JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
10 July 1992 *

In Case T-53/91,

Nicolas Mergen, an official of the Commission of the European Communities, represented by Marcel Slusny and Olivier Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, of its Legal Service, acting as Agent, assisted by Benoît Cambier and Luc Cambier, of the Brussels Bar, with an address for service in Luxembourg at the office of R. Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision not to enter the applicant's name on the list of officials in Grade A 5 considered most deserving of promotion to Grade A 4,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: K. Lenaerts, President of the Chamber, H. Kirschner and D. Barrington, Judges,

Registrar: P. van Ypersele de Strinhou, Legal Secretary,

having regard to the written procedure and further to the hearing on 11 June 1992,

gives the following

* Language of the case: French.

Judgment

The facts

1 The applicant has been in the service of the Commission of the European Communities since 1 September 1963. He has been in Grade A 5 since 1 October 1974 and has been attached to the Directorate-General for the Internal Market and Industrial Affairs ('DG III') for more than 20 years.

2 Since he acquired the two years' seniority required by Article 45(1) of the Staff Regulations of Officials of the European Communities for eligibility for promotion, the applicant has each year been entered on the list of officials eligible for promotion to Grade A 4. Thus, for 1990 his name appears on the list published in *Administrative Notices* No 627 of 26 March 1990, which gives the names of 642 officials, 29 of whom are in DG III.

3 On 15 June 1990, the list of officials eligible for promotion and 'proposed' for promotion in respect of 1990 by the various directorates-general was published in *Administrative Notices* No 632 and included the names of 180 officials in Grade A 5, eight of whom are in DG III. The list does not include the applicant's name.

4 For that reason, on 25 June 1990 the applicant appealed to the Chairman of the Promotion Committee under the internal rules applicable to promotion. In his appeal, he emphasized the importance of the duties that he performs, his seniority, his age and the standard of his staff reports, concluding that 'if my Directorate-General has not proposed me for promotion, therefore, it is not for reasons of a professional nature but clearly for other reasons which cannot easily be admitted and, in fact, are beginning to become known in DG III'.

5 On 13 July 1990, the Select Working Party responsible for considering appeals and problems associated with mobility ('the Select Working Party') met under the chairmanship of the Director-General for Personnel and Administration. The minutes of that meeting indicate that the applicant's case was examined and that the Select Working Party 'considers that it cannot make a favourable recommendation'.

6 On 19 July 1990, the Promotion Committee met under the chairmanship of the Secretary-General of the Commission and drew up a draft list of the 88 officials considered most deserving of promotion to Grade A 4.

7 On 31 July 1990, the chairman of the Promotion Committee informed the applicant that the 'Select Working Party responsible for considering appeals and problems associated with mobility has examined your case. Having regard to all the information in your file, it was unable to make a favourable recommendation to the Promotion Committee'.

8 On 1 August 1990, the Member of the Commission responsible for personnel matters drew up a list of officials in Grade A 5 considered most deserving of promotion to Grade A 4 for 1990.

9 On 10 August 1990, the list of officials in Grade A 5 considered most deserving of promotion to Grade A 4 for 1990 was published in *Administrative Notices* No 637.

10 On 8 October 1990, the list of officials promoted to Grade A 4 for 1990 was published in *Administrative Notices* No 643. Of the eight officials proposed for promotion to Grade A 4, four were promoted. Three of them had already been proposed for promotion on one or two occasions and one of them had already been included on the list of officials most deserving of promotion.

11 By memorandum of 29 October 1990, the applicant lodged a complaint under Article 90(2) of the Staff Regulations concerning the list of officials considered most deserving of promotion and requested cancellation of the decision not to include him on that list.

12 On 4 April 1991, the Commission informed the applicant that his complaint had been rejected.

Procedure

13 In those circumstances, the applicant brought the present action, which was lodged at the Registry of the Court of First Instance on 1 July 1991.

14 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry.

15 The hearing took place on 4 June 1992. Counsel for the parties presented oral argument and answered questions from the Court.

Forms of order sought

16 The applicant claims that the Court of First Instance should:

(1) declare the decision of 31 July 1990 null and void;

(2) declare null and void the defendant's decision not to include the applicant on the list of officials in Grade A 5 considered most deserving of promotion to Grade A 5 (*sic*) for 1990 (list published in *Administrative Notices* No 637);

(3) order the defendant to produce:

(a) the complete text of the 'Practical Guide to the Procedure for the Promotion of Officials of the Commission of the European Communities', an internal document published by Directorate-General IX in November 1988;

(b) a complete record of the proceedings of the Promotion Committee (for Grade A) for 1989 and 1990;

(4) order the defendant to pay the costs.

