

1. The implied rejection of an application for promotion made in completely general terms cannot be categorized as an act adversely affecting the person concerned in the absence of direct and immediate effects on his legal situation.
2. An official has no legitimate interest in contesting the appointment of another official to a post to which he could make no valid claim in accordance with the rules applicable in the institution concerned for filling posts of the type in question.
3. An official who failed to bring an action within the time-limit laid down by Articles 90 and 91 of the Staff Regulations for the annulment of an act allegedly adversely affecting him cannot repair that omission and procure himself further time for bringing proceedings by means of a claim for compensation for the injury caused by that act.
4. Under Articles 90 and 91 of the Staff Regulations, an action for damages in which compensation is sought for injury caused, not by a measure adversely affecting the applicant the annulment of which is sought, but by various wrongful acts and omissions allegedly committed by the administration, has to be preceded by a two-stage administrative procedure or it will be found inadmissible. It is imperative that that procedure should begin with the presentation of a request asking the appointing authority to make good the alleged injury and continue, if necessary, with the lodging of a complaint against the decision rejecting the request.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
13 July 1993 *

In Case T-20/92,

Andrew Macrae Moat, an official of the Commission of the European Communities, represented initially by Eric J. H. Moons and subsequently by Luc Govaert, both of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14a Rue des Bains,

applicant,

* Language of the case: English.

Commission of the European Communities, represented by Thomas F. Cusack, Legal Adviser, with an address for service in Luxembourg at the office of Nicola Anecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for an order that the applicant be promoted to grade A3 or transferred to other duties, and that he be paid a salary corresponding to that grade with effect retroactively from 1 December 1986,

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

composed of: D. P. M. Barrington, President, R. Schintgen and K. Lenaerts, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 5 May 1993,

gives the following

Judgment

The facts

The applicant, Andrew Macrae Moat, is an official of the Commission of the European Communities in grade A4. On the basis of the fact that since 1981 all his staff reports have been complimentary about his management ability and recommend that he be promoted, he considers that he may legitimately expect to be promoted or transferred.

- 2 The applicant observes in particular that in his staff report for 1 July 1979 to 30 June 1981 his director recommended him for promotion on the ground that he had demonstrated his ability to manage a team of some 28 people. This demonstrates that the applicant fulfilled, ten years ago, one of the implicit criteria for promotion to grade A3 implied in the Orientation concernant le profil de carrière de fonctionnaires d'encadrement intermédiaire (Guidelines concerning the career profile of middle-management officials), which is appended to the Commission decision of 19 July 1988 on filling middle-management posts (COM(88)PV928, hereinafter referred to as 'the decision of 19 July 1988'). The applicant goes on to state that he was recommended for promotion in each of his four staff reports for 1981-1983, 1983-1985, 1985-1987 and 1987-1989.
- 3 The decision of 19 July 1988 revised the system for filling posts of heads of division and heads of specialized departments. Under that system, the basic principles of the system for filling posts of heads of unit and for promotions to grade A3 are based on the dissociation of grade and duties, since A3 posts are reserved for duties of heads of unit and, in certain specific cases, for high-level advisers. Promotions to A3 are made, on the one hand, by appointment to posts of head of unit, for which vacancies are published and which, under section 3, are reserved for candidates with suitable qualities, and, on the other hand, under section 4, by the creation of a reserve of A3 posts, the number of which is fixed each year by the Member of the Commission responsible for staff matters, from among those candidates who were not promoted under the procedure provided for in section 3 of the decision for filling posts of heads of unit. For the purposes of the utilization of that reserve, the Consultative Committee on Appointments (hereinafter 'the CCA'), in consultation with the directors-general and heads of service, draws up, at least once a year, an opinion on those officials eligible for promotion to grade A3 who should be considered more particularly for promotion. The resulting list is to exceed by 50% the promotion possibilities created by the reserve. After scrutiny by the chefs de cabinet, the promotion decisions in such cases are adopted by the Member of the Commission responsible for personnel and administration in agreement with the Members of the Commission concerned.
- 4 By letter of 9 April 1991, the applicant submitted the following request under Article 90(1) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'):

