

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
20 June 1990 *

In Joined Cases T-47/89 and T-82/89

Antonio Marcato, an official of the Commission of the European Communities, residing in Brussels, represented by Philippe-François Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Victor Gillen, 13 rue Aldringen,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the list of officials adjudged the most deserving in 1988 of promotion to Grade B 2,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

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

Registrar: B. Pastor, Administrator

having regard to the written procedure and further to the hearing on 29 March 1990,

gives the following

* Language of the case: French.

Judgment

Facts of the case

- 1 The applicant, born on 25 March 1928, entered the service of the Commission on 12 November 1958. After being established in Grade D 2 with effect from 1 January 1962, and following several promotions, he was appointed in 1975 to Grade B 4 and assigned to Division XIX B 2 'Accounting, financial management and information' at the Commission.
- 2 His staff report for the period from 1 July 1985 to 30 June 1987, drawn up by the deputy head of division, Mr Lemoine, was submitted to him only on 13 April 1988. The applicant challenged certain details in that report, and an appeal in respect of the reporting procedure is now pending.
- 3 The promotion procedure which gave rise to the dispute was conducted in a number of stages, in accordance with the general implementing provisions relating to the procedure for promotion within a career bracket which the Commission adopted in 1970 and amended in 1971 (hereinafter referred to as 'the general provisions').
- 4 The first stage of that procedure consists in the publication of the list of officials eligible for promotion who possess the requisite seniority. The applicant, established since 1 October 1980 in Grade B 3 and therefore possessing the minimum of two years' seniority required by Article 45 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), was included on the list of officials eligible for promotion to Grade B 2 in 1988, which was published on 15 February 1988.
- 5 In the next stage of the procedure, the Commission's directorates-general draw up a list of officials whom they propose for promotion. In the circumstances, that list, which was published on 16 March 1988, comprised the names of four officials in DG XIX. The applicant's name was not amongst them.

- 6 After learning that his directorate had not proposed him for promotion, the applicant sent a letter on 9 June 1988 to Mr Valsesia, President of the Promotion Committee for category B, asking for his case to be reconsidered. That letter apparently remained unanswered. By letter of 30 June 1988, the applicant wrote to Mr Morel, Director-General of DG XIX, asking him to state the precise reasons for which the applicant had not been proposed for promotion. By a memorandum of 3 August 1988, Mr Morel replied that the applicant's case had been taken into consideration twice: the first time when Directorate C had drawn up its proposals, and the second when the definitive list had been drawn up for DG XIX. According to that memorandum, the selection had been made on the basis of a comparative examination of the relevant criteria.

- 7 In the meantime, the Promotions Committee for Category B had met on 15 and 16 June 1988 in order to examine the proposals for promotion to Grades B 2 and B 4. With regard to the applicant, the Minutes of those meetings state that 'the committee takes formal note of the detailed explanations furnished by the representative of DG XIX as regards the conduct of Mr Mercato (sic). That opinion is in conformity with the line taken in the past by other representatives of DG XIX and would therefore seem to be confirmed. However, in view of certain differences in the reports concerning Mr Mercato, the committee considers that his position should be clearly defined' (p. 4 of the Minutes of the meeting, Annex 2 to the defence). The Promotions Committee drew up the draft lists of officials adjudged the most deserving of promotion without including the applicant's name.

- 8 On the basis of those draft lists, the Commission's Director-General for Personnel and Administration and the Director of the Publications Office, acting in their capacity as the appointing authority, drew up on 11 July 1988 a list of officials adjudged the most deserving of promotion to Grade B 2 in 1988. The list, which did not include the applicant's name, was published in the Commission's information sheet of 29 July 1988. It contained the names of two of the four officials proposed by DG XIX.

- 9 On 23 September 1988 the applicant lodged a complaint with the Commission pursuant to Article 90(2) of the Staff Regulations. Relying on the absence of a staff report for the period from 1 July 1985 to 30 June 1987 and on the fact that, in his view, the memorandum addressed to him by Mr Morel on 3 August 1988 constitutes a refusal on the part of the Commission to notify him *in extenso* of the

reasons for its decision not to include his name on the list of officials put forward by the directorate-general, the applicant claims that the Commission did not comply with the second paragraph of Article 25 (any decision adversely affecting an official must state the grounds on which it is based) and Article 45(1) (consideration of the comparative merits of officials) of the Staff Regulations. He accordingly sought 'the annulment of the list of officials adjudged the most deserving of promotion, published on 29 July 1988, and a complete revision of the promotion procedures for 1988'.

