

Case T-311/04

José Luis Buendía Sierra

v

Commission of the European Communities

(Officials — Promotion — 2003 promotion exercise — Award of priority points)

Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 19 October 2006 II - 4148

Summary of the Judgment

1. *Officials — Actions — Acts adversely affecting an official (Staff Regulations, Arts 45, 90 and 91)*
2. *Officials — Actions — Prior administrative complaint (Staff Regulations, Arts 45 and 90(2))*

3. *Officials — Promotion — Comparative examination of merits (Staff Regulations, Arts 25, second para., 26, 43, 45 and 90(2))*
4. *Officials — Promotion — Comparative examination of merits (Staff Regulations, Art. 45)*
5. *Officials — Promotion — Comparative examination of merits (Staff Regulations, Art. 45)*
6. *Officials — Promotion — Comparative examination of merits (Staff Regulations, Art. 45)*
7. *Officials — Promotion — Comparative examination of merits (Staff Regulations, Art. 45)*
8. *Officials — Decision adversely affecting an official — Methods of adoption (Staff Regulations, Arts 45, 90(2) and 91)*
9. *Officials — Promotion — Comparative examination of merits (Staff Regulations, Art. 45)*
10. *Officials — Promotion — Comparative examination of merits (Staff Regulations, Art. 45)*
11. *Officials — Actions — Judgment annulling decision — Effects (Art. 233 EC; Staff Regulations, Art. 45)*

1. Under the promotion system established by an internal regulation of the Commission based on the examination of cumulative merits represented by points accumulated year after year, and in which the promotion exercise is concluded by an act of a complex nature in that it comprises two distinct decisions by the appointing authority, the one establishing the list of officials promoted and the other determining the total

number of points of officials on which the former decision is based, that decision determining the total number of points is a self-contained act which may, as such, be the subject-matter of a complaint and, where appropriate, a legal action in accordance with the remedies laid down by the Staff Regulations. The award of points in a given year has effects which are not limited and confined solely to the current

promotion exercise, but which may influence several promotion exercises producing binding legal effects capable of affecting the interests of the official by distinctly altering his legal position.

Consequently, an official who is included on the list of promoted officials may, if he disputes the total number of points which he has been awarded by the appointing authority and thus the balance kept for subsequent years, submit a complaint and, where appropriate, bring an action before the Court against the only act awarding points which entails binding and definitive legal effects in regard to him.

Similarly, it is conceivable that an official who is not promoted and who does not wish to challenge his non-promotion in the exercise in question but only the refusal to award him a certain number of points, which could not enable him to reach the promotion threshold, may bring identical proceedings.

Moreover, an official who is not promoted on account of the allegedly unjustified award of an insufficient number of points, and who is therefore below the promotion threshold, may direct his action both against the appointing authority's decision fixing the total number of points and against

that adopting the list of promoted officials. Even though those acts can in fact be differentiated legally and form the subject of separate claims for annulment, there is no doubt that they are in fact closely linked in a case of refusal of promotion, since such a refusal is necessarily and solely connected with the total number of points awarded to the official in question in relation to the promotion threshold, except where, having reached that threshold and being in the group of *ex aequo*, that is, the group of officials who have reached the promotion threshold, but whose number exceeds the actual promotion possibilities, the official in question was not promoted, on the basis of secondary considerations connected with seniority in grade or equal opportunities.

In the latter situation, the official concerned may properly bring an action only against the appointing authority's final decision adopting the list of promoted officials on account of errors of assessment made by the appointing authority in ranking in order the officials included in the group of *ex aequo*.

(see paras 82, 88-94)

2. Under the promotion system established by an internal regulation of the Commission based on the examination of cumulative merits represented by points accumulated year after year, and in which the promotion exercise is concluded by an act of a complex nature in that it comprises two distinct decisions by the appointing authority, the one establishing the list of officials promoted and the other determining the total number of points of officials on which the former decision is based, the starting point of the three-month period for bringing an action against those two decisions must, in the interests of legal certainty, equal treatment and sound administration, be fixed at the date on which the official obtains effective access to his updated individual promotion file on the institution's internal computer system, provided that consultation by the official of that file took place within a reasonable time from the publication of the summary note informing officials of the availability of that system of data on points awarded.

