, in the absence of the periodic report for 1983-1985, the Consultative Committee had heard his Director-General; misuse and abuse of powers; incorrect assessment of the qualifications of the applicants for the post in question; breach of Article 29, as well as of Articles 27 and 28, of the Staff Regulations; breach by the appointing authority of its duty of care and loyalty towards officials, and, finally, infringement of the principles of good faith and of administrative legality.

17 In Case T-20/89, the Court rejected, by the judgment set aside, the form of order seeking annulment of the decision of 2 July 1986, on the ground that the applicant did not have any interest in securing the annulment of the appointment of the

successful candidate in so far as he could no longer effectively lay claim to an appointment to the post in question, having retired after bringing the action. The Court also rejected the applicant's claim that the Commission should be ordered to pay compensation in respect of the material and non-material damage which he had allegedly suffered as a result of the rejection of his application and the appointment of another candidate. The reasons given for rejecting the applicant's claims for compensation were, so far as he had pleaded material damage, based on the absence of maladministration during the course of the disputed procedure. With regard to non-material damage, the Court essentially took the view that the damage resulting from the delay in drawing up his periodic report for 1983-1985 was in part attributable to the applicant's own failure to cooperate in drawing up his report in time. Finally, the Court ordered the parties to bear their own costs.

- 18 By judgment of 13 December 1990 in Case T-29/89 [1990] ECR II-787, the Court dismissed the applicant's action on the ground that his claim for annulment was out of time and that his claim for damages ought, in any event, to be rejected because the applicant had been in part responsible for the delay in drawing up his periodic report and had thus contributed to the delay underlying the non-material damage complained of. The applicant did not appeal against this judgment of the Court.
- 19 The applicant did, however, lodge an appeal with the Court of Justice on 15 February 1991 against the judgment delivered in Case T-20/89.
- 20 In its judgment on the appeal, the Court of Justice set aside the judgment given at first instance and referred the case back to this Court, while reserving the costs.

### **The procedure following referral**

- 21 Under Article 117 of its Rules of Procedure, the Court was, with effect from the date on which the judgment on the appeal was delivered, seised of fresh proceedings in the present case.

- 22 Pursuant to Article 119 of the Rules of Procedure, the applicant and defendant lodged their written observations on 23 February 1993 and 26 March 1993 respectively.
- 23 Following the Report of the Judge-Rapporteur, the Court decided to open a fresh oral procedure without any preliminary inquiry. It did, however, request the parties to answer a number of questions and the Commission to lodge certain documents. The parties complied with those requests within the time-limits laid down.
- 24 The oral procedure took place on 28 September 1993. The parties' representatives presented oral argument and replied to the questions put to them by the Court.
- 25 In its statement of observations, the applicant claims that the Court should:
- find against the Commission, in accordance with the form of order sought at first instance, with the exception of the claim for the annulment of Mr Engel's appointment on account of an irregularity.
- 26 In its statement of observations, the Commission contends that the Court should:
- dismiss the application;
  - order the parties to bear their own costs.

## **The forms of order sought and the pleas in law submitted by the parties at first instance and in the proceedings following referral**

- 27 Following the judgment given by the Court of Justice on appeal, this Court was seised of all the forms of order sought and the pleas in law submitted by the parties at first instance and in the present proceedings following referral.
- 28 The Court finds, however, that, in the context of the present proceedings following referral, the applicant has abandoned his claim for annulment and maintains only his claim for compensation for the material and non-material damage which he believes he has suffered by reason of the rejection of his application and the improper appointment of another candidate. It follows that his pleas and arguments, which at first instance sought to establish the improper nature of the appointment made to the post in question, must in these proceedings be regarded as seeking to establish the alleged maladministration of the Commission which is said to have occasioned the damage in respect of which he seeks compensation.

## **Maladministration**

### *Arguments of the parties*

- 29 The applicant submits that, during the course of the procedure relating to the contested appointment, the Commission committed a number of illegal and improper acts, all of them amounting to maladministration, which resulted in the rejection of his application and the improper appointment of another candidate whose qualifications and experience were, in several respects, inferior to his own.
- 30 The applicant thus contends, in particular, that during the appointment procedure in question, his personal file was incomplete because it did not contain his periodic reports for 1973-1975 and 1975-1977, or, above all, that covering the period 1983-1985, even though that report was the most important one for the purposes of that procedure which took place in 1986.