The Commission contends that the Court of First Instance should:

(1) dismiss the application as inadmissible and, in any event, unfounded;

(2) make an order as to costs in accordance with the Staff Regulations.

17 The applicant puts forward four pleas in law in support of his action. The first alleges that the system adopted by the Commission for the drawing up of lists of officials with a view to promotion is illegal; the second alleges that no statement of reasons was given for the decision of 31 July 1990; the third alleges the absence of any reference to his personal file in the 'decision of the Promotion Committee' and in the Commission's decision rejecting his complaint, and the fourth alleges that the decision not to promote him is discriminatory. In view of the illegalities which he alleges, the applicant seeks compensation for the non-material damage allegedly suffered by him in the sum of BFR 100 000. He also asks that the Court direct that preparatory inquiries be carried out. For its part, the Commission contends that

the first objective pursued by the action cannot be considered because it is concerned with a preparatory measure and, moreover, one which did not emanate from the appointing authority.

Admissibility

18 The Commission contests the admissibility of the action in so far as it relates to the memorandum of 31 July 1990 from the Chairman of the Select Working Party responsible for the examination of appeals. That memorandum, it maintains, merely expresses the views of an advisory body and should therefore be regarded as a preparatory measure forming part of a complex administrative procedure. Such a measure cannot be the subject of an action (judgment of the Court of First Instance in Case T-27/90 *Latham* v *Commission* [1991] ECR II-35).

19 The Commission adds that the memorandum of 31 July 1990 emanates from an advisory body, the Select Working Party, which gives its opinion to the Promotion Committee. However, the Court of First Instance may only examine measures emanating from the appointing authority (judgment of the Court of Justice in Joined Cases 783/79 and 786/79 *Venus and Obert* v *Commission and Council* [1981] ECR 2445, paragraph 22, and order of the Court of First Instance in Case T-119/89 *Teissonnière* v *Commission* [1989] ECR II-7, paragraph 21).

20 The Commission infers from this that the second plea in law, which concerns the statement of reasons for the memorandum of 31 July 1990 must, as a result, also be declared inadmissible.

21 The applicant replies that the case-law cited by the Commission concerns an advisory committee entrusted with the sole function of giving opinions, which differs from the Select Working Party, the latter being a quasi-judicial body responsible for adjudicating on appeals from officials relating to the procedure for identifying the officials most deserving of promotion. For that reason, the applicant considers that the Court should declare the action admissible, as the Court of Justice did in its judgment in Case 17/78 *Deshormes* v *Commission* [1979] ECR 189.

22 This Court finds that the action is inadmissible in so far as it relates to the memorandum of 31 July 1990. That memorandum did not emanate from the appointing authority or even from the Promotion Committee but from a Select Working Party, which gives its opinion to the latter. However, under Articles 90 and 91 of the Staff Regulations, only measures emanating from the appointing authority can be the subject of a review by the Court of First Instance in proceedings brought by officials and other servants of the Community institutions. Furthermore, that memorandum is a preparatory measure, since the opinion given by the Select Working Party is not binding on either the appointing authority or the Promotion Committee. It has been held that such a measure cannot be the subject of an action (see, in particular, the judgment in Case T-27/90, cited above).

23 As a result of the inadmissibility of the action in so far as it relates to the memorandum of 31 July 1990, the second plea in law must also be declared inadmissible to the extent to which it relates to the statement of the reasons for that memorandum.

The preparatory inquiries sought

24 The Commission observes that it has produced the complete text of the 'Practical Guide to the Procedure for the Promotion of Officials of the Commission of the European Communities' and the files of the eight candidates for promotion who were chosen in preference to the applicant and, therefore, that the request for preparatory inquiries is now nugatory.

25 The applicant states that, as far as the first document is concerned, the matter may be regarded as closed and that, as regards the other documents, he has been given only partial satisfaction.

26 This Court finds that the purpose of the form of order sought by the applicant is essentially to secure the production of certain documents relating to the contested promotion procedure. In that regard, it must be remembered that, pursuant to Article 66(1) of its Rules of Procedure, the Court of First Instance 'shall prescribe the

measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved'. It is clear from that provision that it is for the Court of First Instance to decide whether such a measure is appropriate. In the present case, since the Commission annexed to its defence the complete text of the Practical Guide and the staff reports of the eight candidates proposed for promotion, the applicant's request for the production of those documents must be considered superfluous. That request must also be rejected on the ground that the information produced by the Commission is sufficient to enable the applicant to defend his interests and to enable the Court to give judgment.