- (1) The requester asks the Commission to promote him to grade A3.
- (2) The Commission's decision of 19 July 1988 on the filling of middle-management posts separated promotion to the grade A3 from nomination to a post of head of division. It added the description "Administrator hors classe" to the other descriptions of posts of the A3 career bracket.
- (3) Article 45 of the Staff Regulations requires the Commission to decide promotions after consideration of the comparative merits of the officials eligible for promotion and the reports on them.
- (4) In my staff report for 1 July 1979 to 30 June 1981, my Director recommended me for promotion after I had demonstrated my ability to manage a team of some 28 people (his underlining). This demonstrated that I filled, 10 years ago, one of the implicit criteria for the promotion of a head of unit to the grade A3 implied in the Commission's "*Orientation concernant le profil de carrière de fonctionnaires d'encadrement intermédiaire*" (Annex of Decision of 19 July 1988). *Two subsequent directors have recommended my promotion in all my subsequent staff reports.*

5 By memorandum of 13 August 1991, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the implied rejection of his request of 9 April 1991.

6 The applicant received no reply to his complaint.

7 On 9 October 1991 the applicant brought an action against the implied decision rejecting his request of 9 April 1991. The application was declared inadmissible by order of 22 May 1992 of the Court of First Instance in Case T-72/91 *Moat v*

Commission [1992] ECR II-1771 on the grounds that the applicant could not apply for an order directing the Commission to grant him promotion to grade A3 or a transfer to another post and, in addition, that the application was premature since the applicant had not awaited the Commission's reply to his complaint of 13 August 1991. The applicant's appeal against that order was dismissed by order of the Court of Justice of 1 February 1993 in Case C-318/92 P *Moat v Commission* [1993] ECR I-481.

Procedure

- 8 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 11 March 1992, the applicant brought these proceedings.
- 9 The President of the Court of First Instance assigned the case to the Fourth Chamber and appointed the Judge-Rapporteur.
- 10 Without lodging a defence on the substance, the Commission raised an objection of inadmissibility against the application, which was received at the Court Registry on 30 March 1992.
- 11 By order of the Court of 10 July 1992 the defendant's objection of inadmissibility was reserved until final judgment.
- 12 By decision of the Court of 18 September 1992, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the case was consequently assigned.
- 13 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and asked the parties to answer the following question:

'In order that the Court may consider the admissibility of the action and, more particularly, ascertain its object, the parties are requested to indicate by 15 April 1993 whether all the vacant posts filled at A3 level from 1988 to April 1991 pursuant to the decision of 19 July 1988 on the filling of middle-management posts were made known in vacancy notices and, if they were, to indicate those vacancy notices to which the applicant responded and to indicate whether the applicant's name was on the list provided for in Section 4 of the aforesaid decision.'

- 14 By document lodged at the Registry of the Court of First Instance on 29 March 1993, the applicant asked that the written procedure be reopened for the purposes of his raising a new plea of infringement of Article 45 of the Staff Regulations based on the discovery of a new fact which did not come to light until after the closure of the written procedure on 14 December 1992.
- 15 By document lodged at the Registry of the Court on 15 April 1993, the defendant submitted that the "alleged new evidence" is of no relevance for the resolution of the issues before the Court in this case and that the requests made in the instant application should be rejected in their entirety.'
- 16 The parties' oral arguments and their answers to questions put by the Court were heard at the hearing on 5 May 1993.

