

On the other hand, a request by an official that the administration be ordered in general terms to review his administrative situation must be considered admissible in an action in which the Court enjoys unlimited jurisdiction provided that, without the

discretion which must be available to the appointing authority thereby being affected, such a measure appears to be designed to ensure that any reparation of the damage allegedly suffered as a result of the late preparation of the staff report is appropriate.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
8 November 1990 *

In Case T-73/89,

Giovanni Barbi, a member of the scientific staff of the Commission of the European Communities, residing in Varese (Italy), represented by Giuseppe Marchesini, avvocato with the right of audience before the Corte di Cassazione of the Italian Republic, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by Sergio Fabro, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation for the material and non-material damage allegedly suffered by the applicant,

* Language of the case: Italian.

THE COURT OF FIRST INSTANCE (Fifth Chamber),

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

Registrar: B. Pastor, Administrator,

having regard to the written procedure and following the hearing on 20 June 1990,
gives the following

Judgment

Facts

- 1 The applicant, a graduate in industrial chemistry of the University of Turin, entered the service of the Commission at the Ispira Joint Research Centre ('JRC') in 1961. He is now an official in Grade A 5 in the scientific service of the Commission. He has been in the highest step in his grade for more than 14 years.
- 2 His staff report for the period 1983-85 was not drawn up within the prescribed period, that is to say, in his case, by 30 November 1985. On 26 March 1987 the applicant sent a memorandum to his immediate superior, drawing his attention to the delay.
- 3 On 3 March 1988, the applicant submitted a request to the Commission. He complained that the Commission had not entrusted any fresh research work to him since the Hydrogen production, energy storage and transportation multiannual research programme, to which he had devoted 80% of his time, had come to an end on 31 December 1983. For many years, he stated, he had been kept in a state of almost total isolation, engendering in him 'dissatisfaction, frustration and psychological stress'. That situation, together with the lack of a staff report for the period 1983-85, had prevented any advancement of his career. The applicant requested that 'his work since 1 July 1983 should be appraised in accordance with the Staff Regulations . . . and that, consequently, his career advancement should be reviewed'.

- 4 By memorandum of 3 May 1988, the Commission informed the applicant that his request had been forwarded to the Director-General for Science, Research and Development of the JRC.
- 5 On 18 May 1988, the Director of the JRC drew up a reply to the request submitted by the applicant. He maintained that the applicant had not accepted the new tasks suggested by his Head of Division or made any other suggestions on his own initiative. As regards the applicant's career advancement, the Head of Division informed him that, for the time being, his candidacy for promotion to Grade A 4 was not regarded as a matter of priority. Owing to an administrative error, attributable to the restructuring of the JRC and the departure of its Director, that reply was never sent to the applicant.
- 6 On 26 September 1988, the applicant submitted a complaint to the Commission concerning the implied rejection of his request. In it he repeated his request of 3 March 1988.
- 7 On 16 November 1988, the Director of the JRC, as reporting officer, signed the staff report for the period 1985-87. The applicant countersigned the report on 2 December 1988.
- 8 On 30 November 1988, the same Director signed the report for the period 1983-85. According to the statements of his representative at the hearing, the applicant refused to countersign that report.
- 9 The Court finds of its own motion that it is apparent from the applicant's personal file that his complaint was rejected by a decision of the Commission of 16 February 1989, which was notified to him by letter from the Director-General for Personnel of 1 March 1989. The Commission, referring to the reply from the Director of 18 May 1988 mentioned above (paragraph 5), states in the first place that the complaint was lodged after expiry of the prescribed period. It adds that, notwithstanding that fact, it decided to reply to it. With respect to the first point raised in the complaint — the request for assessment of the applicant's work — it states that the complaint had become devoid of purpose since the staff reports for

the periods 1983-85 and 1985-87 had been drawn up in the mean time. As regards the second point raised in the complaint, the Commission states that it decided not to accede to it.