Substance

27 The Court of First Instance finds, at the outset, that the system described in the Practical Guide comprises several stages. Initially, the administration publishes a list of the officials eligible for promotion at least one month before the commencement of the promotion procedure in order to enable the persons concerned to inform it of any errors or omissions. Subsequently, each Director-General undertakes, in accordance with procedures established in each Directorate-General, a comparative examination of the merits of the officials under him who are eligible for promotion and adopts his proposal for promotion, establishing an order of priority. The third stage involves forwarding those proposals to the Promotion Committee, which has in its possession a list of the officials who were considered most deserving of promotion for the previous year but were not promoted, a chart indicating all the officials eligible for promotion and individual promotion records. The Promotion Committee selects the officials most deserving of promotion. In the applicant's case, the Promotion Committee based its decision on the method for assessing officials in Grade A 5 who are eligible for promotion to Grade A 4 ('the method'). Under the method, a number of points are awarded to the officials considered eligible for promotion in accordance with various criteria, namely the order of priority of the Director-General's proposal (70 points for the first 10, 45 for the next 10 and 20 for the next 10), the staff reports (a maximum of 28 points can be awarded under this heading), seniority in grade (a maximum of 20 points), age (a maximum of 65 points) and the inclusion of the official on the draft list of proposals adopted by the Promotion Committee for the previous year (25 points). The fourth stage involves the appointing authority endorsing the 'list of officials considered most deserving of promotion' drawn up by the Promotion Committee and the administration publishing it. Finally, the Member of the Commission responsible for personnel matters determines the promotions to be made on the basis of that list and signs the individual decisions.

First plea in law: illegality of the Commission's promotion system

28 The applicant maintains that that system does not enable proper account to be taken of the qualities and merits of employees since an excessive number of points is awarded in respect of the order of priority adopted by the Director-General. More specifically, he considers that the method contravenes Article 45 of the Staff Regulations, according to which 'Promotion shall be exclusively by selection ... after consideration of the comparative merits of officials eligible for promotion and of the reports on them'. According to the applicant, the method accords disproportionate and overriding importance to the order of priority determined by the Director-General, whose opinion thus outweighs that of the other officials, as is apparent from the following passage in the Practical Guide:

'This is the crucial stage in the procedure, since it is extremely rare for an official who has not been proposed by his Director-General to be promoted. Furthermore, the order of priority indicated by the Director-General has a considerable influence on the subsequent stages of the procedure.'

Consequently, the merits of officials are not taken into account from the qualitative point of view in so far as Directors-General almost never have dealings with officials in Grade A 5.

29 The Commission replies that the method is in conformity with the requirements laid down in the case-law, from which it is apparent that the criteria of age and seniority in grade or in the service cannot take precedence over the criteria relating to merit (judgment of the Court of Justice in Case 293/87 *Vainker* v *Parliament* [1989] ECR 23, paragraph 16). Indeed, the criterion of merit operates at two levels in the method: first, in relation to the order of priority determined by the Director-General and secondly in relation to the staff reports.

30 Furthermore, it is apparent from the case-law that the institutions enjoy a wide discretion regarding both the choice of candidates and the method chosen for the comparison of the merits and qualifications of the candidates eligible for promo-

tion, and that they cannot therefore be criticized unless they have exercised that discretion in a manifestly incorrect way (judgments of the Court of Justice in Case 62/75 *De Wind* v *Commission* [1976] ECR 1167, paragraph 17, and in Case 111/86 *Delauche* v *Commission* [1987] ECR 5345, paragraph 18).

31 The Commission also contends that the involvement of the Director-General is necessary since it is unrealistic to believe that a promotion may be granted solely on the basis of objective criteria. Any appraisal of the manner in which a person serves is necessarily, in part, subjective. The involvement of the Director-General thus has a twofold purpose: first, to share his knowledge of the sector managed by him, particularly through consultation of the heads of service concerned, who are well acquainted with the officials eligible for promotion, and, secondly, to put into perspective the staff reports of the various officials, which have not always been drawn up in a consistent form or on the basis of consistent criteria. In that regard, his involvement helps, to some extent, to eliminate the subjective nature of the comparison of the merits and qualifications of the candidates for promotion.

