

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
9 February 1994 *

(Official – Transfer decision – Refusal to promote an official)

In Case T-3/92,

Edward Patrick Latham, a former official of the Commission of the European Communities, residing at Wezembeek-Oppem (Belgium), represented by Bernard O'Connor, Solicitor, with an address for service in Luxembourg at the Office of Arsène Kronshagen, 12 Boulevard de la Foire,

applicant,

v

Commission of the European Communities, represented by Hans Gerald Crossland and Christopher Docksey, members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremliis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 25 April 1991 to transfer the applicant to the post of Adviser in the Consumer Policy Service inasmuch as the applicant was not promoted to Grade A 3, and for damages,

* Language of the case: English.

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

composed of: C.P. Briët, President, A. Saggio and H. Kirschner, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on
26 October 1993,

gives the following

Judgment

Facts and procedure

- 1 The applicant, Mr Latham, was recruited by the Commission in 1971. In 1974, he was appointed an official and classified in Grade A 4.
- 2 The applicant was employed in the translation service until 1973 and then in Directorate-General III until 1983. From that time he was concerned with consumer protection, initially in the competent directorate of Directorate-General XI and then, from 1989 until his retirement on 30 November 1991, in the Consumer Policy Service (hereinafter 'CPS').
- 3 Following the publication on 21 February 1991 of vacancy notice No 8, the applicant submitted his candidature, on 6 March 1991, for the post of Adviser to the Director-General of the CPS (post COM/28/91). The standard form used for this purpose was headed 'Candidature pour une mutation/promotion'. The applicant crossed out the word 'mutation'.

- 4 By a note dated 11 April 1991 the Secretary to the Advisory Committee on Appointments ('the Advisory Committee') informed the applicant that during its meeting on 21 March 1991, the Advisory Committee had decided to recommend an appointment at Grade A 5/A 4 to the post of Adviser to the Director-General of the CPS and to consider the applicant's candidature.
- 5 By decision of the appointing authority of 25 April 1991, the applicant was transferred, with effect from 16 April 1991, to the post of Adviser to the Director-General of the CPS. He maintained his classification in Grade A 4.
- 6 On 20 June 1991, the applicant submitted a complaint pursuant to Article 90 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') in which he claimed that he ought to have been appointed to the post in question at Grade A 3. The complaint was registered at the Secretariat of the Commission under No 271/91.
- 7 By decision dated 3 December 1991, sent to the applicant by letter dated 17 December 1991 and received by him on 24 January 1992, the Commission rejected that complaint.
- 8 Those were the circumstances in which, by application lodged at the Court Registry on 20 January 1992, the applicant brought this action.
- 9 By separate document lodged at the Court Registry on 26 March 1992, the Commission raised an objection of inadmissibility. The applicant lodged observations on the objection of inadmissibility on 29 April 1992. By order of 10 July 1992, the Court decided to reserve its decision on the objection until final judgment.

- 10 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry.
- 11 After hearing the parties, the President of the Fourth Chamber of the Court decided that, for the purposes of the oral procedure, this case would be joined with Case T-82/91 (*Latham v Commission*) concerning an application for the annulment of the Commission's decision to reject the applicant's candidature for the post of Head of Unit 3 of the CPS at Grade A 3.
- 12 The parties' oral arguments were heard at the hearing which took place on 26 October 1993.

Forms of order sought by the parties

- 13 The applicant claims that the Court should:
- (i) annul the decision to set the level of the post of Adviser to the Director-General of the CPS at Grade A 5/A 4;
 - (ii) annul the decision not to promote the applicant to Grade A 3;
 - (iii) order the Commission to respond to the applicant's complaint No 271/91;
 - (iv) order the applicant's promotion to Grade A 3 be made retroactive to 16 April 1991;
 - (v) award damages to the applicant for breach of procedure in relation to his request for promotion;

- (vi) award damages to the applicant for failure to comply with the obligation to take, as regards the applicant's staff report for the period 1981/1983, the measures necessary to comply with the judgments of the Court of First Instance of 24 January 1991 in Case T-63/89 *Latham v Commission* [1991] ECR II-19 and in Case T-27/90 *Latham v Commission* [1991] ECR II-35;
- (vii) award damages to the applicant in lieu of appointment to Grade A 3, owing to the fact that the applicant is now retired and cannot make any further applications for promotion;
- (viii) order interest to be paid on all damages;
- (ix) order the defendant to pay the costs;
- (x) order such other relief as the Court considers appropriate.