Procedure

10 In those circumstances, by application lodged at the Registry of the Court of Justice on 13 March 1989, Mr Barbi brought the present action against the Commission.

11 The applicant claims that the Court should:

- (i) declare that, by compiling and communicating to the applicant after a delay of at least three years the staff report for the period from 1 July 1983 to 30 June 1985, the Commission has infringed Article 43 of the Staff Regulations of Officials and Article 6 of the general provisions adopted for its implementation, in addition to the principles of non-discrimination and sound administration;
- (ii) declare that the Commission is under an obligation to review the applicant's administrative situation in view of the fact that he is eligible for promotion to a higher grade and be given appropriate responsibilities, having regard to the assessments made belatedly;
- (iii) order the defendant to pay the costs.

12 In his reply the applicant also claims that the Court should:

- (i) declare that in this case the Commission has infringed Article 43 of the Staff Regulations and Article 6 of the general implementing provisions and consequently Article 45 of the Staff Regulations;
- (ii) declare that the Commission is under an obligation, first, to review the applicant's position regarding his eligibility for promotion to the next higher grade and, secondly, to compensate him for non-material damage, which should be determined on a wholly equitable basis.

- 13 The Commission contends that the Court should:
- (i) dismiss the complaints made against the Commission;
 - (ii) make an appropriate order as to costs.
- 14 The written procedure was conducted in its entirety before the Court of Justice. By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.
- 15 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry. However, it put two questions to the parties concerning the applicant's residence and the signing of the staff report for the period 1983-85.
- 16 The hearing was held on 20 June 1990. The applicant's representative stated at the hearing that the applicant did not seek financial compensation for the damage suffered. Such a claim did not reflect the 'character or intentions' of the applicant. The applicant was devoted to his work and sought specific reparation in the form of a review of his administrative situation.
- 17 The Commission representative then raised an objection of inadmissibility concerning compensation for the non-material damage to be determined on an entirely equitable basis by the Court. That claim, appearing for the first time in the reply, was inadmissible.
- 18 In response to the Court's request that the applicant's conclusions be clarified, the latter's representative declared that he 'withdrew the head of claim concerning compensation for non-material damage appearing for the first time in the reply'.

19 At the end of the hearing, the President declared the oral procedure closed.

The first head of claim

Admissibility

20 The first claim is for a finding by the Court that the Commission has infringed certain provisions and certain general principles of Community law. The Commission has not contested its admissibility. However, it is incumbent on the Court to consider certain aspects of it of its own motion.

21 It must be pointed out, in the first place, that such claims may be made in an action for compensation. The Court of Justice has in the past upheld conclusions which sought a finding of maladministration (judgment in Joined Cases 10 and 47/72 *Di Pillo v Commission* [1973] ECR 763, at pp. 765 and 772). Similarly, in the operative part of its judgment in Case 68/63 *Lubleich v Commission of the EAEC* [1965] ECR 581, at pp. 607 and 608, it found the defendant institution guilty of maladministration.

22 Since the action derives from the employment contract between the applicant and the defendant, it is nevertheless necessary to decide whether Articles 90 and 91 of the Staff Regulations of Officials of the European Communities have been complied with (see judgments of the Court of Justice in Case 9/75 *Meyer-Burckhardt v Commission* [1975] ECR 1171, at p. 1181, and in Case 401/85 *Schina v Commission* [1987] ECR 3911, at p. 3929).

23 It is apparent from the documents before the Court that in March 1988 the applicant submitted a request to the Commission under Article 90(1) of the Staff Regulations. Complaining of 'dissatisfaction, frustration and real psychological stress' owing to his isolation and the lack of a staff report for the period 1983-85, he requested that that report be drawn up and that his career advancement be reviewed.