31 The applicant states in this regard that his periodic report for 1983-1985, which ought to have been notified to him by 30 November 1985 at the latest, in accordance with the general provisions implementing Article 43 of the Staff Regulations, adopted by the Commission on 27 July 1979, was not notified to him until 31 July 1986 and was for that reason not included in his personal file at the time of the appointment procedure and the adoption of the contested decision on 2 July 1986.

32 According to the applicant, this failure could not legitimately be offset by the fact that the Consultative Committee had heard his Director-General in regard to his application. He submits that, even if the latter expressed his views regarding the applicant's qualifications before the Consultative Committee, the Committee ought, in any event, also to have heard the applicant in person, particularly in view of the requirements of the Vacancy Notice, as well as of the Commission's stated intention to extend the applicant's previous periodic report for 1981-1983 in order to cover the period 1983-1985. The applicant points out in this regard that the Director-General heard by the Consultative Committee did not have any direct power of assessment and that he might also, during that interview, have expressed unfavourable views regarding the applicant's candidature. In support of these assertions and arguments, the applicant stated during the hearing that, as transpired from the minutes of the meetings at which the Consultative Committee heard the Director-General, the latter had, *inter alia*, failed to specify that some of the tasks for which the applicant had previously been responsible were no longer so important and had failed to stress the fact that the applicant had for a number of years, in the performance of his duties, been responsible for relations with the budgetary and financial control bodies, including the Court of Auditors. Furthermore, and in particular, the Director-General had failed to inform the Consultative Committee that the applicant had, from January 1984, carried out additional duties, including the introduction of the system of 'security payments', designed to verify and guarantee payment of very large fines imposed on undertakings in the iron and steel industry, and the implementation of which involved contacts with several undertakings and banks in the Member States with a view to bringing about the proper functioning of the system in question.

33 The applicant thus concludes that, because of the absence of his most recent periodic report from his personal file, the Consultative Committee and subsequently

the appointing authority were unable, during the contested procedure, to make an effective comparative examination of the candidates' merits and that his own application was the subject of an incorrect assessment which resulted in its rejection and in the improper appointment of another candidate.

34 The Commission submits in the first place that the absence of a periodic report for the applicant covering the period 1983-1985 was in part attributable to the applicant himself. It points out that it was not until 26 November 1986 that the applicant challenged the first assessor's proposal of 31 July 1986 to extend his previous report, instead of doing so within the 10-day period following that proposal. Moreover, it was not until 3 March 1987 that the applicant appealed against the periodic report finally notified to him, following which the Director-General, as the appeal assessor, informed him on 7 April 1987 of his revised assessment, against which the applicant did not lodge an appeal with the Joint Committee on Staff Reports. It follows that the applicant cannot rely on the irregularity resulting from the absence of his periodic report from his file (Case 151/80 *De Hoe v Commission* [1981] ECR 3161 and Case 1/87 *Picciolo v Commission* [1988] ECR 711, paragraph 43).

35 Secondly, the Commission takes the view that the absence of a periodic report for the applicant covering the period 1983-1985 was in any event offset by the fact that the Consultative Committee, on two occasions, heard the applicant's Director-General, who set out his views both on the qualifications which candidates were required to have for the post in question and on the applicant's own qualifications and performance. Moreover, the Director-General informed the Consultative Committee of his intention to propose to the applicant that his periodic report, as drawn up for 1981-1983, be extended to cover the period 1983-1985, which was confirmed *ex post facto* by the fact that the applicant's definitive periodic report for 1983-1985, as accepted and countersigned by him, was amended only very slightly upwards in comparison with the periodic report covering the period 1981-1983. Consequently, given the *ex post facto* confirmation of the content of the periodic report as definitively drawn up for the period 1983-1985 and of the intention of the applicant's assessors to extend the report previously drawn up for the period 1981-1983, the assessment of the Consultative Committee and the appointing authority regarding the applicant's candidature was validly made on the basis of the 1981-1983 periodic report and of the Director-General's oral statements. With

regard to the Director-General's views concerning the applicant's qualifications in relation to the requirements of the post to be filled, the Commission stresses that those views corresponded, at least in part, to material derived from his personal file and did not therefore require that the applicant be heard in person, in so far as those views merely constituted additional information which the appointing authority can always elicit, even where candidates' files are complete. The Commission therefore concludes that the absence from the applicant's personal file of a periodic report for 1983-1985 could not have had any bearing on the disputed appointment procedure (Joined Cases 156/79 and 51/80 *Gratreau v Commission* [1980] ECR 3943; Case 263/81 *List v Commission* [1983] ECR 103, paragraph 27; Joined Cases 173/82, 157/83 and 186/84 *Castille v Commission* [1986] ECR 497; Case 7/86 *Vincent v Parliament* [1987] ECR 2473).