- 10 However, out of concern that his complaint might be inadmissible and taking the view that he could rely by analogy on the case-law of the Court concerning selection boards (judgments of 14 June 1972 in Case 44/71 *Marcato v Commission* [1972] ECR 427 and of 15 March 1973 in Case 37/72 *Marcato v Commission* [1973] ECR 361), the applicant — without awaiting a decision on his complaint — immediately brought an action which was lodged at the Court Registry on 28 October 1988 (Case T-47/89).

- 11 The list of officials promoted to Grade B 2 was published on 31 October 1988. It did not contain the applicant's name and included only one official from DG XIX.

- 12 As the Commission had still not reacted to his complaint of 6 April 1989, the applicant brought a second action on the same date which was lodged at the Court Registry on 10 April 1989 (Case T-82/89). In his application, he pointed out that he was not discontinuing his first action but, faced with what in his view was an implied decision of rejection, he was bringing a second action in order to ensure that his rights were fully protected.

- 13 On 7 April 1989 the Commission adopted an express decision rejecting the applicant's complaint, which was notified to him on 25 April 1989. The Commission pointed out that the contested staff report had been submitted to the applicant on 13 April 1988 and considered that the applicant's allegations did not substantiate the existence of an infringement of Articles 25 and 45 of the Staff Regulations.

Course of the procedure

- 14 In his first action Mr Marcato seeks the annulment of the list of officials adjudged the most deserving of promotion to Grade B 2 in 1988. The action is also directed 'in so far as is necessary' against Mr Morel's letter of 3 August 1988, in which the latter refused to give an unequivocal explanation of the reasons for the applicant's exclusion from that list. The applicant relies on two submissions, one alleging infringement of the second paragraph of Article 25 of the Staff Regulations (inadequate statement of reasons) and the other alleging infringement of Article 45(1) of the Staff Regulations (irregularity in the consideration of the comparative merits of the officials concerned on account of the absence of the applicant's last staff report).
- 15 The Commission raised an objection of inadmissibility against that action. It maintains that the action was brought in disregard of Article 91(2) of the Staff Regulations, since a direct action is not admissible in the circumstances, which is disputed by the applicant.
- 16 By decision of 24 February 1989, the Court (Fourth Chamber) decided to consider the objection of inadmissibility at the same time as the substance of the case. The written procedure subsequently followed the usual course before the Court.
- 17 In his second action, the applicant also seeks the annulment of the list of officials adjudged the most deserving of promotion to Grade B 2 in 1988. The action is also directed 'in so far as is necessary' against Mr Morel's letter of 3 August 1988. This action is based on the same submissions and arguments as the first, that is to say infringement of the second paragraph of Article 25 and Article 45(1) of the Staff Regulations.
- 18 In the proceedings before the Court, the Commission raised an objection of inadmissibility in accordance with Article 91 of the Rules of Procedure, without lodging a defense on the substance of the case. The applicant submitted observations against that objection.

- 19 By order of 15 November 1989 the Court of Justice assigned the two cases to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities. By two orders of 6 December 1989, the Court of First Instance (Fifth Chamber) joined the two cases for the purposes of the oral procedure and the judgment and decided to exclude from consideration the two documents produced by the defendant.
- 20 On hearing the report of the Judge-Rapporteur, the Court decided to accede to the Commission's request for a ruling on the objection of inadmissibility without considering the substance of the case. It put two questions to the Commission. The applicant, represented by Mr Vandersanden of the Brussels Bar, and the defendant presented oral argument at the hearing on 29 March 1990. In reply to the questions put to it by the Court, the Commission produced at the hearing the text of the amended Commission decision of 21 December 1970 laying down the aforesaid general provisions. It is apparent from those provisions that only the officials included on the list of officials adjudged the most deserving of promotion (within a career bracket) may be promoted in the same financial year. The Commission's representative confirmed that so far — in the case of officials in Grade B, C and D — that rule had been observed by the Commission without a single exception.
- 21 Since an Advocate General has not been designated in these cases, the President terminated the oral procedure concerning the objection of inadmissibility at the end of the hearing.
- 22 In Case T-47/89 the applicant claims that the Court should:
- (a) declare the action admissible and well founded;
 - (b) annul the list of officials adjudged the most deserving of promotion to Grade B 2 (including BS and BT) in 1988, published in *Administrative Notices* No 565 of 29 July 1988, (p. 9 *et seq*), for infringement of Articles 25 (in particular, the second paragraph thereof) and Article 45(1) of the Staff Regulations;
 - (c) order the defendant to pay the whole of the costs.