- 24 Since the draft reply prepared on 18 May 1988 by the Director of the JRC was not sent to the applicant, the request must be deemed to have been rejected by implication in July 1988. The complaint of 26 September 1988 was therefore lodged within the period of three months laid down in Article 90(2) of the Staff Regulations.
- 25 As to the staff report, the Commission acted on the complaint by drawing it up. As to the other points raised in the complaint, the Commission did not respond within the period of four months laid down in Article 90(2) of the Staff Regulations. Consequently, it rejected the complaint by implication in so far as the applicant sought a review of his career advancement. Without there being any need to take account of the express decision rejecting the complaint which was adopted after expiry of the period of four months, it must therefore be declared that the action was brought within the period laid down in Article 91(3) of the Staff Regulations. It follows that the first head of claim is admissible.

The substance

- 26 The applicant alleges, first, infringement of Article 43 of the Staff Regulations and of Article 6 of the general provisions for the implementation of Article 43 adopted by the Commission. The delay of three years in drawing up his staff report constitutes, in the applicant's view, an infringement of rules of a mandatory nature contained in those provisions. In his view, there is no ancillary provision allowing any exceptions to the reporting system laid down by those rules. The delay in question cannot be justified by special circumstances since his immediate superiors had been the same persons for several years.
- 27 Secondly, the applicant alleges breach of the principles of non-discrimination and sound administration. The delay of three years to which he refers constituted discrimination as compared with the majority of officials; the latter also experienced habitual, and similarly inexcusable, delays in the preparation of their staff reports but those delays did not exceed a maximum of about one year.

- 28 Thirdly, the applicant claims that Article 45 of the Staff Regulations and the procedural rules on promotions within the same career bracket were also infringed. His staff report, which was clearly favourable, could not have been taken into account in the promotion procedures for 1986, 1987 and 1988. His case was probably overlooked or, at most, considered in the absence of a fundamental source of information. Since his scientific output was exceptional in comparison with that of the scientific officers of the JRC on average, the applicant considers that he should have been placed in a leading position after a proper comparative examination of the candidates' merits. The evaluation of a candidate's merits should not, contrary to the Commission's contention, be based on other factors such as the direct knowledge which superiors have of those working under them. The result of that method of evaluation would be to introduce subjective and unverifiable factors, which is not in conformity with the comparative examination of merits provided for in the Staff Regulations. Moreover, the applicant's superiors showed a total lack of interest in his activities. They never discussed them with him. For that reason, they were not in a position to examine his candidature conscientiously and in full knowledge of the facts in the promotion procedures for the years 1986, 1987 and 1988.
- 29 The Commission produced as an annex to its defence the text of the memorandum prepared on 18 May 1988 by the Director of the JRC in response to the request made by the applicant, and the applicant challenged the content thereof in his reply. Contrary to the Director's contention, he did not refuse to carry out a study of electrochemical detectors. The applicant also maintains that, contrary to the assertions contained in the memorandum of 18 May 1988, he proposed two new projects to his previous superiors which could have been entrusted to him after the end of the multiannual programme.
- 30 The applicant considers that the drawing up of a staff report three years after the end of the prescribed period constitutes misconduct for which the Commission must answer. He refers in that regard to the decision of the Court of Justice according to which an official 'suffers non-material damage . . . from the fact that he possesses a personal file which is irregular and incomplete' (judgment in Case 61/76 *Geist v Commission* [1977] ECR 1419, at p. 1435).