### *Findings of the Court*

36 It is common ground that there was a delay in drawing up the applicant's report for the period from 1 July 1983 to 30 June 1985 by reason of the fact that the first assessor, who ought to have forwarded the periodic report to the applicant before 30 November 1985, did not do so until 31 July 1986. The administrative authorities of the defendant institution thus acted in such a way as to exclude any possibility of that periodic report being drawn up within the specified time-limit and, in any event, prior to the contested appointment on 2 July 1986. The delay which, according to the applicant, occasioned him the damage alleged is thus entirely attributable to the administrative authorities.

37 According to the Court's case-law, the fact of not having drawn up an official's periodic report within the time-limit prescribed by the Staff Regulations constitutes maladministration if the official did not contribute in any significant way to that delay (Case T-68/91 *Barbi v Commission* [1992] ECR II-2127, paragraph 45, and, most recently, Case T-13/92 *Moat v Commission* [1993] ECR II-287, paragraph 33). The absence of the periodic report from an official's personal file does not allow persons who are required to give an opinion or adopt decisions concerning the career progress of the official in question to take account of this important assessment criterion, particularly where it is a matter of applying Article 45(1) of the Staff Regulations.

38 The Court also considers that the absence of the applicant's periodic report for 1983-1985 could not be covered by the fact that the applicant's personal file contained his periodic report for 1981-1983 or by the fact that the Director-General stated before the Consultative Committee that he would propose to the applicant that this report be extended to cover the period from 1983-1985. In the first place, the Director-General heard by the Consultative Committee was not the applicant's first assessor and, consequently, the expression of an intention to extend the existing periodic report did not make it possible to establish with a sufficient degree of certainty what the applicant's qualifications were at the point in time when his superiors were required to examine his personal file. Second, the procedure for drawing up officials' periodic reports is subject to specific procedures which require, at the very least, the participation of two assessors as well as the official actually being assessed and which, by virtue of that fact, may result in a final report on the official concerned which differs from that resulting from the assessment made by the first assessor. It follows that, even where a periodic report that has been definitively drawn up is identical in content to the periodic report for the preceding period, it is only in the light of the definitive periodic report that the appointing authority can properly proceed, with a sufficient degree of certainty, to examine the file of the official concerned with a view to taking a decision that will have a bearing on his career progress.

39 Finally, the Court finds that, in this case, the applicant's periodic report for 1983-1985, as finally drawn up, differed in several respects from the periodic report covering the period 1981-1983. Thus, reference is made at points 6(b) and 7(a) to the fact that the applicant was responsible for operating the 'security' system established by the Commission decision of 23 December 1983, which was not the case in his previous report. Similarly, reference is made at points 8 and 9 ('Languages' and 'Knowledge of new languages') of the report for 1983-1985 to the fact that the applicant had at least a passive knowledge of Spanish, which was not mentioned in his previous periodic report. Furthermore, at point 10(III)(4) ('Human relations') of the periodic report for 1983-1985, the applicant is marked 'very good' instead of 'good', as was the case in the 1981-1983 periodic report. Also under point 10(III) of the periodic report for 1983-1985, it is stated that the applicant continued 'to take measures and initiatives designed to improve the collection ... of fines' and that he 'introduced and employed the same method to refine the "security" system', matters which are not mentioned in the periodic report for 1981-1983. Finally, in the definitive periodic report for 1983-1985, the statement contained in point 6(b) of the 1981-1983 periodic report, to the effect that the applicant had responsibility

for 'contacts ... with the Court of Auditors and the parliamentary committees', has been deleted and an addition made at point 7 stating that those tasks have, since 19 July 1983, been allocated to the internal control section, following a redeployment of duties within DG XVIII. It thus follows from all of the foregoing that the applicant's periodic report for 1983-1985 differs in several respects from that drawn up for the period 1981-1983, particularly in so far as the later report refers to new duties performed by the applicant since the previous report was drawn up and tends on the whole to indicate an upgraded assessment of the applicant's qualifications, in particular with regard to the heading 'Human relations', which is of particular importance when filling the post of director (*Moat*, cited above, paragraph 47). Consequently, even on the assumption that the Director-General who was heard by the Consultative Committee could properly have referred the Committee to the applicant's periodic report for 1981-1983, that report did not truly reflect the applicant's precise qualifications at the time of the procedure in dispute and the adoption of the contested decision. The fact that the applicant's periodic report for 1983-1985 was not on his personal file could not therefore be covered by the fact that his periodic report for 1981-1983 was on his file and that the Director-General had stated before the Consultative Committee his intention to extend that report to cover the period 1983-1985.

