

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)  
6 June 1996

Case T-262/94

**Jean Baiwir**  
v  
**Commission of the European Communities**

(Officials – Plea of illegality – Concordance between complaint and application – New method of calculating career profiles for Categories B, C and D at the Commission – List of officials most deserving of promotion – Articles 5(3) and 45 of the Staff Regulations – Principle of non-discrimination – Manifest errors in assessing facts and law – Action for damages)

Full text in French . . . . . II - 739

**Application for:** annulment of the list of officials most deserving of promotion to Grade B 4 in 1993 in so far as the applicant's name is not included in it, for an order that the Commission reconstruct his career as an official in Step 2 of Grade B 4 as from 1 January 1993 and for compensation for non-material damage suffered.

**Decision:** Application dismissed.

### Abstract of the Judgment

The applicant was appointed on 1 May 1988 as a Commission official in Grade C 5 and, after taking part in an open competition, was appointed on 27 February 1992 as an official in Step 1 of Grade B 5 with effect from 1 March 1992.

On 9 July 1992, the Commission adopted a 'New Method of Calculating Career Profiles – Categories B, C and D – Administrative Budget'. Under paragraph 1(b) of that decision, a set of points is awarded for age, on the one hand, to single-category officials in the same grade eligible for promotion, who have spent their entire career in the same category, B, C or D, and, on the other hand, to cross-category officials in the same grade eligible for promotion, who have spent part of their career in a lower category.

On 1 December 1992, the applicant and two other officials brought actions before the Court of First Instance against the decisions appointing them in so far as they were thereby classified in the first step of their grades, with no seniority. In Joined Cases T-103/92, T-104/92 and T-105/92 *Baiwir and Others v Commission* [1993] ECR II-987, the Court annulled the contested decisions in so far as they classified the applicants in step on the basis of Article 46 of the Staff Regulations, relating to promotion, and not on the basis of Article 32 thereof, relating to recruitment. By a decision of 3 February 1994, which replaced the decision of 27 February 1992, the applicant was classified in Step 3 of Grade B 5, with effect from 1 March 1992.

On 12 February 1993, the head of Unit 6 (B, C and D Staff) of Directorate A (Personnel) of Directorate-General IX (Personnel and Administration) of the Commission sent a memorandum to the applicant, informing him that a new method of calculating career profiles was coming into force for the 1993 promotion procedure and that it would be applied to him. The memorandum stated that the applicant was classified as a cross-category official for calculating the points for age.

The appointing authority did not include the applicant either on the list of Grade B 5 officials most deserving of promotion to Grade B 4 in 1993 or on the list of officials promoted to Grade B 4.

On 22 November 1993, the applicant lodged a complaint under Article 90(2) of the Staff Regulations, seeking correction of the list of officials most deserving of promotion to Grade B 4 in 1993 and amendment of the list of promoted officials on the basis of the judgment in *Baiwir and Others v Commission*. The Commission rejected that complaint by a decision of 12 April 1994.

### **The claim for annulment**

The applicant bases his claim for annulment on four pleas in law, namely infringement of the Staff Regulations, infringement of the principles of non-discrimination and the protection of legitimate expectations, failure to take account of the judgment in *Baiwir and Others v Commission* and manifest errors in assessing the facts and the law (paragraph 23).

## *Admissibility*

The decision of 9 July 1992 sets out rules of practice and accordingly constitutes a measure of a general nature that may be challenged by a plea of illegality (paragraphs 32, 33 and 34).

See: 44/74, 46/74 and 49/74 *Acton and Others v Commission* [1975] ECR 383, para. 7; 181/86, 182/86, 183/86 and 184/86 *Del Plato and Others v Commission* [1987] ECR 4991, paras 9 and 10; T-64/92 *Chavane de Dalmassy and Others v Commission* [1994] ECR-SC II-723, para. 41

However, not all the pleas relied on by the applicant call into question the decision of 9 July 1992. That decision distinguishes solely between cross-category and single-category officials and does not mention the other two distinctions that the applicant disputes: between internal-competition cross-category officials and open-competition cross-category officials; and between cross-category officials who have benefited from exemption from the age-limit and those who have not. In so far as it relates to the latter two distinctions, the action calls into question, therefore, not the decision of 9 July 1992 but the way in which the new system introduced by the Commission was applied to the applicant (paragraphs 35 and 36).

That part of the first plea which calls into question the distinction drawn in the decision of 9 July 1992 between cross-category officials and single-category officials is also admissible, since the applicant implicitly raised in his application the plea that the decision was illegal (paragraphs 37, 38 and 39).

See: 14/59 *Pont-à-Mousson v High Authority* [1959] ECR 215, at p. 230

During the pre-litigation procedure the applicant also put forward his first plea in various documents, including the request, annexed to his complaint in this case, and the Commission was therefore in a position to know in sufficient detail what criticism the applicant was making in that regard (paragraphs 40 to 44).