- 31 After noting the explanations given by the applicant in his reply, the Commission did not retract its allegation that the applicant refused to undertake new tasks. The delay in drawing up the report is attributable, according to the Commission, to two sets of circumstances. In the first place, as from 1985, the department to which the applicant belonged was without a director. It was managed by its previous Director, who had become the Director of the Ispra establishment. Secondly, the JRC was reorganized in 1987. In the circumstances, superiors were 'unable to take all the required decisions in due time'. The applicant was not the only official in that position, 'the same applied to most of his colleagues'.
- 32 The Commission denies that the delay in question caused damage to the applicant by preventing his career advancement. A distinction must be drawn in that regard, according to the case-law of the Court, between two types of promotion procedure. Under Article 29 of the Staff Regulations, consultation of staff reports by the committee responsible for choosing a limited number of candidates for a post which has been declared vacant is essential. On the other hand, under Article 45 of the Staff Regulations, the mere absence of a staff report has never been penalized, according to the Commission, by annulment of the decision adopted on conclusion of the procedure. A decision promoting an official is taken by his superiors and may therefore be based on their knowledge of the merits of the person concerned. It follows that the staff report is not essential in the various phases of the procedure. In the present case, the Director to whom the applicant reported was the chairman of the committee responsible for putting forward the first proposal listing candidates for promotion. The head of the applicant's division was also a member of that committee. The Commission, which concludes from this that the absence of a staff report had no decisive influence such as to detract from the validity of the promotion procedures, adds that in 1989 the applicant's new superiors, who had the applicant's staff report at their disposal, likewise did not put his name forward for promotion.
- 33 In the Commission's view, the applicant should have produced, to support his 'theory of missed promotion', proof of a causal link between, on the one hand, the failure to include him on the list of officials considered most deserving of promotion in the procedure for 1988 and, on the other, the lack of a staff report relating to him. He ought to have shown that the various committees dealing with promotions to Grade A 4 for the year in question, within the JRC, did not have at their disposal favourable assessments of the applicant which they would have been

able to find in the staff report. The Commission observes that the applicant never proposed furnishing such proof.

34 It must first be stated that it is established that the report at issue was not drawn up by the prescribed date, 30 November 1985. The reporting director did not sign it until 30 November 1988, that is to say three years late.

35 Such a delay is not compatible with the principle of sound administration (see the judgment of the Court of Justice in Joined Cases 173/82, 157/83 and 186/84 *Castille v Commission* [1986] ECR 497, at p. 526). Neither the absence of a director nor the reorganization of a department can justify such disregard of the time-limit laid down by Article 6 of the general provisions for the implementation of Article 43 of the Staff Regulations on the preparation of staff reports. Without there being any need to verify whether the Commission has also infringed the general principles of law referred to by the applicant or to examine the substance of the allegations — which are in any event imprecise — made by the applicant against his superiors, it must be stated that the Commission is guilty of maladministration.

36 The applicant expressly requested that the Court find, in the operative part of the present judgment, that the Commission has infringed certain legal provisions. However, it is not appropriate to record the existence of that infringement in the operative part of the present judgment since it is not an independent factor which can be dissociated from the second head of claim.

The second head of claim

Admissibility

37 The second head of claim concerns review of the applicant's administrative situation and the damage which he claims to have suffered. The Commission has not challenged the admissibility of this head of claim. However, in this case too, it is incumbent upon the Court to consider certain aspects of it of its own motion.

- 38 In an action for annulment, the Community Court cannot, without encroaching on the prerogatives of the administrative authority, order a Community institution to take the measures necessary for the enforcement of a judgment by which a decision is annulled (see the judgment in Case 225/82 *Verzyck v Commission* [1983] ECR 1991, at p. 2005). In the present case, however, the Court enjoys unlimited jurisdiction. The review requested by the applicant appears to be a measure designed to ensure that any reparation of the alleged damage is appropriate. Moreover, the applicant made only a general request that his administrative situation be reviewed, without specifying how this is to be done. The margin of discretion which must be available to the appointing authority would not therefore be affected in this case by a finding against the defendant in those terms. Consequently, the nature of the measures sought is not such as to render this head of claim inadmissible.
- 39 It follows from the findings made in respect of the first head of claim that the pre-litigation procedure was in conformity with the provisions of the Staff Regulations. Accordingly, the second head of claim is also admissible.

