

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
17 March 1993 *

In Case T-13/92,

Andrew Macrae Moat, an official of the Commission of the European Communities, residing in Brussels, represented initially by Eric Moons, then by Luc Govaert, both of the Brussels Bar, and at the hearing by Ian Forrester QC, of the Scottish Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14A Rue des Bains,

applicant,

v

Commission of the European Communities, represented by Thomas F. Cusack, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for an award of compensation for the damage allegedly suffered by the applicant owing to the fact that staff reports concerning him were placed belatedly on his personal file,

* Language of the case: English.

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: L. Kintzelé-Prussen, Legal Secretary,

having regard to the written procedure and further to the hearing on

gives the following

Judgment

The facts and origin of the proceedings

- 1 Since 1974 the applicant, Andrew Macrae Moat, has been an official in Grade A4 at the Commission of the European Communities (hereinafter 'the Commission'). His staff reports for the periods 1981-1983 and 1983-1985 are complimentary about his management ability and recommend his promotion.
- 2 During the second half of 1989 and 1990 the applicant submitted applications in response to 24 vacancy notices. None of those applications was successful.
- 3 On 19 October 1989, the applicant signed his staff report relating to the period from 1 July 1985 to 30 June 1987 which had been submitted to him no earlier than 12 October 1989. On 24 July 1990, he signed his staff report relating to the period from 1 July 1987 to 30 June 1989 which had been submitted to him no earlier than 19 July 1990.

- 4 On 9 August 1990, the applicant discovered that his staff reports for the period after 30 June 1985 had not been placed on his personal file. By letter of 10 August 1990 he brought that fact to the attention of the Secretary-General of the Commission and questioned the validity of a number of appointments which had been made in the meantime.
- 5 In his reply of 29 October 1990, the Secretary-General of the Commission admitted that there had been delays in the filing of documents in personal files but stated that the situation was improving. He added that both the Director-General, who was responsible for the applicant's staff reports, and the Advisory Committee on Appointments had the applicant's curriculum vitae, which enabled them at all times to appraise the applications for posts submitted by the applicant and to compare them with those from other candidates.
- 6 By letter of 14 March 1991, the applicant submitted a request within the meaning of Article 90(1) of the Staff Regulations. By error, that letter was registered on 20 March 1991 as a complaint and not as a request. Pointing out that his staff reports had not been placed on his personal file and referring to the judgments given by the Court of First Instance on 24 January 1991 in Case T-63/89 *Latham v Commission* [1991] ECR II-19 and Case T-27/90 *Latham v Commission* [1991] ECR II-35, the applicant claimed exemplary damages like those which the Court of First Instance had awarded in those cases, which, in his view, it had undoubtedly done in order to encourage the Commission to 'put its house in order'. After stating that he did not seek the annulment of the various appointments which had been made, he concluded by requesting the Commission to pay him a sum of BFR 150 000 as damages for its failure to maintain his personal file in the way required by the Staff Regulations and its failure, in consequence, to consider seriously his various applications for posts.
- 7 On 19 July 1991, the applicant submitted a complaint pursuant to Article 90(2) of the Staff Regulations against the implied rejection of his request dated 14 March 1991.

- 8 The Commission did not reply to his complaint of 19 July 1991.
- 9 On 9 October 1990 the applicant brought an action against the implied rejection of his request of 14 March 1991. That action was declared inadmissible by order of the Court of First Instance of 22 May 1992 in Case T-72/91 *Moat v Commission* [1992] ECR II-1771 on the ground that it was premature since the applicant had not waited for the Commission's reply to his complaint of 19 July 1991. The appeal lodged by the applicant 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

- 10 Consequently, by application lodged at the Registry of the Court of First Instance on 17 February 1992, the applicant brought this action for compensation for the damage which he considers he has suffered owing to the fact that the staff reports concerning him were placed belatedly on his personal file.
- 11 The applicant claims that the Court should:
- declare the application admissible and well founded;
 - annul the acts adversely affecting him;
 - order the Commission to pay him the sum of BFR 150 000 as damages for its failure to maintain his personal file as required by the Staff Regulations and for its failure, in consequence, to consider seriously his various applications for posts.

- 12 At the hearing, the applicant also claimed that the defendant should be ordered to pay the costs.
- 13 The defendant contends that the Court should:
- in accordance with its powers under Article 114 of its Rules of Procedure, pronounce upon the admissibility of the application;
 - declare the application inadmissible;
 - declare the application unfounded and dismiss it;
 - make an appropriate order as to costs.
- 14 Upon hearing the Report of the Judge-Rapporteur the Court decided to open the oral procedure without any preparatory inquiry.
- 15 The hearing took place on 17 December 1992. The parties' representatives submitted oral argument and answered questions put by the Court. Noting that the parties agreed that the defendant should produce a document establishing the dates on which the applications for posts which are mentioned in the applicant's reply were submitted to the Advisory Committee on Appointments and the dates on which those posts were filled, the Court gave the defendant until 15 January 1993 to produce that document.
- 16 By decision of 18 February 1993 the President pronounced the oral procedure closed.