See: 58/75 *Sergy v Commission* [1976] ECR 1139, para. 32; 242/85 *Geist v Commission* [1987] ECR 2181, para. 9; 224/87 *Koutchoumoff v Commission* [1989] ECR 99, para. 10; 133/88 *Del Amo Martinez v Parliament* [1989] ECR 689, para. 9; T-57/89 *Alexandrakis v Commission* [1990] ECR II-143, para. 8; T-58/91 *Booss and Fischer v Commission* [1993] ECR II-147, para. 83; T-4/92 *Vardakas v Commission* [1993] ECR II-357, para. 16

It is further clear from the complaint that the applicant was claiming that he should be treated as a single-category official for the purpose of determining his career profile following the judgment in *Baiwir and Others v Commission*. The Court of First Instance annulled the decisions at issue in that case on the basis, in particular, of unequal treatment. The second limb of the second plea in this action, to the effect that the principle of non-discrimination was infringed, is therefore closely linked to the complaint (paragraph 45).

On the other hand, the complaint refers neither expressly nor by implication to an alleged infringement of the principle of the protection of legitimate expectations, which is relied upon in the second limb of the second plea in this action (paragraph 46).

Finally, the fourth plea, that the Commission committed manifest errors in assessing the facts and the law when it drew up the list of officials most deserving of promotion, is raised in one of the final paragraphs of the complaint, where the applicant claims that the directorates-general are in a position that does not allow them to 'treat merit as the primary criterion in the promotion procedure' and

challenges the Commission's assertion that career profiles are purely advisory (paragraph 47).

### *Substance*

#### The plea alleging breach of the Staff Regulations

As regards the distinction between cross-category and single-category officials, classifying a group of officials eligible for promotion as cross-category candidates amounts to treating them differently from the other officials eligible for promotion, since points awarded for age are calculated differently. That differentiation must therefore be examined to see whether it is objectively justified (paragraph 70).

See: T-109/92 *Lacruz Bassols v Court of Justice* [1994] ECR-SC II-105, para. 87

The distinction between cross-category and single-category officials was introduced to allow for the different age profiles of the two groups and thus to prevent the latter from being unduly disadvantaged in relation to the former (paragraph 71).

Cross-category officials are, as a general rule, older than single-category officials and those who have taken part in an open competition have usually needed to take advantage of the exemption from the age-limit for admission. Had the distinction not been introduced, cross-category officials would therefore have been placed at an advantage in relation to single-category officials, although their experience was

acquired not in the higher category, but doing different work in a lower category. To avoid such a result, the age of a single-category official is compared, when awarding points for age under the new method, to the average age of single-category officials and that of a cross-category official is compared to the average age of cross-category officials. The age of an open-competition cross-category official who did not need to take advantage of the exemption from the age-limit to take part in the competition is compared, however, to the average age of single-category officials. Such an official is, as regards his age, in a comparable situation to that of an official who has been directly recruited from outside to a specific category (paragraphs 72 and 73).

The distinction drawn by the decision of 9 July 1992 between cross-category and single-category officials must therefore be regarded as objectively justified (paragraph 74).

Nor can the Court accept the applicant's argument based on the procedure set up being different from that of the other institutions, since he has not adduced evidence showing that the Commission exercised its discretion in a manifestly incorrect way (paragraph 76).

See: 280/80 *D'Aloia v Council* [1981] ECR 2887, para. 17

Furthermore, the distinction between cross-category and single-category officials does not mean that the age criterion necessarily prevails over an assessment of officials' merits. The career profile is only one of the factors used to assess the career development of officials eligible for promotion (paragraphs 77 and 79).

See: 62/75 *De Wind v Commission* [1976] ECR 1167, para. 17; 298/81 *Colussi v Parliament* [1983] ECR 1131, para. 22; 293/87 *Vainker v Parliament* [1989] ECR 23, para. 16; T-53/91 *Mergen v Commission* [1992] ECR II-2041, para. 33

The applicant has no interest in obtaining a ruling that the distinction between internal-competitor and open-competition cross-category officials and the distinction between cross-category officials who have benefited from the exemption from the age-limit and those who have not cannot validly be applied to him, since he would be classified as a cross-category official in any event (paragraph 80).

The plea that the principle of non-discrimination was infringed

Treating as single-category officials only some of the open-competition cross-category officials competing for the same promotion on the basis that they did not need to take advantage of the exemption from the age-limit and drawing the resulting distinction when calculating career profile points awarded for age amount, in principle, to treating them differently from cross-category officials who did need to take advantage of that exemption. It is therefore necessary to examine whether such a distinction is objectively justified (paragraph 95).

See: *Lacruz Bassols v Court of Justice*, cited above, para. 87

The distinction was introduced to prevent cross-category officials who did not need to take advantage of the exemption from the age-limit from being disadvantaged in relation to single-category officials. Those two types of official are, as regards age, in an identical position, unlike cross-category officials who needed to take advantage of the exemption, who by definition are older. Moreover, the latter have experience at the Commission which they acquired in a lower category than the one in question,



to which different duties are assigned. The contested distinction must therefore be regarded as objectively justified (paragraph 96).