Forms of order sought by the parties

- 17 The applicant claims that the Court should:
 - (1) declare the application admissible and founded;
 - (2) order the Commission to promote him to grade A3;

- (3) order the Commission to transfer him to duties that will enable him to serve the Commission to the Commission's and his own satisfaction for the remainder of his career;
- (4) order the Commission to pay the applicant's salary and pension as if he had been promoted on 1 December 1986 with interest as from that day, or to pay him the net present value of the difference of such a salary and pension and his actual salary and pension, which sum should be calculated actuarially on his expectation of life and the effective date of the Commission's action pursuant to the Court's ruling on the second head of claim.

18 Following the objection of inadmissibility raised by the defendant, the applicant claimed in addition in his observations on the objection of inadmissibility that the Court should:

Annul the Commission's decision not to promote the him to grade A3.

19 In his request that the written procedure should be reopened, the applicant claims that the Court should:

- (1) reopen the written procedure and admit the annexed document for consideration;
- (2) condemn the Commission for its failure to comply with Article 90 of the Staff Regulations or, at least, disclose the new document earlier;
- (3) condemn the Commission for its failure either to consider his request and complaint, or for its failure to consider them in conformity with the requirements of Article 45 of the Staff Regulations;

(4) condemn the Commission to pay him damages in whatever amount the Court, *ex aequo et bono*, should consider appropriate.

20 The defendant claims that the Court should:

(1) in accordance with its powers under Article 114 of its Rules of Procedure pronounce upon the admissibility of the application;

(2) declare the application inadmissible;

(3) declare the application unfounded and dismiss it;

(4) make an appropriate order as to costs.

21 In its observations on the request for the reopening of the procedure, the defendant claims that the requests made therein should be rejected in their entirety.

Admissibility

Pleas and arguments of the parties

22 The applicant requests the Court to examine the legality of various acts which allegedly adversely affect him and to rule on the claims for compensation, which, in his view, are closely linked thereto. He states that he was induced to bring the present proceedings 'in the light of the earlier history of the Commission' not to promote him to posts for which he had applied. It appears to him highly probable that many decisions affecting the development of his career were taken in the absence of his staff reports and in ignorance of the favourable and detailed opinions expressed by his superiors in the periodical reports relating to him.

23 The applicant observes that, since the decision of 19 July 1988, promotions to grade A3 may be made either by appointment to a post declared to be vacant or by a separate promotion 'exercise' which takes place at least once a year. He adds that the procedural rules applying to the said exercise and its course are not specified and are not apparent. He explains that he had been seeking a transfer to other duties since 1986 and promotion since 1981 and that he made a request under Article 90 of the Staff Regulations when he discovered that the Commission was filling posts for which he had appropriate experience. On the one hand, the Commission failed to bring those posts to his attention and, on the other, it drew up his staff reports late and placed them on his personal file even later.

24 The applicant adds that the purpose of his request was to ensure that the Commission would give attention to the highly favourable opinions given of him in his staff reports and might decide to promote him. He hoped to learn from the reasons given for refusing his request whether the Commission had grounds unrelated to the content of his staff reports for considering him unworthy of promotion.

25 The applicant maintains that his action is to be regarded as being brought either against the Commission's total failure to take his request into consideration or against its implied rejection of his complaint. He admits that an application brought against the Commission for failure to promote an official to grade A3 on appointment to a post of head of unit should usually be directed against the act of appointing another official, since the official in question knows as a result of that decision that he has not been promoted. Similarly, in the context of the annual promotion procedure for lower grades, the publication of the list of those promoted or adjudged the most worthy of promotion enables a person who has not been promoted to attack the act of adopting the list from which he has been excluded. However, the applicant observes that the promotion procedure introduced by the Commission's decision of 19 July 1988, which is carried out 'at least once a year', does not enable him, in the absence of an express reply to his complaint, to know either the date on which or the reasons for which the Commission decided not to promote him. In the absence of a reasoned decision, neither the applicant nor the Court can verify whether his application for promotion was examined in accordance with the requirements of Article 45 of the Staff Regulations. The applicant points out that, according to the case-law of the Court of Justice (Joined Cases 33 and 75/79 *Kuhner v Commission* [1980] 1677, paragraph 15), 'the purpose of the

duty to state ... grounds ... is both to permit the official concerned to determine whether the decision is defective making it possible for its legality to be challenged and to enable it to be reviewed by the Court’.