40 It follows that the Commission's failure to draw up, within the prescribed time-limit, the applicant's periodic report for 1983-1985, in particular by reason of the fact that the first assessor did not forward his periodic report to him within the time-limit and, in any event, did not do so before 2 July 1986, the date of the disputed appointment, constituted maladministration of such a kind as to render the Commission liable if it is established that this delay may have occasioned damage to the applicant.

## Damage and causal connection

### *Arguments of the parties*

41 The applicant submits that the absence from his personal file of his periodic report for 1983-1985 resulted in the examination and assessment of his application by the Consultative Committee and the appointing authority being made in ignorance of the favourable and reasoned opinions contained in his periodic report for

1983-1985, and that this maladministration on the part of the Commission, resulting in the rejection of his application and the improper appointment of Mr Engel, occasioned him both material and non-material damage. For the purpose of remedying that damage, he seeks an order requiring the Commission to place him in the financial position, also as regards pension rights, in which he would have been had he been appointed to the post in question on 2 July 1986 or, failing that, for an order requiring such damage to be calculated on a fair and equitable basis, consistent with the case-law under which the absence of a periodic report from a personal file, in the event of the adoption of a measure affecting the career of the official concerned, itself confers entitlement to compensation for the damage thus occasioned.

42 The Commission argues that the applicant has not established the existence of material damage that is certain. With regard to the applicant's claim that he should be placed in the financial position in which he would have been had he been appointed to the post in question, the Commission stresses that, even if his claim for the annulment of the contested appointment had been upheld, he would still not have been automatically appointed to the post of director at issue. It follows that the material damage alleged is not certain and that if reparation, in the form sought by the applicant, were to be granted, he would in fact be securing, in financial terms, his appointment to the post in question.

43 With regard to the non-material damage alleged by the applicant, the Commission argues that he has not adduced any evidence enabling the extent of that damage to be determined (*Moat*, cited above, paragraph 47). The Commission also submits that the applicant has not demonstrated that the improper appointment of another candidate to the post in question caused him any non-material damage distinct from that on which the Court has already ruled in its judgment of 13 December 1990 in Case T-29/89 dismissing the application by which the applicant sought compensation for the non-material damage occasioned by the delay in drawing up his periodic report for 1983-1985.

44 Finally, the Commission maintains that the causal connection between the damage allegedly suffered by the applicant and the alleged maladministration has not been established with a sufficient degree of precision by the applicant, as he is required to do according to the settled case-law of the Court of Justice and Court of First Instance. In this connection, the Commission, emphasizing that the applicant did

not have a right to be appointed to the post in question and that the appointing authority enjoys a wide discretion in the matter, contends that the applicant has not established that the alleged maladministration could have had a decisive influence on his failure to be promoted, in so far as it consists in the fact of not having been heard by the Consultative Committee (*Vincent*, cited above, paragraph 26, and Case T-63/89 *Latham v Commission* [1991] ECR II-19, paragraph 33), and, consequently, on his salary and pension not corresponding to those of a director. The same holds true in so far as the alleged maladministration consists in the fact that the applicant's periodic report for 1983-1985 was not on his personal file when the contested procedure took place. According to the Commission, the applicant has failed to demonstrate that he would have had a better prospect of being appointed to the post in question if his personal file had contained the periodic report for 1983-1985, as finally drawn up (*Picciolo*, cited above, and Case 346/87 *Bossi v Commission* [1989] ECR 303). The Commission stresses in that regard that his last periodic report contains only minor alterations from the initial draft submitted to the applicant and that the Consultative Committee had before it his periodic report for 1981-1983, which contained an assessment of the applicant's performance essentially comparable to that of the report belatedly drawn up for the period 1983-1985. It follows that, even if the applicant's periodic report for 1983-1985 had been on his personal file, that fact could not have had any bearing whatsoever on his prospects of being appointed to the post in question.