The Commission contends that the Court should:

- (a) consider of its own motion whether there exists an absolute bar to proceeding with the case;
- (b) declare the action inadmissible;
- (c) failing that, dismiss the action as unfounded;
- (d) make an appropriate order as to costs.

In Case T-82/89, the applicant reiterates in their entirety the conclusions which he put forward in Case T-47/89.

The Commission contends that the Court should:

- (a) dismiss the action as inadmissible;
- (b) make an appropriate order as to costs.

With regard to the objection of inadmissibility raised by the Commission, the applicant claims that the Court should:

- (a) dismiss the objection of inadmissibility raised by the defendant and order the continuance of the proceedings on the substance of the case;
- (b) order the defendant to pay the whole of the costs.

Admissibility of the action brought in Case T-47/89

- 23 The defendant institution argued in the first place, in support of the objection of inadmissibility raised in accordance with Article 91 of the Rules of Procedure, that, as the Court has consistently held, an action which has not been preceded by the lodging of a complaint is admissible only if it seeks the annulment of the

decision of a selection board for a competition or the annulment of a staff report. Even if that case-law could be applied to the subject-matter of this dispute, the Commission considers that the applicant, having lodged a complaint in this case before instituting proceedings, should have awaited the decision of the appointing authority on that complaint. According to the case-law of the Court, an action brought before a decision has been given on the complaint is in any event premature, and consequently inadmissible.

- 24 In its defence, the Commission has put forward a further objection of inadmissibility. It relies on the judgment given by the Court in the meantime on 14 February 1989 in Case 346/87 *Bossi v Commission* [1989] ECR 303, in which it was decided that a list of officials adjudged the most deserving of promotion is merely a preparatory act whose regularity may be called in question only in an application brought against the decision concluding the promotion procedure. According to the Commission, that constitutes an absolute bar to proceeding with the case, which justifies the application of Article 92 of the Rules of Procedure. Since the applicant did not lodge a complaint against the list of officials promoted to Grade B 2, which has therefore become definitive in relation to him, the Commission considers this action to be inadmissible. Such a complaint would have enabled the applicant to safeguard his rights and interests in due time. The Commission considers that the principles laid down by the Court in its judgment in *Bossi* must be applied *mutatis mutandis* to the applicant's action, notwithstanding the fact that it was brought a few months earlier. Even though that judgment constituted a reversal of case-law, the court adjudicating on the substance of the case should always take account of the most recent case-law. In addition, it would be contradictory, to say the least, if such a reversal could be applied to the applicant in *Bossi* but not to the applicant in this case.
- 25 With regard to the fact that the list in question is binding on the appointing authority so far as promotions during the financial year are concerned, the Commission points out that, as the Court has consistently held, even preparatory acts which are binding on the administration, such as the opinions of an establishment board or an invalidity committee, cannot be referred separately to the Court.
- 26 Finally, referring to the judgment in *Bossi*, the Commission raises in its rejoinder the question of the applicant's interest in seeking the annulment of the list of officials adjudged the most deserving of promotion when he has failed to challenge within the prescribed period the list of officials actually promoted, which has therefore become definitive in relation to him.