- 26 In his request for the reopening of the written procedure, the applicant raised a new plea alleging infringement of Article 45 of the Staff Regulations. He maintains that, between 9 April 1991, the date of his request to be promoted to grade A3 under the procedure referred to in section 4 of the decision of 19 July 1988, and 13 December 1991, the date of the implied refusal of his complaint, his staff file was not consulted, and that therefore, contrary to the decision of 19 July 1988, which provides that the CCA is to consider once a year promotions to grade A3 and submit its proposals to the Commission, the CCA did not consider his request for promotion or considered the promotion of other officials without comparing their merits and staff reports with his. The applicant bases his request on the disclosure on 8 February 1993 of a document recording the movements of his file and the names of the persons who withdrew it. He asks that the Commission be ordered to pay him compensation for infringing Articles 90 and 45 of the Staff Regulations.
- 27 The defendant raises four pleas of inadmissibility. First, referring to the plea of inadmissibility which it raised in Case T-72/91 (see paragraph 7 of this judgment), it claims that the Court has no jurisdiction to entertain this application, on the ground that the heads of claim presented therein are identical to those advanced under numbers 1 to 4 of the application in Case T-72/91. Since the arguments advanced in this case are identical or similar to those advanced in Case T-71/91, it is otiose to consider them afresh. In any event, if there is anything new in what is now advanced in the instant case in support of arguments already put forward in connection with Case T-72/91 it is inadmissible.
- 28 Secondly, the defendant argues that the Community court has no jurisdiction to issue injunctions to a Community institution or, consequently, to make any ruling as to the related claim for compensation.

29 The defendant claims that the present action, which does not seek the annulment of any act of the Commission, but seeks an order that the Commission should take promotion and/or transfer measures *vis-à-vis* the applicant, cannot be described as a 'request for an examination of the legality of various acts affecting the applicant'.

30 The defendant, which observes that the applicant has advanced no plea in law or argument capable of proving that the Commission infringed a provision governing procedures for access to grade A3, argues that the request of 9 April 1991 and the subsequent complaint do not relate to a specific procedure resulting in filling a post, such as a vacancy notice or a competition, but express a general request on the part of the applicant to be promoted to grade A3.

31 The defendant adds that the fact that an official fulfils the requisite conditions for promotion and has actually been recommended for promotion does not give him any right to be promoted and does not necessarily mean that the Commission has failed to take account of his staff reports, curriculum vitae or qualifications or that the Commission formed the view that he was unworthy of promotion. It stresses that no decision on the part of the Commission not to promote the applicant was adopted and that, even assuming that such a decision existed, it would be illegal in that it would purport to exclude a particular official from the selection provided for in Article 45 of the Staff Regulations.

32 The defendant observes that there was, on the other hand, an implied decision rejecting the applicant's request in the terms in which that request was made. It acknowledges that the applicant's complaint against that decision likewise received no response and states that the applicant wrongly contests the decision impliedly rejecting his complaint, on the ground that it was not reasoned, whereas, by definition, it could not be reasoned.

33 While pointing out that decisions to promote other officials obviously exist, the defendant emphasizes that those decisions are not identified and are not challenged in these proceedings.

- 34 Thirdly, the defendant argued at the hearing that the request for the annulment of the Commission's decision not to promote the applicant, which was made at the stage of the observations on the objection of inadmissibility, should be declared inadmissible on the ground that, under Article 48(2) of the Rules of Procedure, a new plea may not be introduced in the course of proceedings unless it is based on matters which come to light in the course of the procedure.
- 35 Fourthly, the defendant claims that the claims for financial compensation set out in the applicant's last head of claim should also be rejected as inadmissible, since they are closely linked with the request that the Court should order the Commission to promote or transfer the applicant.