Under such a promotion system, publication of the list of promoted officials, which contains only the names and positions of the persons concerned, does not enable the officials concerned to have full knowledge of the act adversely affecting them, by nature complex, in which the promotion procedure culminates, and it is only by consulting his

individual promotion file that the official will be able to have access to his total number of points and their breakdown

(see paras 105, 111, 112, 115, 118, 121)

3. The system of promotion established by an internal regulation of the Commission, which is based on the quantification of merits, characterised by the annual award to officials of different types of points, some of which — 'merit points' — arise from the transformation of the mark received by the official at his periodical report under Article 43 of the Staff Regulations, whilst others — 'priority points' — granted in addition and not in themselves determining promotion, are designed to reward officials who have exceeded their individual objectives or have successfully carried out additional duties in the interest of the institution, does not infringe the principle of equal treatment or Article 45 of the Staff Regulations, since those two types of points are intended to reward merit and their attribution must always be justified by merit-based considerations.

Under that system, in which the promotion exercise is concluded by an act of a complex nature in that it comprises two distinct decisions by the appointing authority, the one establishing the list of officials promoted and the other determining the total number of points

of officials on which the former decision is based, absence of reasoning for decisions concerning the award of priority points does not infringe the second paragraph of Article 25 of the Staff Regulations, which does not require reasons to be stated for proposals, recommendations or opinions which, in themselves, do not adversely affect officials and which concerns only preparatory measures, the obligation to state reasons being satisfied where the appointing authority states reasons for its decision rejecting a complaint lodged under Article 90(2) of the Staff Regulations.

Nor is the award of priority points contrary to Article 26 of the Staff Regulations, the purpose of which is to guarantee an official's right to a fair hearing by ensuring that decisions taken by the appointing authority affecting his administrative status and his career are not based on matters concerning his conduct which are not included in his personal file, since that award is made, after examining the results of the career development reports, in the light of the merits of the officials concerned, as recorded in those reports, the drawing up of which is part of a complex process in which the officials are closely involved in accordance with Article 43 of the Staff Regulations, which provides that the periodical report is to be communicated to the official who 'shall be entitled to make any comments thereon which he considers relevant'. Nor can an infringement of defence rights be inferred from decisions to grant those points, since those decisions merely constitute acts

preparatory to the decisions fixing the total number of promotion points and adopting the list of promoted officials, whereas defence rights apply not to such measures, but to those adversely affecting officials.

(see paras 129-138, 143-147, 152, 155-157)

4. Under the system of promotion established by an internal regulation of the Commission, which is based on the quantification of merits, characterised by the annual award to officials of different types of points, some of which — 'merit points' — arise from the transformation of the mark received by the official at his periodical report under Article 43 of the Staff Regulations, whilst others — 'priority points' — are designed to distinguish, amongst officials, those which have the most merit in order to increase their promotion chances, neither the existence of a quota for awarding those latter points within each directorate-general nor the indication of a target average for the award of points of the first type are such as to limit the discretion of the directorates general to an extent which is contrary to Article 45 of the Staff Regulations, to the principle of equal treatment and to the principle of career progression. It is clear, on the contrary, that those two mechanisms are such as to favour the effective expression of an appraisal which is representative of the merits of the officials by ensuring the highest level of comparability of appraisals in all the directorates-general of the Commission and, consequently, equal treatment for those officials. In that

regard, in practice, consideration of the comparative merits must be undertaken on a basis of equality, using comparable sources of information.

As regards the quota of priority points within each directorate-general, it meets the general objective of that type of points, which is to reward those among the officials who are the most deserving, so as to increase their chances of promotion. A limit on the number of points available is designed to induce the directorates-general to make such a selection. That objective is itself compatible with Article 45 of the Staff Regulations, equal treatment and career progression.

As regards the target average of merit points, which that promotion system encourages but does not impose as an absolute obligation, the fact that the directorates-general take account of the target average which they are given does not in any way mean that their discretion is limited to an extent contrary to Article 45 of the Staff Regulations, the principle of equal treatment and the principle of career progression. That average, which expresses mathematically the assessment of an average official's performance, does not prevent reporting officers from using a very wide range of marking, even in combination with indicative but non-binding bands, resulting from observation of the way in which

promotions have generally been granted in the past. Nor does such an average limit the possibility of reporting officers differentiating between the assessments made individually of the performance of each official according to whether that performance is below or above that average, reporting officers being able to express nuances in their assessment of officials. It allows the risk of inflation in markings to be avoided by obliging reporting officers to carry out a more rigorous comparison of the individual merits of each official, and also serves to reduce the risk of a disparity in the averages of the markings given by the various directorates general, which would not be justified by objective considerations connected with the merits of the officials reported on. Such an average takes account, finally, of the most commonly observed reality, namely a homogeneous breakdown of the officials reported on around the average level of merit, of the possibility of departing from the target average when the particular situation of a directorate-general does not coincide with the common reality, and of the possibility of officials lodging an internal appeal which may lead the appointing authority to grant them one or more priority points outside the quota, sufficing to resolve the difficulties in departments where very good officials are concentrated.