32 It states that, in the present case, the method was applied correctly, having regard in particular to the fact that the Director-General based his order of priority on a comparison of the staff reports of the various persons eligible for promotion within the Directorate-General concerned. That comparison, which is not contested by the applicant from the substantive point of view, shows that the assessments made in respect of the applicant were lower than those relating to the officials proposed for promotion, even though they give rise within the method — under the heading 'staff reports' — to the award of the same number of points, since the method gives the same number of points for the assessments 'good', 'very good' and 'excellent'.

33 This Court finds that it has consistently been held that the institutions have a wide discretion concerning promotion and can be criticized only if they exercise it in a 'manifestly incorrect way' (see in particular the judgment of the Court of Justice in Case 111/86, cited above, paragraph 18). Moreover, the Court of Justice has recognized the power of the appointing authority under the Staff Regulations to take

its decisions in such matters on the basis of a comparative examination of the merits of the candidates eligible for promotion carried out by the method which it considers most appropriate (judgment of the Court of Justice in Case 62/75, cited above, paragraph 17).

34 The Court of Justice has already had occasion to examine in Case 62/75 *De Wind* (cited above), in relation to allegations identical to those made by the applicant in the present case, the 'method of assessment of officials in Grade A 5 eligible for promotion to Grade A 4', which was adopted by the Commission on 18 June 1973. That method — which was substantially the same as that applied in the present case, apart from the fact that a maximum of 30 points instead of 28 could be awarded in respect of staff reports — was held by the Court of Justice to be compatible with Article 45 of the Staff Regulations (judgment in Case 62/75).

35 The applicant has put forward no argument capable of justifying a different conclusion on the part of the Court of First Instance regarding the compatibility with Article 45 of the Staff Regulations of the method applied to him. Indeed, if the applicant's reasoning were accepted, it would be necessary to deprive the Director-General of his power to determine an order of priority on which the award of a substantial number of points is based. If that were done, it would result in decisive weight being attributed to the criteria of age and seniority in the grade and service, which cannot take precedence over the criteria relating to merit (judgment of the Court of Justice in Case 293/87, cited above, paragraph 16).

36 Furthermore, the involvement of the Director-General in the promotion procedure is necessary for two reasons: first, to ensure that account is taken of factors specific to his Directorate-General, of which he is aware through consultation of the various senior officials in it, and secondly to ensure that the staff reports of the various officials eligible for promotion, which have been drawn up by different assessors, are viewed in a uniform manner.

37 It follows from the foregoing that this plea in law must be rejected.

Second plea in law: lack of a statement of reasons

38 The applicant submits that the Commission decision not to include him on the list of officials in Grade A 5 most deserving of promotion to Grade A 4 does not state the reasons on which it is based. He considers that Article 25 of the Staff Regulations has thereby been infringed.

39 He rejects the view that the case-law cited by the Commission can be relied on against him (judgments of the Court of Justice in Case 90/71 *Bernardi* v *Parliament* [1972] ECR 603 and in Case 343/87 *Culin* v *Commission* [1990] ECR 225, paragraph 13, and the judgment of the Court of First Instance in Case T-25/90 *Schönherr* v *Economic and Social Committee* [1992] ECR II-63), according to which promotion decisions do not have to disclose the reasons on which they are based to candidates who were not promoted since the reasoning adopted in those cases, namely that reference to aspects of the personality of an official who was not promoted might be prejudicial to him, is not applicable to the present case. Indeed, the appointing authority does not have to refer to such matters but must, according to the case-law, confine its observations to the competence, performance and conduct in the service of the complainant, the calculations to be made under the method in force and any qualitative appraisals made by officials called on to make their views known (judgments of the Court of First Instance in Joined Cases T-160/89 and T-161/89 *Kalavros* v *Court of Justice* [1990] ECR II-871 and in Case T-1/90 *Pérez-Mínguez Casariego* v *Commission* [1991] ECR II-143, paragraph 79).

40 The Court of First Instance finds that it has been consistently held that reasons for a promotion decision do not have to be given in so far as they affect candidates who have not been promoted, since such decisions are taken not only in relation to the competence and professional capability of the persons concerned but also in relation to certain aspects of their personality, with the result that a statement of reasons might be prejudicial to them (judgments of the Court of Justice in Case 90/71 and in Case 343/87, paragraph 13, both cited above). However, it is also apparent from the case-law (see, most recently, the judgment of the Court of First Instance in Case T-25/90, cited above, paragraph 21) that the appointing authority is under an obligation to give reasons for a decision rejecting a complaint in respect of a promotion.