Admissibility

Arguments of the parties

17 The defendant claims that the action is inadmissible on the ground that the applicant is claiming damages on the basis only of an alleged administrative fault without identifying any specific damage or specifying whether such damage consists of material or non-material damage and without providing the information for enabling the quantum of damages to be assessed. Furthermore, the only interest relied on by the applicant is that in obtaining an award of ‘exemplary’ damages; no further details are given.

18 According to the defendant, this action is different from that in which the Court of First Instance gave judgment on 24 January 1991 (Case T-27/90 *Latham v Commission*, cited above) in which the Court awarded damages as compensation for the non-material damage suffered on account of the Commission’s maladministration and not, as the applicant contends, as ‘exemplary’ damages.

19 The applicant replies that the arguments advanced by the defendant in support of its plea of inadmissibility do not concern the admissibility of his application but its substance.

Assessment of the Court

20 As a preliminary point, the Court notes that at the hearing the applicant withdrew his claims regarding the annulment of the acts allegedly adversely affecting him.

21 This action accordingly constitutes an action for damages, having as its sole object a claim for compensation for the damage allegedly suffered by the applicant owing to the Commission’s culpable delay in filing two staff reports concerning him.

22 In this regard, the Court observes that the action was brought against an omission capable of adversely affecting an official, within the period laid down by Article 91(3) of the Staff Regulations, after a full pre-litigation procedure had taken place and that the Commission's arguments that the applicant is claiming only 'exemplary' damages and does not specify the nature of the damage allegedly suffered concern the existence and proof of the alleged damage and therefore go to the substance of the case, with which they must be examined.

23 It follows that the action is admissible.

Substance

Maladministration

Arguments of the parties

24 The applicant maintains that in not keeping an official's personal file up to date, that is to say by failing to place his staff report on his personal file, the Commission is in breach of Article 26 of the Staff Regulations and has thus caused harm to that official (see the judgment in Case T-82/89 *Marcato v Commission* [1990] ECR II-735). He points out that, according to the case-law of the Court of First Instance (see the judgment in Case T-27/90 *Latham v Commission*, cited above), the staff report constitutes an important document in the taking of decisions concerning an official's career progress and the Commission has an obligation to ensure that staff reports are put on personal files within a reasonable period of time.

25 He also claims that the failure to update an official's personal file constitutes a breach of Article 45 of the Staff Regulations which requires staff reports to be examined when the question of promotions is considered.

26 The applicant claims that the breach of those provisions of the Staff Regulations constituted, in the circumstances, an administrative fault for which the Commission is responsible.

27 In the reply and at the hearing the applicant, emphasizing the seriousness of the fault committed by the Commission, pointed to the delay in the drawing-up of his staff reports which added to the delay in the filing of them.

28 The defendant admits that there was a period of delay of nearly one year in the filing of the applicant's staff report for the period from 1 July 1985 to 30 June 1987 and a delay of three months in the filing of the report covering the period from 1 July 1987 to 30 June 1989 but it contends that the mere failure to observe Articles 26 and 45 of the Staff Regulations cannot create a right to financial compensation.

29 The defendant also contends that the applicant's reference in the reply to delay in the drawing-up of his staff reports constitutes the introduction of a new plea in law which is inadmissible under Article 48(2) of the Rules of Procedure.

Assessment of the Court

30 The Court finds first of all that, in so far as it is based on delay in the drawing-up of the applicant's staff reports and not on their filing in his personal file, the application is based on a new plea in law which was introduced for the first time in the reply without that plea being based on matters of law which came to light in the course of procedure. It is in fact established that the applicant was aware of the delay in the drawing-up of his staff reports before he brought his action.

31 This plea therefore constitutes a new plea within the meaning of Article 48(2) of the Rules of Procedure and must consequently be dismissed as inapplicable.