¹⁴ The Commission contends that the Court should:

- (i) declare the application entirely inadmissible;
- (ii) dismiss the application as invalid;
- (iii) make an appropriate order as to costs.

Admissibility

The claim for the annulment of the decision setting the level of the post of Adviser at Grade A 5/A 4 and of the decision not to promote the applicant to Grade A 3

Arguments of the parties

- 15 First, the Commission considers that the two claims for annulment are inadmissible on the ground that the applicant did not lodge his complaint within the three-month period laid down in Article 90(2) of the Staff Regulations. It maintains that the complaint, which concerned defamatory remarks allegedly made about the applicant by various Commission officials in December 1990 and January 1991, was lodged on 20 June 1991, after the three-month period had expired. Secondly, the Commission considers that the defamatory remarks complained of are not capable of directly affecting the applicant's legal situation (judgment of the Court of Justice in Case 32/68 *Grasselli v Commission* [1969] ECR 505). Thirdly, the Commission considers that the claims are inadmissible in so far as the applicant, who has been retired since 30 November 1991, no longer has any personal interest in the decisions which he requests the Court to annul (judgment of the Court of Justice in Joined Cases 81/74 to 88/74 *Marenco v Commission* [1975] ECR 1247, at p. 1255; judgment of the Court of First Instance in Case T-20/89 *Moritz v Commission* [1990] ECR II-769, at p. 775).
- 16 The applicant states, first, that he was informed by the note of 11 April 1991 that the level of the post of Adviser to the Director-General of the CPS had been set at Grade A 5/A 4. He claims that the complaint of 20 June 1991 was therefore lodged within the period laid down by Article 90 of the Staff Regulations. According to the applicant, the purpose of his complaint was that 'the Commission should grade the CPS Adviser post at A 3'. The defamatory statements mentioned in the complaint were referred to only in evidence and support of the main claim against the failure to appoint him. Secondly, the applicant maintains that the decision to set the grade of the post at A 5/A 4 is an act adversely affecting him. He maintains that he was the only candidate for the post concerned and that the setting of the grade of the post at A 5/A 4 and the failure to appoint him to Grade A 3 caused him actual loss of income and moral and material damage. Finally, the applicant, who points out that he is not seeking the annulment of the appointment of a third person, considers, with reference to the judgment of the Court of First Instance in Case T-82/89 *Marcato v Commission* [1990] ECR II-735, paragraphs 53 and 54 at p. 752, that he has not lost his interest in bringing proceedings by reason of the fact that he is retired.

Assessment of the Court

- 17 As regards, first of all, the conduct of the preliminary administrative procedure, the Court notes that the subject of the complaint lodged on 20 June 1991 was described by the applicant, in the covering letter annexed to the complaint, as the 'Rejection of my application for promotion to A 3 in relation to the post of Adviser advertised in Vacancy Notice COM/28/91 for the Consumer Policy Service' and that the claim set out at the end of the complaint was that 'the Commission should grade the CPS Adviser post at A 3 and procure me to enjoy a pension at that grade from the time of my retirement in November 1991'.
- 18 Although it is true, as the Commission points out, that the complaint repeatedly refers to defamatory statements and insulting remarks allegedly made by officials in December 1990 and January 1991, the Court considers that those statements and remarks are not the subject of the complaint and that they were referred to by the applicant only in order to highlight the alleged irregularities and unlawfulness of the contested decision.
- 19 It follows that the applicant's complaint, lodged on 20 June 1991 against the decision of 25 April 1991, by which the applicant was appointed to the post of Adviser to the Director General of the CPS at Grade A 4, was lodged within the three-month period laid down in Article 90(2) of the Staff Regulations.
- 20 Next, as regards the existence of an act adversely affecting the applicant, it should be pointed out first of all that the opinions given by the Advisory Committee, which, by virtue of the Commission's decision of 19 July 1988 on the filling of middle management posts – containing the provisions which were applicable to the applicant's appointment to the post concerned – has merely advisory powers regarding both the appraisal of candidates' abilities and the level of the post to be filled, cannot, as preparatory decisions, be the subject of an action (see, in particular, the judgment in Case T-27/90 *Latham v Commission*, cited above, paragraphs 26 and 27).