In that regard, it must be pointed out that, in its reply to the complaint, the Commission gave a sufficient statement of the reasons for its decision by stating that:

'The complainant has put forward no argument capable of establishing that the decision of the Directorate-General for the Internal Market and Industrial Affairs not to include his name on the list of proposals for promotion contravenes the principle of equality of opportunity for all persons eligible for promotion, is vitiated by a manifest error or constitutes a misuse of powers.'

Indeed, by referring to the principle of equality of opportunity for all persons eligible for promotion, the Commission clearly indicated to the applicant that it took its decision after making a comparative examination of the merits of the officials eligible for promotion. The Commission also supplemented its statement of reasons by producing in the course of these proceedings the staff reports of the eight officials who were promoted.

42 This plea in law must therefore be rejected.

Third plea in law: absence of any reference to the applicant's personal file and of any comparative examination of merits

43 The applicant maintains that the contested decision is unlawful, in so far as it made no reference to his personal file or to his staff reports in the procedure relating to him, either in the 'decision of the Promotion Committee' or in the Commission's reply to his complaint. That information was necessary, in his opinion, for an evaluation of his merits.

44 He adds, in his reply, that in the present case his personal file, as made available to him, contained only formal documents and staff reports and did not contain a memorandum sent on 23 September 1988 by his head of division to the Director-General. That memorandum — which was very favourable to the applicant — should, pursuant to Article 26 of the Staff Regulations, have been included in his personal file. He considers that his right to a fair hearing was thereby undermined

(judgments of the Court of Justice in Case 88/71 *Brasseur* v *Parliament* [1972] ECR 499 and in Case 233/85 *Bonino* v *Commission* [1987] ECR 739, and judgment of the Court of First Instance in Case T-47/89 *Marcato* v *Commission* [1990] ECR II-231).

45 The applicant also asserts that, alongside his 'official' personal file, there is an 'unofficial' personal file on him within DG III. As evidence of that, he refers to statements by the assistant to the Director-General, who, he claims, told him orally that his specific DG III file contained nothing of particular significance. The applicant considers that the fifth paragraph of Article 26 of the Staff Regulations, according to which only one file may be created for each official, has thereby been infringed.

46 The Commission contends that since promotion decisions do not have to state reasons in so far as they affect candidates who were not promoted, they likewise do not have to mention in their preamble that they were taken having regard to the files of the persons concerned.

47 The Commission adds, however, that it is self-evident that neither the Director-General nor the Promotion Committee nor the appointing authority can give a decision on promotion without having seen the personal files of the candidates, to which each member of the Promotion Committee has access. As evidence of this, it refers to the preamble to the decision of the appointing authority, which states:

'... the Member of the Commission responsible for personnel matters had an opportunity to examine the personal files of all the officials eligible for promotion'.

Furthermore, the memorandum of 31 July 1990 indicates that the Select Working Party did in fact examine Mr Mergen's case and that 'having regard to all the information in your file, it was unable to make a favourable recommendation to the Promotion Committee'.

48 It contends, finally, that both the applicant's allegation that a second file on him exists in DG III and that concerning the absence from his personal file of a memorandum concerning him, sent by his head of division to the Director-General, from which he infers that there was a breach of Article 26 of the Staff Regulations, were made for the first time in his reply. For that reason, the Commission considers that they must be declared inadmissible pursuant to Article 48(2) of the Rules of Procedure.

49 This Court finds that no provision imposes on the appointing authority a formal obligation to refer to the personal file of a candidate for promotion when deciding whether or not to enter his name on the list of officials considered most deserving of promotion. Consequently, the Commission cannot be criticized for failing to make a formal reference to the applicant's personal file.

50 In so far as the applicant's reasoning seeks to show that the absence of a reference to his personal file indicates that that file was not considered and that, as a result, there was no comparative examination of the merits of the various candidates, it must be observed that it is apparent from the preamble to the appointing authority's decision of 1 August 1990 that:

'the Member of the Commission responsible for personnel matters had an opportunity to examine the personal files of all the officials eligible for promotion ... he took account of all the information relevant to promotion, in particular the competence, performance and conduct in the service, seniority in grade and in the service, the age of the official, the list of officials considered most deserving of promotion in the previous years but not promoted ... (and) he undertook a comparative examination of the merits of the officials eligible for promotion'.

51 It must also be stated that the Select Working Party, which participates in the promotion procedure at an earlier stage, also examined the applicant's file since it is stated in the memorandum of 31 July 1990 that the Select Working Party examined

the applicant's case but 'having regard to all the information in [his] file, it was unable to make a favourable recommendation to the Promotion Committee'.