- 32 The parties do not dispute that the applicant's staff reports for the periods 1985-1987 and 1987-1989 were placed on his personal file only after some considerable delay. The first report, drawn up on 19 October 1989, was not placed on the applicant's personal file until 29 October 1990, that is to say after a delay of nearly one year in relation to the rules which the Commission has imposed on itself. The second report, drawn up on 24 July 1990, was filed on the same date as the previous report, with a delay of nearly three months.
- 33 According to the case-law of the Court of First Instance, a failure to draw up an official's staff report within the period laid down by the Staff Regulations constitutes an administrative fault if the official did not contribute in any significant way to that delay (see, most recently, the judgment of the Court of First Instance of 10 July 1992 in Case T-68/91 *Barbi v Commission* [1992] ECR II-2127, paragraph 45). The Court considers that the same applies with regard to the filing of an official's staff report on his personal file. The fact that a staff report is drawn up but not placed on an official's personal file, in breach of Article 26 of the Staff Regulations, does not allow persons who must give recommendations or take decisions concerning the career progress of the official in question to take into account that important element of assessment, particularly where it is a matter of applying Article 45 of the Staff Regulations.
- 34 It follows that the Commission, by its considerable delay in placing the applicant's staff reports for the periods 1985-1987 and 1987-1989 in his personal file, committed an administrative fault sufficient to make it liable in the event of its being shown that the fault caused the applicant damage.

The injury and the existence of a causal link

Arguments of the parties

- 35 The applicant maintains that the fault of which he complains caused him injury since, in his view, it seems highly probable that many decisions capable of affecting the progress of his career have been taken in ignorance of the favourable, detailed opinions expressed by his superiors in his staff reports. The applicant states in this

regard that between 1 September 1989 and 30 October 1990 he submitted applications for 24 vacant posts. He claims that the injury which he suffered as a result is particularly important because he has been looking for promotion since at least 1981 and he has repeatedly expressed his wish to be transferred. This situation caused him great psychological stress, as is attested by various sickness certificates. That stress was aggravated when in 1990 he discovered that the Commission had not placed his two last staff reports on his personal file.

36 On the question whether the nature of the injury he suffered was material or non-material, the applicant argues that it is sufficient to establish injury and that it is unnecessary to specify whether it is material or non-material.

37 At the hearing, the applicant explained that the injury for which he sought reparation consisted in the loss of opportunities to obtain a transfer or a promotion as well as in the dissatisfaction which he felt in not being transferred or promoted to another post in the same, or a higher, grade. His claim for damages was intended only to cover the non-material damage arising from his not having obtained satisfaction, as was indicated by the sum of damages claimed.

38 At the hearing, the plaintiff also asked the Court to take account of his age in the assessment of the damages since his chances of still being promoted or transferred to another post diminish year by year.

39 In reply the defendant argues that the applicant, although referring to non-material damage, is in fact claiming compensation for material damage consisting in his not having been promoted. Even if it were to be admitted that the delay in the filing of the applicant's staff reports constituted an administrative fault, there is no evidence to support the conclusion that the applicant's career prospects were harmed, still less any evidence to enable any such damage to be quantified. Consequently, the

applicant has established no clear causal link between the delay in the filing of his staff reports and the fact that he has not obtained promotion or a transfer. According to settled case-law, a claim for damages necessarily presupposes the existence of such a link of causality (judgment of the Court of First Instance in Case T-63/89 *Latham v Commission*, cited above).

40 As regards the case-law referred to by the applicant in support of his application (the two judgments of 24 January 1991 in Cases T-63/89 and T-27/90 *Latham v Commission*, cited above), the defendant observes that the facts underlying the two judgments in question were different from those in the present case. First of all, although the Court did award damages, it was in order to provide compensation for the non-material injury suffered by an official who was anxious and uncertain about his professional career in the future and, secondly, that injury was caused not by the late filing of the official's staff reports but by the delay in drawing them up. Furthermore, the delay exceeded three years in one case.

41 In the present case, however, it points out that the staff reports were regularly drawn up and that the applicant, after discovering in August 1990 that there had been some delay in the filing of his reports, was informed two months later that his file had been put in order.

42 The defendant points out that the applicant does not allege, either in his complaint prior to action or in his application to the Court, that he was subject to anxiety, stress or uncertainty during that period of two months and considers that damages for any non-material injury are not payable.

43 Finally, it points out that the absence of staff reports was in any event compensated for by the fact that the missing staff reports contained the same favourable assessments of the applicant as the previous reports which were properly on record at

the time when his applications for various posts were examined. It points out in particular that in the 'general assessment' section of the report covering the period from 1981 to 1983 it is stated that the applicant's 'abilities and drive richly merit promotion'. Even though that recommendation was not expressly repeated in the general assessment for the period from 1983 to 1985, it must be considered that since the assessment was highly favourable it continued to stand. In the defendant's view, the same considerations apply in relation to the reports covering the periods 1985-1987 and 1987-1989, the latter stating that the applicant '... has obvious management capability ...', which can be read as confirmation of the initial recommendation for promotion.