- 21 In these circumstances, the Court finds that in the present case the only act capable of affecting the applicant's position under the Staff Regulations – and, therefore, the only act capable of being challenged – is the decision which was taken by the appointing authority at the end of the procedure and which was communicated to the applicant by letter of 25 April 1991. The subject of that decision was the applicant's transfer to the post of Adviser to the Director-General of the CPS with effect from 16 April 1991.
- 22 The applicant is seeking, first, the annulment of the decision setting the grade of the post of Adviser to the Director-General of the CPS at A 5/A 4 and, secondly, the annulment of the decision not to promote him to Grade A 3. The Court considers that the two claims for annulment must be understood as seeking the annulment of the decision of 25 April 1991 in so far as it set the grade of the post to be filled at A 5/A 4 and at the same time rejected the applicant's request to be promoted to Grade A 3. The decision of which the applicant seeks the annulment therefore constitutes an act adversely affecting him.
- 23 Finally, as regards the applicant's interest in bringing proceedings, the Court considers that the applicant, who retired in November 1991, has not lost his interest in bringing proceedings against the decision of 25 April 1991. It must be observed in this regard that the applicant has retained his interest in securing a judgment in so far as he is seeking not only the annulment of an allegedly unlawful decision but also compensation for the moral and material damage which he considers he has suffered as a result of that decision (see, in particular, the judgment in *Marcato v Commission*, cited above, paragraph 54).
- 24 It follows from the foregoing that the claim for the annulment of the decision of 25 April 1991, in so far as it sets the grade of the post to be filled at A 5/A 4 and at the same time rejects the applicant's request to be promoted to Grade A 3, is admissible.

The claim for the applicant's promotion to Grade A 3 to be made retroactive from 16 April 1991

Arguments of the parties

- 25 As regards the applicant's claim that the Court order the Commission to promote him to Grade A 3 with retroactive effect, the Commission contends that it is clear from the judgment of the Court of Justice in Case C-137/88 *Schneemann v Commission* [1990] ECR I-369, paragraph 16 at p. 392) that the Community judicature 'has no jurisdiction to issue injunctions to the administration when carrying out the review of legality entrusted to it by Article 91 of the Staff Regulations'.
- 26 In response to that point, the applicant states that the application is not concerned with his actual appointment to the post in question but with the setting of the grade at which he was appointed.

Assessment of the Court

- 27 It is settled law that the Community judicature has no jurisdiction to issue injunctions to the administration when carrying out the review of legality entrusted to it by Article 91 of the Staff Regulations and that the obligations incumbent on the administration can derive only from the annulment, under Article 176 of the EC Treaty, of a measure adopted by it (see, in particular, the judgments of the Court of Justice in *Oyowe and Traore v Commission*, cited above, at paragraph 19 and in *Schneemann and Others v Commission*, cited above, at paragraph 16; the judgment of the Court of First Instance in Case T-20/92 *Moat v Commission*, not yet published in the ECR, paragraph 36).
- 28 It follows that the claim that the Court order the applicant's promotion from Grade A 4 to Grade A 3 with retroactive effect must be dismissed as inadmissible.

The claim for an order requiring the Commission to respond to the applicant's complaint No 271/91

Arguments of the parties

- 29 The Commission contends that the applicant's claim for an order requiring it to respond to his complaint is inadmissible since it adopted an express decision rejecting the complaint on 3 December 1991. It points out that, although this decision was not notified until 24 January 1992, the delay in notification was due solely to the applicant's refusal to accept service of the first notification of the decision on 17 December 1991.
- 30 The applicant points out that his complaint was made on 20 June 1991 and that the Commission's decision was notified to him on 24 January 1992. Under Article 90 of the Staff Regulations, failure to respond to a complaint within a period of four months means that the complaint is rejected by implication.

Assessment of the Court

- 31 The Court notes that on 20 June 1991, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the decision of 25 April 1991. By decision of 3 December 1991, notified to the applicant by letter of 17 December 1991 and received by the applicant on 24 January 1992, the Commission rejected that complaint.
- 32 It follows from those facts that the applicant's claim that the Commission should respond to complaint No 271/91 has become devoid of purpose.

