

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)  
12 December 2002

Case T-135/00

**Carmelo Morello**  
v  
**Commission of the European Communities**

(Officials – Procedure for filling vacant posts – Statement of reasons –  
Comparative consideration of candidatures and equal treatment of officials –  
Actions for annulment – Action for damages)

Full text in French . . . . . II - 1313

**Application for:** first, annulment of the Commission's decision not to appoint the applicant to the post of Head of Unit 1 'Post and telecommunications and information society coordination' within Directorate C 'Information, Communication and Media' of the Directorate-General for Competition (COM/069/99) and of the decision to appoint another candidate to that post, and, second, damages.

**Held:** The Commission is ordered to pay the applicant a sum of EUR 5 000. The remainder of the application is dismissed. The Commission is ordered to pay the costs.

## Summary

1. *Officials – Decision adversely affecting an official – Rejection of an application for a post – Obligation to provide a statement of reasons at the latest by the stage of rejection of the complaint – Scope – Failure to comply – Rectification during legal proceedings – Condition*  
(Staff Regulations, Arts 25, second para., 45 and 90(2))

2. *Officials – Notice of vacancy – Purpose – Consideration of the comparative merits of candidates – Administration’s discretion – Limits – Compliance with the requirements laid down in the vacancy notice*  
(Staff Regulations, Art. 29)

3. *Officials – Promotion – Simplified procedure introduced within the Commission – Directors-general acting as the appointing authority – Hearing of the director-general concerned by the Advisory Committee on Appointments – Lawfulness*  
(Staff Regulations, Arts 7 and 45)

4. *Officials – Promotion – Consideration of comparative merits – Procedure – Consideration of staff reports – Incomplete personal file – Consequences*  
(Staff Regulations, Arts 43 and 45)

5. *Officials – Promotion – Consideration of comparative merits – Criteria – Interests of the service – Personal merits of candidates – Appointing authority’s discretion – Review by the Court – Limits*  
(Staff Regulations, Art. 45)

6. *Officials – Actions – Pleas in law – Misuse of powers – Concept*

*7. Officials – Actions – Claim for compensation directly connected with an application for annulment – Admissible notwithstanding failure to follow a pre-litigation procedure consistent with the Staff Regulations (Staff Regulations, Arts 90 and 91)*

*8. Officials – Reports procedure – Staff report – Drawing up – Delay – Breach of administrative duty giving rise to non-material damage – Conditions (Staff Regulations, Art. 43)*

1. Although the appointing authority is not under an obligation to provide unsuccessful candidates with reasons for its decisions on promotion, it is required to provide reasons for its decision to reject a complaint made under Article 90(2) of the Staff Regulations by a candidate who was not promoted, the reasons for that decision being deemed to be identical to those of the decision against which the complaint was directed.

Since, under Article 45 of the Staff Regulations, promotion is 'by selection', the appointing authority is neither required to disclose to the unsuccessful candidate details of the comparison of his merits and those of the candidate who is promoted nor to set out in detail in what way it considered that the appointed candidate fulfilled the conditions in the vacancy notice, but it is enough that the reasons given relate to the existence of the legal conditions which the Staff Regulations lay down as a prerequisite for a lawful promotion. In a promotion procedure, the statement of reasons must therefore relate, not to the respective qualities of the candidates, but solely to the validity of the promotion.

Although the total absence of a statement of reasons for the rejection of the candidature of an official applying for a post by way of promotion cannot be remedied by explanations provided by the appointing authority after an action has been brought before the Court, a merely inadequate statement of reasons provided in the course of the pre-litigation procedure is not such as to justify annulment of the contested decision where additional information is provided by the administration during the proceedings.

(see paras 31, 34, 37)

See: 188/73 *Grassi v Council* [1974] ECR 1099, para. 14; C-316/97 P *Parliament v Gaspari* [1998] ECR I-7597, para. 29; T-52/90 *Volger v Parliament* [1992] ECR II-121, para. 40; confirmed on appeal in C-115/92 P *Parliament v Volger* [1993] ECR I-6549, paras 22 to 24; T-25/92 *Vela Palacios v ESC* [1993] ECR II-201, para. 26; T-16/94 *Benecos v Commission* [1995] ECR-SC I-A-103 and II-335, para. 36; T-118/95 *Anacoreta Correia v Commission* [1996] ECR-SC I-A-283 and II-835, para. 82; T-37/94 *Benecos v Commission* [1996] ECR-SC I-A-461 and II-1301, paras 39 to 46; T-178/95 and T-179/95 *Picciolo and Caló v Committee of the Regions* [1997] ECR-SC I-A-51 and II-155, para. 34; T-71/96 *Berlinguieri Vinzek v Commission* [1997] ECR-SC I-A-339 and II-921, paras 79 to 84; T-86/98 *Gouloussis v Commission* [2000] ECR-SC I-A-5 and II-23, paras 73 to 77; T-230/99 *McAuley v Council* [2001] ECR-SC I-A-127 and II-583, para. 52

2. The essential function of the vacancy notice is to give those interested the most accurate information possible about the conditions of eligibility for the post to enable them to judge whether they should apply for it. The vacancy notice is also intended to establish the legal framework within which the appointing authority will undertake consideration of the comparative merits of the candidates, provided for in Article 45(1) of the Staff Regulations.

The appointing authority fails to respect that framework if it decides on the particular conditions required to fill the vacant post only after the vacancy notice has been published, regard being had to the candidates who have come forward, and if it takes into consideration, when examining the candidatures, requirements other than those set out in the vacancy notice, since such a course of action would deprive the vacancy notice of the essential function which it must fulfil in the recruitment procedure.