The substance

- 40 To substantiate this head of claim, the applicant must show that the maladministration on the part of the Commission caused him damage for the reparation of which a review of his administrative situation is required. Consequently, it must first be decided whether the applicant has suffered such damage.
- 41 The Court of Justice has held that 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 (see Case 61/76 *Geist supra*, at p. 1435, and the judgment in Case 140/87 *Bevan v Commission* [1989] ECR 701).
- 42 In the present case the applicant suffered uncertainty and anxiety of that kind for three years since his staff report for the period 1983-85 was prepared only after a considerable delay. It must therefore be stated that the maladministration on the part of the Commission in fact caused him non-material damage. However, that

non-material damage did not persist after his staff report was drawn up on 30 November 1988. The reparation of that damage does not therefore, in itself, require a review of the applicant's administrative situation as regards the future, since it may take the form of financial compensation.

- 43 It follows that, in order to justify his claim for a general review of his administrative situation, the applicant ought to demonstrate that the Commission's maladministration has caused him damage which is not only certain but is also still affecting him.
- 44 The applicant claims that the absence of a staff report prevented him from being promoted and, after the alleged omission to promote him, from having new duties assigned to him corresponding to a more senior post.
- 45 However, the applicant has been unable to establish any causal link between the absence of the report at issue and the decisions concerning promotions for 1986, 1987 and 1988. His general allegations in that context are insufficient. The Commission has rightly pointed out that the applicant should have furnished proof — concrete and specific proof — of a causal link between the failure to include the applicant in the list of officials considered most deserving of promotion with regard to the 1988 budgetary year and the lack of a staff report for the period 1983-85. The same argument applies for the years 1986 and 1987.
- 46 Consequently, the applicant has not shown that the lack of a staff report in any way influenced the promotion procedures in question. In addition, he has not proved the existence of damage rendering necessary a review of his administrative situation. Accordingly, his claim for such a review must be rejected.
- 47 However, since the Court has found that the applicant did suffer non-material damage, it is appropriate to consider, first, whether or not he has sought reparation thereof in the alternative and, secondly, what form such reparation might take.

48 At the hearing, the applicant abandoned his claim that the Commission be ordered to 'compensate him for the non-material damage which should be determined on a wholly equitable basis' on the ground that it appeared for the first time in his reply. However, that abandonment related only to the claim for financial compensation. It must therefore be deemed not to extend to a claim for the award of a symbolic amount, which does not constitute financial compensation.

49 Consequently, it is necessary to consider the content of the complaint and of the application in order to establish whether the applicant in fact claimed compensation of that kind. Although the applicant put forward no formal conclusions in that regard, it must be stated that, in the request initially sent to the Commission and in his complaint, he mentioned 'frustration and psychological stress'. In his application he also complained of isolation and, in general terms, asked that the damage be compensated for. The applicant's formal conclusions — seeking a review of his administrative situation — do not expressly mention compensation for such damage by the award of a symbolic sum. However, despite the absence of express conclusions to that effect the Court is of the opinion that the abovementioned passages of the application must be interpreted as seeking, in the alternative, compensation of that kind (see the judgment of the Court of Justice in Case 8/56 *ALMA v High Authority* [1957] ECR 95, at p. 100).

50 In view of the foregoing it must be concluded that maladministration on the part of the Commission has caused non-material damage to the applicant. That non-material damage cannot be regarded as adequately compensated for merely by the Court's finding to that effect in this judgment. It is therefore appropriate to order the Commission to pay the applicant a symbolic sum of one European Currency Unit as compensation for the non-material damage suffered by him.

Costs

51 The applicant has failed in some of his submissions. However, it is apparent from the foregoing that the action was brought as a result of maladministration attributable to the defendant institution. In those circumstances, it is appropriate, pursuant to Article 69 of the Rules of Procedure of the Court, to order the Commission to pay the costs (see the judgment of the Court of Justice in Case 79/71 *Heinemann v Commission* [1972] ECR 579, at p. 591).

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- (1) Orders the Commission to pay the applicant the sum of one European Currency Unit as compensation for the non-material damage suffered by him;
- (2) Dismisses the remainder of the application;
- (3) Orders the Commission to pay the costs.

Kirschner

Briët

Biancarelli

Delivered in open court in Luxembourg on 8 November 1990.

H. Jung
Registrar

C. P. Briët
President