Findings of the Court

- 36 It should be observed *in limine* that it has been consistently held that the Community court may not give directions to a Community institution with regard to an official's position under the Staff Regulations or to the general organization of its services without encroaching upon the prerogatives of the appointing authority. That principle also applies in the context of an application for compensation (see the judgments of the Court of First Instance in Case T-45/90 *Speybrouck v Parliament* [1992] ECR II-33, paragraphs 30, 31 and 32, in Case T-163/89 *Sebastiani v Parliament* [1991] ECR II-715, paragraph 21, and in T-156/89 *Valverde Mordt v Court of Justice* [1991] ECR II-407, paragraph 150, and the order of the Court of First Instance of 22 May 1992 in *Moat v Commission*, cited above, confirmed by the order of the Court of Justice of 1 February 1993, also cited above).
- 37 It follows that the applicant is not entitled to ask that the Commission should be ordered to grant him a promotion to grade A3 or a transfer to another post and that the applicant's heads of claim relating thereto are therefore inadmissible.

- 38 The Court further observes that, after asking in his application that the legality of the various acts allegedly adversely affecting him should be examined, without, however, identifying the acts whose legality he wishes the Community court to review, the applicant asked in his observations on the objection of inadmissibility that the decision not to promote him to grade A3 be annulled.
- 39 The Court observes that the existence of an act adversely affecting the official concerned within the meaning of Articles 90(2) and 91(1) of the Staff Regulations is an essential condition for the admissibility of any action brought by officials against the institution by which they are employed (see, most recently, the judgment of the Court of First Instance in T-50/92 *Fiorani v Parliament* [1993] ECR II-555).
- 40 However, in the first place, the applicant did not lodge a complaint against the decisions filling posts of heads of unit of grade A3 which were adopted by the appointing authority during the period between 19 June 1988 and 9 April 1991 following the procedure referred to in section 3 of the decision of 19 July 1988. That finding is borne out in particular with regard to the decisions filling the four vacant posts for which the defendant admits having received an application from the applicant, namely notice of vacancy COM/106/88 filled by the appointing authority on 1 January 1989, notice of vacancy COM/7/89 filled by the appointing authority on 1 March 1989, notice of vacancy COM/86/88 filled by the appointing authority on 1 April 1989 and notice of vacancy COM/209/89 filled by the appointing authority on 1 April 1990.
- 41 Secondly, the applicant did not lodge a complaint against the decisions promoting officials to grade A3 which were adopted by the appointing authority during the period 19 July 1988 to 9 April 1991 following the annual promotion procedures referred to in section 4 of the decision of 19 July 1988.
- 42 Consequently, the complaint lodged by the applicant on 13 August 1991 against the implied rejection of his request to be promoted which had been made in completely general terms on 9 April 1991 was directed neither against a decision filling a post of head of unit in grade A3, nor against a decision granting another person promotion to an A3 post nor against a decision refusing to grant him the promotion which he sought.