(see paras 62, 64, 67)

See: C-81/88 *Müllers v ESC* [1990] ECR I-249, para. 20; T-169/89 *Frederiksen v Parliament* [1991] ECR II-1403, para. 67; T-16/94 *Benecos v Commission*, cited above, para. 18; T-159/96 *Wenk v Commission* [1998] ECR-SC I-A-193 and II-593, para. 25

3. The fact that, since the reform decentralising promotion and appointment measures was introduced within the Commission, directors-general have acted as the appointing authority does not remove the requirement, and still less the opportunity, for the Advisory Committee on Appointments to hear the director-general concerned. The purpose of hearing the director-general concerned is to inform the Advisory Committee on Appointments about the qualifications required for the post to be filled and about the assessment of the candidates' merits, which does not detract either from the independence of the Advisory Committee on Appointments when adopting its opinion or from that of the director-general in question, in his capacity as the appointing authority, when adopting the final decision at a later stage. The fact that, following the reform, the director-general concerned is now empowered to take appointment decisions, after consulting the President and two other Members of the Commission, does not alter the nature of, and fundamental reason for, the hearing of the director-general by the Advisory Committee on Appointments.

(see para. 79)

4. The periodic report constitutes an indispensable criterion of assessment each time an official's career is taken into consideration for the purpose of adopting a decision concerning his promotion.

The promotion procedure is tainted with irregularity if the absence of a periodic report is not due to the normal course of the reporting procedure but to a substantial delay in the latter which is attributable to the administration. However, such an irregularity is such as to result in annulment of the decision adopted following the promotion procedure only in so far as the absence of the periodic report may have had a decisive effect on that procedure, in particular where that absence could not be compensated for by means of other information relating to the merits of the official who was unsuccessful.

The absence of a candidate's periodic report alone does not give rise to an obligation on the appointing authority to delay the appointment or promotion decision, since that authority may seek to obtain other material and base its assessment on other aspects of the candidates' merits, such as information about their administrative and personal situation.

(see paras 84, 86, 89, 90)

See: C-68/91 P *Moritz v Commission* [1992] ECR I-6849, para. 16; T-89/91, T-21/92 and T-89/92 X v *Commission* [1993] ECR II-1235, para. 49; T-58/92 *Moat v Commission* [1993] ECR II-1443, para. 59; T-18/93 *Marcato v Commission* [1994] ECR-SC I-A-215 and II-681, para. 73; T-82/98 *Jacobs v Commission* [2000] ECR-SC I-A-39 and II-169, paras 34 and 36; T-202/99 *Rappe v Commission* [2000] ECR-SC I-A-201 and II-911, paras 40 and 45

5. In assessing the interests of the service and the qualities to be taken into consideration in the context of the decision referred to in Article 45 of the Staff Regulations, the appointing authority possesses a wide discretion and, in that connection, the Community judicature must restrict itself to consideration of the question whether, regard being had to the various considerations which have influenced the administration in making its assessment, the latter has remained within reasonable limits and has not used its power in a manifestly incorrect way. The Court may not substitute its assessment of the qualifications of the candidate appointed for that of the appointing authority.

In that regard, the fact that an official has obvious and acknowledged merits does not exclude the possibility that, in the context of consideration of the candidates' comparative merits, other officials may have higher merits. Neither the fact of having occupied the post concerned in an acting capacity nor length of service in the lower grade constitute decisive factors overriding the interests of the service, which is the decisive criterion determining the choice of candidates to be promoted.

(see paras 99, 102)

See: 282/81 *Ragusa v Commission* [1983] ECR 1254, para. 9; C-446/00 P *Cubero Vermurie v Commission* [2001] ECR I-10315, para. 21; C-309/01 P *Council v McAuley* [2001], not published in the ECR, para. 18; T-112/96 and T-115/96 *Séché v Commission* [1999] ECR-SC I-A-115 and II-623, para. 62; T-152/00 *E v Commission* [2001] ECR-SC I-A-179 and II-813, para. 29

6. The concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated.

The fact that the official appointed following the publication of a vacancy notice did not take up his post does not support the conclusion that the institution concerned exercised its powers for purposes other than those stated.

(see paras 113, 120)

See: T-176/97 *Hick v ESC* [1998] ECR-SC I-A-281 and II-845, paras 27 to 34; *Séché v Commission*, cited above, para. 139; T-111/99 *Samper v Parliament* [2000] ECR-SC I-A-135 and II-611, para. 64

7. Where there is a direct link between an action for annulment and a claim for compensation, the latter may be declared admissible as incidental to the action for annulment, without necessarily having to be preceded both by a request from the person concerned to the appointing authority for compensation for the damage allegedly suffered and by a complaint challenging the validity of the rejection of that request.

(see para. 128)

See: T-17/90, T-28/91 and T-17/92 *Camara Alloisio and Others v Commission* [1993] ECR II-841, para. 46; T-36/93 *Ojha v Commission* [1995] ECR-SC I-A-161 and II-497, para. 115

8. The absence, as a result of a delay in its compilation, of a periodic report from an official's personal file may give rise, on his part, to non-material damage not only if his career may have been affected thereby but also if that circumstance put him in an uncertain and anxious state of mind with regard to his professional future.

(see para. 132)

See: 61/76 *Geist v Commission* [1977] ECR 1419; 140/87 *Bevan v Commission* [1989] ECR 701; T-73/89 *Barbi v Commission* [1990] ECR II-619; T-386/94 *Allo v Commission* [1996] ECR-SC I-A-393 and II-1161, para. 76