The claim for damages

Arguments of the parties

- 33 The Commission considers that the applicant's claim for damages for breach of procedure in the examination of his application for promotion is inadmissible on the

ground that the claim for the annulment of the decision not to promote him is itself inadmissible. Furthermore, it considers that the claim for damages for failure to rectify the applicant's staff report for the period 1981/1983 following the judgments in the *Latham v Commission* cases, cited above, must be declared inadmissible on the same grounds as the two claims for annulment.

- 34 The Commission considers that the claim for damages in lieu of appointment to Grade A 3 is inadmissible on the ground that the claims for the annulment of the decision to set the grade of the post to which the applicant was appointed at A 5/A 4 and of the decision not to promote him to Grade A 3 are inadmissible. It contends that in so far as this claim relates to lost income, the applicant has not adduced any evidence in support of his claim that the Commission acted unlawfully or indicating what specific harm was done to him. The Commission also states that it has a wide power of discretion with regard both to the initial classification of posts and to the decision concerning the level at which a post should be filled. Finally, the Commission considers that the applicant, who retired on 30 November 1990, could not have suffered any real loss since by virtue of Article 77 of the Staff Regulations and Annex VIII thereto he could not have fulfilled the conditions for receiving a pension calculated on the basis of an A 3 salary, even if he had been appointed to that grade by the decision of 25 April 1991.
- 35 The applicant, who maintains that his claim for the annulment of the decision not to promote him is admissible, considers that his claim for damages based on a breach of procedure in arriving at that decision is also admissible. As regards the claim for damages for failure to rectify his staff report for the period 1981/1983, he maintains that the absence of this report was an essential factor in the combination of events leading to the Commission's breach of procedure.
- 36 The applicant admits that the Commission enjoys a discretionary power when appointing officials but he considers that this power must be exercised consistently with the Staff Regulations and with natural justice. He also contends that the fact that the grade of the post to which he was appointed was not set at Grade A 3 has caused him a real loss of income from 16 April 1991 until the date of his retirement.

Assessment of the Court

- 37 It is apparent from the case-law of the Court of Justice, as examined and elaborated by the Court of First Instance (see its judgment in T-27/90 *Latham v Commission* [1991] ECR II-35, at paragraph 38, in Case T-5/90 *Marcato v Commission* [1991] ECR II-731, paragraph 49 at p. 746, and its order in Case T-53/92 *Piette de Stachelski v Commission* [1993] ECR II-35, paragraph 17 at p. 41), that it is only where a direct link exists between an action for annulment and an action for damages that the latter action is admissible as being ancillary to the action for annulment without its necessarily having to be preceded by a request made to the appointing authority for compensation for the damage allegedly suffered and by a complaint challenging the correctness of the implied or express rejection of the request. It must also be recalled that where a close link exists between a claim for annulment and an action for damages, the inadmissibility of the claim for annulment entails the inadmissibility of the claim for damages (judgments of the Court of Justice in Case 4/67 *Anne Muller (née Collignon) v Commission* [1967] ECR 365, at p. 373, and in Case 346/87 *Bossi v Commission* [1989] ECR 303, paragraph 31 at p. 334; judgment in *Moat v Commission*, cited above, paragraph 46).
- 38 The Court considers that it follows from the observations lodged by the applicant on the objection of inadmissibility that his claim ‘that damages be granted in lieu of appointment to the grade of A 3 due to the fact that the applicant is now retired and cannot make any further applications for promotion’ must be understood as seeking compensation for the material and moral damage for which he considers that he has suffered owing to the fact that he was not promoted to Grade A 3. The Court considers that this claim for damages is closely linked to the claim for the annulment of the decision of 25 April 1991 which set the grade of the post to be filled at A 5/A 4 and at the same time dismissed the applicant’s request to be promoted to Grade A 3. Since the claim for annulment is admissible, the claim for damages must also be considered to be admissible.
- 39 As regards the claims for compensation for the damage allegedly caused to the applicant as a result of the breach of the procedure relating to his application for promotion and as a result of the non-rectification of his staff report for the period 1981 to 1983 following the judgments in the *Latham v Commission* cases, cited