- 43 It follows that, in the absence of direct and immediate effects on the applicant's legal situation, the implied decision rejecting his request for promotion cannot be categorized as an act adversely affecting him and, in so far as his application is directed against the implied decision rejecting his complaint made subsequent to his request for promotion, it must be rejected as inadmissible (see the judgments of the Court of First Instance in Case T-45/81 *Mc Avoy v Parliament* [1993] ECR II-83 and in Joined Cases T-33/89 and T-74/89 *Blackman v Parliament* [1993] II-249).
- 44 The Court further observes that, in any event, the applicant, who is not a head of a unit, cannot validly claim an A3 post and has no legitimate interest in objecting to a decision filling such a post or to a decision promoting an official to such a post, since the decision of 19 July 1988 reserves middle-management posts of grade A3 to heads of unit (see the judgments of the Court of Justice in Case 111/83 *Picciolo v Parliament* [1984] ECR 2323 and in Case 95/88 *Laval v ESC* [1990] ECR 253 and the judgment of the Court of First Instance in Case T-169/89 *Frederiksen v Parliament* [1991] ECR II-1403, confirmed by the judgment of the Court of Justice in Case C-35/92 P *Parliament v Frederiksen* [1993] ECR I-991, and the judgment of the Court of First Instance in Case T-51/90 *Moretti v Commission* [1992] ECR II-487).
- 45 Furthermore, it is appropriate to observe *ex abundante cautela* that, according to settled case-law, Article 48(2) of the Rules of Procedure, which enables new pleas to be introduced in certain circumstances in the course of the procedure, may in no event be interpreted as authorizing the applicant to introduce new pleas before the Community court thereby changing the subject-matter of the dispute (judgments of the Court of Justice in Case 232/78 *Commission v France* [1979] ECR 2729, in Case 125/78 *GEMA v Commission* [1979] ECR 3173, in Case 124/81 *Commission v United Kingdom* [1983] ECR 203, in Case 205/84 *Commission v Germany* [1986] ECR 3755 and in Case 278/85 *Commission v Denmark* [1987] ECR 4069; judgment of the Court of First Instance in Case T-28/90 *Asia Motor France and Others v Commission* [1992] ECR II-2285 and judgment of the Court of First Instance in Case T-87/91 *Boessen v ESC* [1993] ECR II-235). Consequently, the pleas for annulment submitted by the applicant in his observations on inadmissibility must also be rejected as being out of time.

46 As regards the claims for compensation by which the applicant seeks an order that the defendant pay him a salary and a pension commensurate with the amounts which he would have received if he had been promoted — claims which have no independent existence in so far as they are closely linked to the heads of claim seeking an order that the defendant promote or transfer the applicant —, the Court points out that, according to the case-law of the Court of Justice, ‘the first sentence of Article 91(1) governs the second so that this provision only confers unlimited jurisdiction on the Court where there is a dispute within the meaning of the first sentence’ (Case 32/68 *Grasselli v Commission* [1969] ECR 505, paragraph 10). In this case, the applicant, who failed to contest the measures which are alleged to have adversely affected him by bringing proceedings to annul them at the proper time, cannot repair that omission and, as it were, procure himself further time for bringing proceedings by means of a claim for compensation (see the order of the Court of First Instance of 22 May 1992 in Case T-72/91 *Moat v Commission*, cited above, confirmed by order of the Court of Justice of 1 February 1993 in Case C-318/92 P, cited above).

47 Likewise, as regards the damages claims, set out in the applicant’s request for the reopening of the written procedure, by which the applicant asks that the Commission be ordered to pay damages on account of the infringement of Article 45 of the Staff Regulations, it should be observed that the Court of Justice and the Court of First Instance have consistently held that an action for damages in which compensation is sought for injury caused, not by a measure adversely affecting the applicant whose annulment is sought, but by various wrongful acts and omissions allegedly committed by the administration, has to be preceded by a two-stage procedure. It is imperative that that procedure should begin with the presentation of a request asking the appointing authority to make good the alleged injury and continue, if necessary, with the lodging of a complaint against the decision rejecting the request (see, most recently, the order of the Court of First Instance of 28 January 1993 in Case T-53/92 *Piette de Stachelski v Commission* [1993] ECR II-35). However, the Court observes that in this case, even supposing that the document showing the movements of his file which the applicant relies on in support of his request may constitute a new matter within the meaning of Article 48(2) of the Rules of Procedure, the aforementioned claim for damages has not been preceded by a proper pre-litigation procedure.

48 It follows from the whole of the foregoing that the application as a whole must be dismissed as inadmissible.

Costs

- 49 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. However, Article 88 of those rules provides that in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application as inadmissible;
2. Orders the parties to bear their own costs.

Barrington

Schintgen

Lenaerts

Delivered in open court in Luxembourg on 13 July 1993.

H. Jung

D. P. M. Barrington

Registrar

President