The plea that account was not taken of the judgment in *Baiwir and Others v Commission*

First, *Baiwir and Others v Commission* differs from this case in that it was concerned with classification in step, not with the promotion procedure (paragraph 106).

There is no specific obligation in the Staff Regulations requiring the appointing authority to take account in a promotion procedure of professional experience acquired by an official before he was recruited. That experience, moreover, plays no part in the drawing up of an official's career profile. For the purposes of a promotion procedure, an official cannot be regarded as starting a new career when he moves to a higher category (paragraph 109).

Secondly, this Court found in *Baiwir and Others v Commission* that the advantages of the exemption from the age-limit were 'not commensurate with the disadvantages arising from the unequal treatment' to which the applicants were subject and were not capable of justifying the difference in treatment. That finding was based on the fact that there is no link between exemption from the age-limit and classification in step, because age is not a criterion used to determine that classification. Age is taken into account, on the other hand, when calculating career profiles of officials eligible for promotion. Open-competition cross-category officials who have benefited from the exemption from the age-limit are, by definition, older than open-competition cross-category officials who did not so benefit and single-category officials, whereas they have gained their experience at the Commission not in the higher category but in a lower one. Treating open-competition cross-category

officials who have benefited from the exemption from the age-limit differently from those who did not is, therefore, objectively justified (paragraph 111).

Thirdly, the argument that Article 45 of the Staff Regulations was infringed because the officials' experience and merits were not taken into account has no connection with the alleged failure to take account of the judgment in *Baiwir and Others v Commission* (paragraph 112).

The plea alleging manifest errors in assessing the facts and the law

The first limb of the plea, to the effect that the Commission continued to classify the applicant as a cross-category official solely because the age-limit had not applied in his case, is covered by the second and third pleas (paragraph 136).

The second limb, to the effect that the Commission did not take the applicant's merits into account when drawing up the list of officials most deserving of promotion but relied solely on age and seniority, has already been rejected as unfounded under the first plea (paragraph 137).

Also, it is apparent from the documents before the Court both that Directorate-General XIX, when drawing up its list, in order of priority, of officials put forward for promotion, examined the merits of every official on its staff eligible for promotion to Grade B 4 and that it did not rely solely on their periodic reports but based its assessment in addition on other aspects of their merits, which included neither age nor seniority in the grade. The appointing authority assessed those

aspects within the broad discretion that it enjoys in that regard and did not use it in a manifestly incorrect way (paragraphs 138, 139 and 140).

See: 282/81 *Ragusa v Commission* [1983] ECR 1245, para. 9; 26/85 *Vaysse v Commission* [1986] ECR 3131, para. 26; 324/85 *Bouteiller v Commission* [1987] ECR 529, para. 6; 306/85 *Huybrechts v Commission* [1987] ECR 629, para. 9; 111/86 *Delauche v Commission* [1987] ECR 5345, para. 18; T-25/90 *Schönherr v Economic and Social Committee* [1992] ECR II-63, para. 20; T-11/91 *Schloh v Council* [1992] ECR II-203, para. 51; T-89/91, T-21/92 and T-89/92 *X v Commission* [1993] ECR II-1235, paras 34, 48 and 49; T-3/92 *Latham v Commission* [1994] ECR-SC II-83, para. 50; T-507/93 *Branco v Court of Auditors* [1995] ECR-SC II-797, para. 28

Nor has the applicant adduced any evidence capable of proving that the candidates' comparative merits were not considered (paragraph 142).

See: *Schönherr v Economic and Social Committee*, cited above, para. 25; T-557/93 *Rasmussen v Commission* [1995] ECR-SC II-603, para. 33

Moreover, where the qualifications and merits of the candidates are equal, their age and their seniority in the grade or service may constitute a decisive factor in the appointing authority's decision.

See: *Colussi v Parliament*, cited above, para. 22; *Vainker v Parliament*, cited above, para. 16

## **The claim for compensation**

Claims for compensation for material or non-material damage must be rejected where they are closely linked with claims for annulment which have themselves been dismissed, either as inadmissible or as unfounded (paragraph 151).

See: T-562/93 *Obst v Commission* [1995] ECR-SC II-737, para. 88

Since the head of claim alleging that the Commission did not have sufficient regard to the applicant's interests or act in sufficiently good faith towards him is not closely linked to the claim for annulment, the admissibility of the claim for compensation must be determined independently from that of the claim for annulment, having regard in particular to whether the prior administrative procedure laid down by Articles 90 and 91 of the Staff Regulations followed the proper course. Under Article 90(1), that procedure must commence with the submission of a request by the person concerned to the appointing authority for the damage allegedly caused by the conduct in issue to be made good. In this case, the applicant did not submit such a request to the appointing authority (paragraphs 152, 153 and 154).

See: T-5/90 *Marcato v Commission* [1991] ECR II-731, paras 49 and 50

## **Operative part:**

**The application is dismissed.**