(see paras 169, 172-177, 179-183, 187)

5. It is inherent in a change of rules that new situations are created on a given date as a result of adapting the account taken of situations constituted earlier. Under the system of promotion established by an internal regulation of the Commission, which is based on the quantification of merits, characterised by the annual award to officials of different types of points, it is for the appointing authority to adapt, on a transitional basis, the change in the rules relating to the promotion of officials by taking into account the constraints inherent in the transition from one method of management to another, which may require it to depart temporarily, and within certain limits, from the strict application of the permanent rules and principles that normally apply to the situations at issue. However, such departures must be justified by an overriding requirement connected with the transition, and their duration and scope should not exceed what is necessary to ensure an orderly move from one system to the other. In that respect, in order to take account of the merit accumulated in their grade by the Commission officials in post at the time of the entry into force of that system, transitional arrangements cover the award of various transitional points to those officials.

regarded as an objective, but only partial, indicator of the merit accumulated by an official, so that the award of those points reveals a taking into account of seniority in grade, contrary to the rules which normally govern promotion procedures. However, the adoption of a system characterised by quantification of merit and by the need to reach a certain threshold corresponding to an accumulated number of merit and priority points in order to be promoted involves taking into account the merits accumulated by the officials since their last promotion, in the form of an award of a certain number of points and according to a method which complies with the principle of equal treatment. The measure consisting in automatically awarding priority points meets that imperative need connected with the transition, and the provisions restricting its scope, such as its limitation to the first promotion exercise after the entry into force of the new system, the very limited weight of those points in comparison with the total of points capable of being awarded, and the making of an official's promotion subject to the condition that he must have totalled a certain number of other points in his last career development report, support the conclusion that the appointing authority did not go beyond what was necessary to ensure an orderly transition from one system to another.

Regarding transitional priority points automatically awarded, up to a certain limit, to officials per year spent in the grade, that number of years may be

Concerning the maximum of two transitional priority points per official which the appointing authority may award on

the recommendation of the promotion committees, these were introduced in order to resolve, on an equitable basis, specific problems arising from the transition between the old and the new system. That particular purpose necessarily falls within the scope of the objective of all the transitional points of which they form part, namely to take into account the merit accumulated by an official since his last promotion, with the result that the provision providing for their award does not, in itself, infringe Article 45 of the Staff Regulations. The fact that such an award could lead to arbitrary promotions would result from the individual application of that provision and not from its inherent illegality.

Regarding transitional priority points capable of being awarded to officials recommended for promotion during the previous promotion exercise but not promoted, these are not contrary to Article 45 of the Staff Regulations either. Whilst it is true that a practice consisting in automatically promoting a carry over from the previous promotion exercise infringes the principle under that provision of consideration of the comparative merits of the officials eligible for promotion, the appointing authority is, however, entitled in principle to take into consideration, in the assessment of candidates' comparative merits, the fact that an official has already been proposed for promotion in a previous exercise, on condition that he has not ceased to be deserving of promotion and

that his merits are assessed in comparison with those of other candidates for promotion, which is the case with the transitional arrangements established by the Commission.

Finally, the Commission is under no obligation to adopt, as the system for converting previous markings, that known as the average analytical assessment or that applied by other institutions, allegedly less at variance with the rule of promotion according to merit. The purpose of changing the existing method of promoting officials is, by definition, to rectify certain problems resulting from the application of the earlier rules. It is therefore inherent in such a reform process, the need for which the administration has wide discretion to assess, that the merits of officials should begin to be evaluated on a new basis from a given date. The administration cannot be expected, under the new system, to take account, in exactly the same way, of all the marks awarded to officials under the old system, since that would almost inevitably negate the effectiveness of the reform of the promotion system, and staff are, in any event, not entitled to expect the existing rules to remain unchanged.