Assessment of the Court

44 It appears from all of the applicant's arguments that he maintains, in support of his claim for damages, that he suffered non-material damage through the impairment of his chances of being promoted or transferred, as he had requested, by the fact that his staff reports for the periods from 1 July 1985 to 30 June 1989 were not on his personal file. It is settled law that delays in the drawing-up of staff 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 (judgment of the Court of Justice in Joined Cases 173/82, 157/83 and 186/84 *Castille v Commission* [1986] ECR 497, paragraph 36, and judgment of the Court of First Instance in Case T-63/89 *Latham v Commission*, cited above, paragraph 36).

45 In the present case, the parties are agreed that between the time when the applicant's staff report for the period 1985-1987 ought to have been filed in his personal file, that is to say November 1989, and the date on which it was actually placed on his personal file, which was on 29 November 1990, 17 applications, submitted by the applicant in response to various vacancy notices, were examined either by an advisory committee on appointments or by a *comité d'accompagnement*. Of those applications, 11 related to vacancy notices concerning intermediate-level posts. These were the applications submitted pursuant to Vacancy Notice COM/103/89, examined by the advisory committee on 16 November 1989, Vacancy Notices COM/201/89 and COM/202/89, examined on 21 December 1989, Vacancy Notices

COM/209/89 and COM/15/90, examined on 1 March 1990, Vacancy Notice COM/74/90, examined on 4 July 1990, Vacancy Notices COM/83/90, COM/84/90, COM/85/90 and COM/86/90, examined on 19 July 1990, and offer of redeployment RED/C/2/90, which was examined by the *comité d'accompagnement* on 21 May 1990. However, as the Commission admitted at the hearing, neither the advisory committees on appointments nor the *comité d'accompagnement* given the task of examining applications for those posts had any knowledge of the applicant's staff reports for the periods 1985-1987 and 1987-1989 when they examined the applicant's applications.

46 Consequently, the examination of the applications submitted by the applicant pursuant to those various vacancy notices was affected by the absence of those staff reports from his personal file.

47 The Commission cannot justifiably argue that the absence of those staff reports from the applicant's personal file did not have any effect on his chances of promotion or transfer because they did not add anything to the excellent reports which he had already received. Indeed, the last available staff report (1983-1985), even though containing a very favourable assessment overall, nevertheless contained, in the section dealing with ability to get on with people, a less favourable assessment than that which appeared in one of the earlier reports (1979-1981). Consequently, the notable improvement in both the analytical assessments (in particular, in the section dealing with ability to get on with people, mentioned above) and the general assessments contained in the applicant's staff reports for the periods 1985-1987 and 1987-1989 were particularly important and ought to have been among the factors taken into consideration when the applicant's applications for promotion or a transfer were considered. In this regard, it is important to note that at the hearing the defendant admitted that, even though the missing staff reports confirmed the assessments contained in his previous reports, they undeniably added a certain 'lustre'.

- 48 It follows that the delay in the filing of the applicant's staff reports was capable of causing him damage since the course of his career could have been affected by the absence of such a report at a time when decisions concerning him were taken. Since the Commission has not been able to prove that the persons called upon to take such decisions could have been aware of information equivalent to that contained in those staff reports and since the Commission has not mentioned any particular circumstance justifying such a delay, to which, it must be added, the applicant did not contribute in any way at all, it must be held that the Commission committed an administrative fault entitling the applicant to compensation for the non-material damage which he has suffered.
- 49 In assessing that non-material damage account must be taken of the fact that the applicant, being 63 years of age, will be able to participate in transfer or promotion procedures only for a few years more. In those circumstances, the Court, assessing the damages *ex aequo et bono*, considers that the awarding of a sum of BFR 90 000 constitutes appropriate compensation for the applicant.

Costs

- 50 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party must be ordered to pay the costs if they have been applied for. In the present case, the Commission has failed in its pleas and at the hearing the applicant asked for the Commission to be ordered to pay the costs. According to the case-law of the Court of Justice and this Court the fact that successful party asks for costs only at the hearing does not preclude the claim from being upheld (see the judgment of the Court of Justice in Case 113/77 *NTN Toyo Bearing Co v Council* [1979] ECR 1185 and the Opinion of Advocate General Warner at page 1275, and the judgment of the Court of First Instance in Case T-64/89 *Automec v Commission* [1990] ECR II-367). Consequently, the Commission must be ordered to pay all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Orders the Commission to pay to the applicant a sum of BFR 90 000 by way of damages;
2. Orders the Commission to pay all the costs.

Barrington

Schintgen

Lenaerts

Delivered in open court in Luxembourg on 17 March 1993.

H. Jung

D. P. M. Barrington

Registrar

President