above, the Court considers that these claims are not closely linked to the claim for the annulment of the decision of 25 April 1991 since they purport to be based on a whole series of wrongful acts and admissions allegedly committed by the administration and not on any damage arising from the fact that the applicant was not promoted to Grade A 3 by the decision of 25 April 1991. It accordingly follows from Article 90 of the Staff Regulations that it is imperative for the administrative procedure to be commenced by a request by the person concerned asking the appointing authority to compensate him for that damage (see the order of the Court of First Instance in Case T-29/91 *Castelletti and Others v Commission* [1992] ECR II-77, paragraph 30 at p. 87) and be followed, if necessary, by a complaint against the decision rejecting the request. Since no procedure prior to the commencement of legal proceedings, as required by Article 90 of the Staff Regulations, took place, the claims for compensation for the damage allegedly caused by the breach of the procedure for examining the applicant's request for promotion and by the non-rectification of his staff report for the period 1981/1983 are inadmissible.

Substance

The claim for the annulment of the decision of 25 April 1991

Arguments of the parties

- 40 The applicant considers that the decision of 25 April 1991 is unlawful in so far as irregularities occurred in the procedure leading to its adoption. Thus, during a meeting with the Director-General of the CPS, which, according to the applicant, took place on 6 December 1990, the applicant was informed that the post of Adviser to the Director-General would be specifically created for him. Moreover, he claims that the vacancy notice relating to that post was not properly distributed. He also claims that the decision to set the grade of the post at A 5/A 4 was taken solely with him in mind since he was the only candidate for the post. According to the applicant, in the present case, the decision setting the level of the post to be filled cannot be separated from the decision to appoint the candidate selected. He also complains that the Commission failed to rectify his staff report for the period 1981 to 1983 following the judgments in the *Latham v Commission* cases, cited above, and considers that his unrectified report influenced the Commission's decision on the question whether or not he deserved promotion to Grade A 3. He also claims that no-one in a position to orally rectify the deficiencies in his staff report was

heard at the meeting of the Advisory Committee on 21 March 1991. Finally, he claims that his nationality was a factor which the Commission took into account, contrary to the fundamental principles of Community law, in determining whether or not he should be promoted to Grade A 3.

41 At the hearing, the applicant explained that his superiors always gave him to understand that he would reach Grade A 3 at the end of his career. Thus, the key factor which he stresses is his non-appointment to Grade A 3. He considers that all the other claims are subsidiary to that claim.

42 The Commission points out that in recruiting, promoting and assigning staff, the institutions of the European Communities must be guided primarily by the interests of the service and that they have a wide discretion to adopt specific decisions. As regards the filling of posts at Grades A 5/A 4/A 3, that discretion is exercised within the framework of the procedure laid down by the Commission's decision of 19 July 1988 concerning the filling of middle-management posts, published in *Administration Notices* No 578 of 5 December 1988, which, according to the Commission, is intended to separate the question of the grade at which a post is fixed from the question of the duties performed by the person appointed to the post. The Commission contends that the applicant has not produced any evidence showing that it exercised its powers in an arbitrary or manifestly erroneous manner. The Commission also contests the applicant's assertion that the post of Adviser to the Director-General of the CPS was offered to him during a meeting held on 6 December 1990 and contends that this assertion is not supported by any documentary evidence. As regards the applicant's complaint that the vacancy notice was not properly distributed at the time when he submitted his application, the Commission claims that the vacancy notice was published and displayed in the customary way but that it had proved impossible to distribute a copy to individual members of staff in due time and that in any event, this omission did not prejudice the applicant. As regards the contention that the applicant's staff report for the period 1981 to 1983 was not complete at the time when the decision was taken not to promote him, the Commission points out that the Advisory Committee had more recent information, such as the staff reports drawn up since 1983, which were all complete, and the applicant's curriculum vitae, so that the staff report for the period 1981 to 1983 could not have influenced the Commission's decision. Finally, the

Commission contends that the applicant has not produced any evidence to show that his nationality influenced that decision.