(see paras 204-211, 213-218, 220)

6. The promotion system established by an internal Commission regulation whereby officials may be awarded priority points in recognition of additional tasks carried out in the interests of the institution is not contrary to Article 45 of the Staff Regulations, since those points can reward only tasks distinct from the official's normal activities, not covered by an annual appraisal and, therefore, not serving as a basis for the award of the other types of merit points. In any event, the legal framework established by the Commission enables the appointing authority to avoid any double counting of merits.

working within those entities, to the detriment of those officials. Those officials are therefore in a situation which is objectively different from that of their colleagues in post in large directorates-general or services, which explains and justifies, for the purposes of compliance with the principles of equal treatment and career progression, different treatment such as the particular provision providing that where a directorate general or service has fewer than four officials in a given grade, the total number of available priority points is 10 and their award is not subject to the distribution ratio set out in general for other officials.

(see paras 236, 240)

(see paras 246-250)

7. Under the promotion system established by an internal regulation of the Commission based on the quantification of merits, characterised by the annual award to officials of different types of points, strict application of the rule whereby each directorate-general will have available, for distribution, a package of priority points equal to 2.5 times the number of officials in grades which are still susceptible to promotion, having regard to their grade, and which makes the award of those points subject to a distribution ratio between the best performing officials and other officials would have the effect of reducing considerably the number of priority points to be distributed among the officials

8. The Staff Regulations and the internal Commission regulation establishing a promotion system based on the quantification of merits, characterised by the annual award to officials of different types of points do not prescribe any form for adopting decisions on the award of those points or for ruling on internal appeals lodged against that award before the appointing authority. In particular, Article 90(2) of the Staff Regulations, which provides that officials 'may submit to the appointing authority a complaint against an act', does not

preclude such an act from being expressed other than on paper. It follows that the responsible authority may adopt such decisions by affixing an electronic signature on a digital document prepared for that purpose, in the context of a computerised system, without formalisation in writing.

(see paras 255, 256)

9. Under the promotion system established by an internal regulation of the Commission based on the quantification of merits, characterised by the annual award to officials of different types of points, the award of priority points, intended to reward officials deemed most deserving and to increase their chances of promotion must be based on considerations connected with the particular merits of the officials in question, seniority in grade not in any event constituting a decisive factor for their award. It is therefore not possible to use as the principal criterion for the award of priority points the criterion of the total sum of merit points, which result from the transformation of the mark received by the official at his periodic assessment under Article 43 of the Staff Regulations, and of transitional priority points, awarded automatically up to a certain limit to officials by year spent in the grade, such a criterion being capable of having as its objective consequence of favouring officials with greater seniority in grade. In that respect, whilst it is true

that the administration may depart temporarily, and within certain limits, from the strict application of the permanent rules and principles that normally apply to promotion procedures, that is only in order to satisfy an overriding requirement connected with the transition between the old and new promotion systems and in order to take into account the constraints inherent in changing from one method of management to another, whereas priority points constitute a permanent and not a provisional aspect of the new promotion system and the taking into account of merit accumulated in their grade by Commission officials in post at the time of the entry into force of that system did, moreover, justify the award of three categories of transitional points.

(see paras 286, 288, 290, 293, 297, 301)

10. In assessing the merits to be taken into consideration in the context of a promotion decision under Article 45 of the Staff Regulations and, consequently, also in the context of a decision awarding points in a promotion system under which such an assessment is quantified, the administration possesses a wide discretion and the Community judicature must restrict its review 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 kept within proper bounds and has not used its power in a manifestly incorrect way.

(see paras 291, 320)

11. Under the promotion system established by an internal regulation of the Commission based on the quantification of merits, characterised by the annual award to officials of different types of points, where the Community judicature has annulled the decision of the appointing authority to award the applicant only a given number of points, it is also

necessary to annul the decision to refuse to enter him on the list of officials promoted where the measures which the administration finds it necessary to take in order to remedy the irregularities found could bring the applicant up to the promotion threshold. However, annulment of the whole list of promoted officials would constitute an excessive penalty. That assessment is not contradicted by the circumstance, which is moreover current, that the decisions taken in the context of the promotion exercise at issue do not exhaust their effects at the end of the exercise, because the applicant could in the future enter into competition with officials whose promotion was not annulled.

(see paras 340-342, 349)