52 It follows that appointing authority did in fact undertake a comparative examination of the merits of the various officials eligible for promotion.

53 Furthermore, with respect to the applicant's allegation of infringement of Article 26 of the Staff Regulations, this Court finds that, since that plea was first advanced in the reply and is not connected with the other pleas in law put forward in the application, in particular that concerning the lack of a reference to his personal file. it is a new plea in law within the meaning of Article 48(2) of the Rules of Procedure which must, therefore, be declared inadmissible. First, the applicant stated at the hearing that he had been aware of the memorandum of 23 September 1988 before the present action was brought. Consequently, that memorandum cannot constitute a matter of fact which came to light in the course of the procedure such as to justify a new plea in law being introduced. Secondly, in response to the objection of inadmissibility raised by the Commission in its rejoinder, the applicant did not claim at the hearing that the statements of the assistant to the Director-General of DG III were made after the commencement of the present proceedings.

54 It follows that the third plea in law must be rejected.

Fourth plea in law: discriminatory nature of the decision not to promote the applicant

55 The applicant claims that he is the victim of a systematic intention not to promote him, the discriminatory nature of which is particularly evident from the fact that at the same time his merits are systematically disregarded. His merits are considerable, as is apparent, on the one hand, from the quality of his staff reports, which, considered in accordance with the method, produce a mathematical result equal to that of the candidates proposed for promotion, and, on the other, from the 27 directives which he drafted.

56 He also maintains that a Member of the European Parliament sent a number of memoranda to the Commission criticizing such discrimination but that no reply was received. The applicant considers that the Commission's silence enables him to rely on the existence of proof based on a series of presumptions.

57 The Commission replies that the applicant has produced no evidence whatsoever to support his assertions that he is a victim of discrimination, such assertions thus being entirely gratuitous, improbable and incorrect. There is no reason why the applicant's Director-General should have such a grudge against him as to wish to block his career advancement. The fact is that the applicant is unwilling to admit that he could be outstripped by candidates who are younger or have less seniority in the grade or service than he.

58 It considers that the fact that his staff reports were good, but not as good as those of the eight officials proposed for promotion, justifies the proposals of both the Director-General and the Promotion Committee. Whilst the assessment of the applicant's merits is not negative, and is indeed good, that does not mean that he must be classified as one of the best.

59 The Commission states, finally, that the series of presumptions relied upon by the applicant can hardly be raised by memoranda from a Member of the European Parliament, who is unconnected with the service and is not familiar with the work done by the applicant or, still less, with the qualities of the other candidates for promotion. Furthermore, the memoranda and the parliamentary questions from the Member of the European Parliament did receive an answer.

60 This Court finds that the applicant has not denied anywhere in his submissions that the officials who were entered both on the list of officials proposed for promotion and on the list of officials considered most deserving of promotion had better staff reports than his and that, accordingly, their merits might be regarded as greater than his, at least by the Director-General. As far as the latter is concerned, the applicant cannot in any case claim that the fact that, under the method applied at a stage earlier than the Director-General's involvement, the same number of points

is given for the assessments 'good', 'very good' and 'excellent' prevents the Director-General from taking account, in drawing up his order of priority, of the differences between those assessments.

61 Furthermore, the applicant has not put forward in his submissions any evidence of a systematic intention on the part of his Director-General not to promote him. Such an intention is excluded by the fact that the Director-General relied, in drawing up his order of priority, on the staff reports of the various officials. In that regard, it must be emphasized that the applicant has not challenged his own report, having agreed to its being expressed in the same terms on several occasions.

62 It must be emphasized that, as indicated by the Commission, the applicant is not entitled in this case to rely on memoranda from a Member of the European Parliament as a basis for evidence of the alleged discrimination against him, since those memoranda do not in themselves prove the existence of any fact of such a kind as to establish the existence of such discrimination.

63 It follows from the foregoing that this plea in law cannot be upheld.

The claim for damages

64 The applicant maintains that, through the unlawful acts of which he complains, the Commission has been guilty of maladministration, causing him non-material damage, the quantum of which he assesses as BFR 100 000.

65 The Commission denies any unlawful conduct and, accordingly, any offence whatsoever.

66 This Court finds that, since the Commission has not acted unlawfully, there can be no question of maladministration.

67 Consequently, the claim for damages must be rejected.

68 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

69 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those rules provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Lenaerts Kirschner Barrington

Delivered in open court in Luxembourg on 10 July 1992.

H. Jung K. Lenaerts

Registrar President