Assessment of the Court

- 43 The applicant submitted his request for promotion when applying for the position of Adviser to the Director-General of the CPS and thus linked his request for promotion to his candidature for the post in question. By decision of 25 April 1991, the applicant was appointed to the position of Adviser to the Director-General of the CPS. Since the grade of the post was set at A 5/A 4, the applicant, who was in Grade A 4, did not receive promotion when appointed to the post.
- 44 The Court notes that the applicant is asking it to annul 'the decision to set the grade of the post of Adviser to the Director-General, CPS post at A 5/A 4' and 'the decision not to promote the Applicant to the grade of A 3'. The Court considers that these two decisions were incorporated in the decision of 25 April 1991 by which the applicant was transferred to the post concerned. Since the Commission's decision relating to the applicant's non-promotion is closely linked to the decision setting the grade of the post to be filled, the Court considers that it is necessary to examine only the lawfulness of the latter decision in order to rule upon the claim for annulment. If the decision setting the grade of the post proves to be lawful, the applicant's transfer, and therefore his non-promotion, would also be lawful. If, on the other hand, the Court were to find that the Commission should have set the grade of the post at A 3, the applicant's transfer would also be unlawful.
- 45 It follows from Article 5(1) and (4) of the Staff Regulations and from the general principles governing the public service that, although the Commission has a wide discretion in organizing its departments and assessing posts, it is the importance of the duties and responsibilities assigned to a particular post which must be the principal criterion by virtue of which it is appropriate to determine the level of a post which is to be filled (see, in particular, the judgment of the Court of Justice in Case 2/80 *Dautzenberg v Court of Justice* [1980] ECR 3107, paragraph 9 at p. 3117). It follows from that principle that the appointing authority must set the level of a vacant post on the basis of the importance of the post, irrespective of the

qualifications of any candidate or candidates who have applied for it following the publication of the vacancy notice.

- 46 Since the appointing authority has a wide discretion in determining the level of a post to be filled, the Court's review must be limited in the present case to examination of the question whether, having regard to the considerations which may have influenced the administration in making its assessment, the administration remained within reasonable bounds and did not use its power in a manifestly incorrect way. The Court cannot therefore substitute its assessment of the level at which the post is to be filled for that of the appointing authority (see, in particular, the judgment of the Court of Justice in Case 233/85 *Bonino v Commission* [1987] ECR 739, paragraph 5 at p. 757, and its judgment in Case 324/85 *Bouteiller v Commission* [1987] ECR 529, paragraph 6 at p. 546).
- 47 The Court considers that the applicant's arguments may be regarded as forming three pleas in law: misuse of power, irregularities of procedure and breach of the principle of the protection of legitimate expectations.
- 48 As regards the first plea concerning a misuse of power, the applicant is arguing that the post concerned was specifically created for him, that he was the only candidate and that the decision setting the grade of the post was therefore taken solely with him in mind so as to prevent him from reaching Grade A 3.
- 49 It should be noted that the annex to the Commission's decision of 19 July 1988 concerning the filling of middle-management posts, the provisions of which were applicable to the applicant's transfer to the post concerned, clearly provides that an adviser's post is to be filled at either Grade A 5/A 4 or Grade A 3.
- 50 Although it is not contested that the applicant was the only candidate for the post of Adviser to the Director-General of the CPS, the Court considers that the

applicant has not adduced any specific evidence to show that the appointing authority's decision setting the grade of the post at A 5/A 4 was taken for purposes other than those envisaged by the relevant rules. Even though the appointing authority was aware that the applicant was the candidate envisaged for the post in question, that circumstance is not sufficient to prove that in assessing the post it failed to take account of the duties of the future adviser to the Director-General. It should be pointed out in this regard that the Staff Regulations do not confer an automatic right to promotion, even on officials who meet all the conditions for promotion (judgment of the Court of Justice in Joined Cases C-41/88 and C-178/88 *Becker and Starquit v Parliament* [1989] ECR 3807, paragraph 4 of the summary at p. 3808; judgment of the Court of First Instance in Case T-163/89 *Sebastiani v Parliament* [1981] ECR II-715, paragraph 33 at p. 725).

- 51 It follows from the foregoing that the plea alleging a misuse of power must be dismissed.
- 52 As regards the alleged irregularities of procedure affecting the validity of the decision of 25 April 1991 in so far as it set the grade of the post in question at A 5/A 4, the applicant claims first of all that the vacancy notice was not properly distributed and, secondly, that his staff report for the period 1981/1983 was not rectified following the judgments in the *Latham v Commission* cases, cited above. Finally, he claims that in taking its decision the Commission took account of his nationality.
- 53 The Court considers that, even if the vacancy notice was not distributed in a proper manner, as the applicant contends, that irregularity could only have been favourable to him. The omission of which the applicant complains was not therefore capable of harming his interests. Since the applicant is not entitled to act in the interests of the law (judgment in Case 85/82 *Schloh v Council* [1983] ECR 2105, paragraph 14 at p. 2123), this argument must be dismissed as inadmissible.
- 54 As regards the non-rectification of the applicant's staff report drawn up for the period 1981 to 1983, it should be recalled that in its judgment in Case T-63/89

Latham v Commission, cited above, this Court annulled the decision definitively adopting the applicant's staff report for the period 1981 to 1983 owing to the fact that his superiors during that period had not been consulted.