### *Findings of the Court*

- 45 First, it follows from all of the applicant's arguments that he is relying, in support of his claim for compensation, on the existence of damage to his detriment, consisting in the fact that his prospects of promotion were adversely affected by the absence, from his personal file, of his periodic report covering the period from 1 July 1983 to 30 June 1985.
- 46 Second, the Court considers that, viewed in those terms, the damage which the applicant alleges differs in its origin from the non-material damage in respect of which he sought reparation in Case T-29/89 and on which the Court ruled in its abovementioned judgment of 13 December 1990, in which the sole issue was the delay with which his periodic report for 1983-1985 had been drawn up, as the Court of Justice pointed out in its judgment on appeal (paragraph 35). It follows

from the settled case-law of the Court of Justice (Case 61/76 *Geist v Commission* [1977] ECR 1419 and Case 140/87 *Bevan v Commission* [1989] ECR 701) and of the Court of First Instance that, although 'an official in possession of an irregular and incomplete personal file thereby suffers non-material damage as a result of being put in an uncertain and anxious state of mind with regard to his professional future' (Case T-73/89 *Barbi v Commission* [1990] ECR II-619, paragraph 41, *Latham*, cited above, paragraph 37, and Case T-27/90 *Latham v Commission* [1991] ECR II-35, paragraph 49), it is also true that 'delays in the drawing-up of periodic reports may in themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions concerning them must be taken' (*Castille*, cited above, paragraph 36, Case T-63/89 *Latham*, cited above, paragraph 36, Case T-27/90 *Latham*, cited above, paragraph 48, and *Moat*, cited above, paragraph 44).

47 In the present case, as already stated, it is common ground that the applicant's periodic report for 1983-1985 was not forwarded to him until 31 July 1986, and thus outwith the time-limit set for that purpose and after the dates on which the Consultative Committee and the appointing authority examined his application for the post in question and adopted the decision of 2 July 1986 appointing another candidate to that post. It is therefore quite clear that neither the Consultative Committee nor the appointing authority had any knowledge of the applicant's periodic report for 1983-1985 at the time when his application was considered.

48 It follows that the examination of the applicant's candidature lodged pursuant to Notice of Vacancy COM/24/86 concerning the post of Director of Investments and Loans within DG XVIII was influenced by the absence of that periodic report from his personal file and, consequently, that the delay in drawing up the applicant's periodic report for 1983-1985 was such as to adversely affect him since the absence of that report may have affected his career progress at the time when a decision concerning him was taken.

49 Nor can the Commission argue that the absence of that periodic report from the applicant's personal file did not have any bearing on his promotion prospects on



the ground that the applicant's report for the period 1983-1985 could not have added anything to his previous report. As the Court has found, the marks and assessments in the 1983-1985 periodic report are, in comparison with those in the 1981-1983 report, more favourable to the applicant, highlighting, *inter alia*, new duties which he was performing and which were not mentioned in the previous report. These differences between the periodic reports were of particular importance and ought to have been included among the factors taken into consideration when the candidature lodged by the applicant was examined in connection with the procedure initiated under Article 29(1)(a) of the Staff Regulations or that initiated under Article 29(2) thereof.

50 Having regard to the fact that the Commission has also failed to demonstrate that the persons required to take such decisions could have been aware of matters equal in weight to the applicant's periodic report for 1983-1985, and to the fact that the Commission has not relied on any particular circumstance which might have justified the delay in drawing up that report, a delay to which, it should be remembered, the applicant in no way contributed and which he could not have avoided, given the absence of any means available to him for that purpose under the Staff Regulations, it must be held, without its being necessary to address the other pleas in law and arguments put forward by the applicant, that it was the Commission's maladministration which occasioned damage to the applicant that must be remedied.

51 In evaluating that damage, account must be taken of the age of the applicant, who, at the time of the contested procedure, would have been able to take part in subsequent promotion procedures only for a few more years, and of the importance of the post at issue. In those circumstances, evaluating the damage suffered by the applicant *ex æquo et bono*, the Court takes the view that an award of BFR 150 000 would constitute appropriate compensation for him.

## Costs

- 52 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In this case, the Commission has been unsuccessful and the applicant has asked that it be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- 1. Orders the Commission to pay a sum of BFR 150 000 to the applicant by way of damages;**
- 2. Orders the Commission to pay the whole of the costs, including those relating to the appeal to the Court of Justice and those relating to the proceedings at first instance before this Court.**

Kalogeropoulos

Schintgen

Lenaerts

Delivered in open court in Luxembourg on 16 December 1993.

H. Jung

A. Kalogeropoulos

Registrar

President