55 The Court considers, however, that the non-rectification of the staff report in question – and the applicant's nationality – were not factors capable of influencing the decision taken by the appointing authority in 1991 with regard to the grade of the post to be filled, that decision being taken independently of the staff reports and nationality of the candidate or candidates for the post concerned. Consequently, the arguments concerning the non-rectification of the applicant's staff report and his nationality must be dismissed.

56 It follows from the foregoing that the plea alleging irregularities of procedure must also be dismissed.

57 Finally, the applicant appears to be submitting a plea alleging the infringement of the principle of the protection of legitimate expectations in so far as he claims that his superiors always led him to believe that he would reach Grade A 3 at the end of his career.

58 It is settled law that the right to claim protection of legitimate expectations extends to any individual who is in a situation in which it appears that the Community administration has led him to entertain reasonable expectations. However, an official may not plead a breach of the principle of the protection of legitimate expectations unless the administration has given him precise assurances (judgment of the Court of Justice in Case 289/81 *Mavridis v Parliament* [1983] ECR 1731, paragraph 21 at p. 1744; judgment of the Court of First Instance in Case T-123/89 *Chomel v Commission* [1990] ECR II-131, paragraphs 25 and 26 at p. 139).

- 59 In the papers before it the Court finds no evidence of precise assurances given by the appointing authority about the applicant's possible promotion to Grade A 3. In those circumstances, there can be no question of a breach of the principle of the protection of legitimate expectations. The plea based upon it cannot therefore be upheld.
- 60 It follows from the foregoing considerations that the claim for the annulment of the decision of 25 April 1991 must be dismissed.

The claim for damages

Arguments of the parties

- 61 The applicant contends that the irregularities committed by the Commission when adopting the decision of 25 April 1991 constitute a wrongful act on the Commission's part which renders it non-contractually liable. He considers that appropriate reparation would consist of an award of damages as compensation for his loss of the opportunity to be promoted to Grade A 3.
- 62 The Commission contends that the applicant had no right to promotion to Grade A 3, that he could not claim such a right and that he has not been able to prove that in adopting the decision of 25 April 1991 the Commission exercised its discretion in an improper way. The Commission therefore considers that the applicant has not demonstrated that it committed any wrongful act and that he is not therefore entitled to damages in compensation for the harm which he considers he has suffered.

Assessment of the Court

- 63 It is settled law that the Community can only be held liable to pay damages if a number of conditions are satisfied as regards the illegality of the allegedly wrongful act committed by the institutions, the actual harm suffered and the existence of a causal link between the act and the damage alleged to have been suffered (judgment

of the Court of Justice in Case 111/86 *Delauche v Commission* [1987] ECR 5345, paragraph 30 at p. 5364; judgment of the Court of First Instance in Case T-165/89 *Plug v Commission* [1992] ECR II-367, paragraph 115 at p. 412).

64 The Court finds that the applicant is claiming damages in compensation for the loss of the opportunity to be promoted to Grade A 3 following his transfer to the post of Adviser to the Director-General of the CPS.

65 The Court also finds that the applicant has not adduced any evidence of irregularities or unlawful acts committed by the Commission when it set the grade of the post of Adviser to the Director-General of the CPS at A 5/A 4 and that the fact that he was not promoted to Grade A 3 was directly due to the setting of the grade for the post concerned at A 5/A 4.

66 Since the unlawful conduct alleged by the applicant has not been established, the claim for damages for the loss which he claims to have suffered through not being promoted from Grade A 4 to Grade A 3 must be dismissed.

Costs

67 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. However, under Article 88 of those Rules, the institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;
2. Orders the parties to bear their own costs.

Briët

Kirschner

Saggio

Delivered in open court in Luxembourg on 9 February 1994.

H. Jung
Registrar

C.P. Briët
President