- 27 The applicant maintains that his direct action is admissible in view of the fact that the deliberations of a promotion committee are comparable to those of a selection board for a competition. A prior complaint is therefore unnecessary.
- 28 As far as the consequences of the judgment in *Bossi* are concerned, the applicant maintains that the Commission, by raising an objection of inadmissibility, exhausted all the arguments which it could rely upon in that regard. In its objection, it did not refer to the fact that a list is in the nature of a preparatory act. Compared with the judgment of 12 October 1978 in Case 86/77 *Ditterich v Commission* [1978] ECR 1855, in which, according to the applicant's interpretation, the Court held an action directed against a list of officials proposed for promotion to be admissible, the judgment in *Bossi* constitutes a departure from previous case-law. The applicant considers that the question should be raised whether, in those circumstances, the principles laid down by the Court in *Bossi* may be relied upon by the defendant as an absolute bar to proceeding with the action. In its view, such an objection of inadmissibility should be covered by the rules on admissibility applicable at the time when the action was brought.
- 29 Since the list of officials adjudged the most deserving of promotion is binding on the appointing authority, it is unnecessary, according to the applicant, to regard it as a preparatory act except in relation to the officials included on it but not subsequently promoted. In the case of officials not included on the list, however, the application of the principles laid down by the Court in its judgment in *Bossi* would mean an impairment of their rights and interests. If those principles were applicable to them, they would have to await the publication of the list of officials promoted in order to be able to assert their rights, first before the administration, and then before the Court. The possibilities of securing a 'rectification' in their favour would therefore be reduced.
- 30 Having regard to those factual and legal considerations, it is appropriate to begin by determining the act of the Commission against which the action is directed. The applicant has pointed out that the action, 'in so far as is necessary', is 'also' directed against Mr Morel's letter. However, that letter refers only to the proposals for promotion drawn up by DG XIX, which have not been challenged by the applicant. The applicant sought only the annulment of a subsequent list which was not commented on in the letter in question. It follows that Mr Morel's letter is not an act contested in the action. It is merely a factual detail on which the applicant relies in support of one of his submissions, namely that the second paragraph of Article 25 of the Staff Regulations was infringed. Accordingly, the action is directed only against the list of officials adjudged the most deserving of promotion to Grade B 2 in 1988.

- 31 With regard to the applicant's argument to the effect that a prior complaint was unnecessary inasmuch as the deliberations of a promotion committee are comparable to those of a selection board for a competition, it should be noted that the contested list was drawn up not by the promotion committee but by the appointing authority itself. According to its decision of 11 July 1988, the appointing authority examined the draft list drawn up by the promotion committee as well as the Minutes of the meeting of that committee and the foreseeable budgetary resources before drawing up the list complained of (see Annex 3 to the defence). The list is therefore an act originating from the appointing authority itself. Accordingly, it is not comparable to the decision of a selection board for a competition.
- 32 If the contested list constitutes, as the applicant maintains, an act adversely affecting him, he was under an obligation, pursuant to Articles 90 and 91 of the Staff Regulations, to lodge a complaint against it with the appointing authority. As the Court has consistently held, any action challenging an act adversely affecting the applicant and originating from the appointing authority must necessarily be preceded by a complaint which has been rejected by express or implied decision. By virtue of Article 91(2) of the Staff Regulations, an action brought before that preliminary procedure has been completed is premature and therefore inadmissible (see, for example, the order of 23 September 1986 in Case 130/86 *Du Besset v Council* [1986] ECR 2619, at p. 2621).
- 33 In this case, the applicant did lodge a complaint with the Commission. However, he brought an action without awaiting the rejection of that complaint by express or implied decision, as provided for by Article 91(2) of the Staff Regulations. The administration had not therefore completed its reconsideration of the contested measure before the action was brought. It must therefore be held that, if the contested list constitutes an act adversely affecting the applicant, the action is inadmissible.
- 34 If, on the other hand, as the Commission maintains, the list does not constitute an act adversely affecting an official eligible for promotion but not included on the list, the action is also inadmissible, for the simple reason that there is no act adversely affecting the applicant.
- 35 In those circumstances, and without there being any need to rule on the other objections of inadmissibility raised by the Commission or to determine whether or

not the contested list constitutes an act adversely affecting the applicant, it must be held that the action is inadmissible in any event.

Admissibility of the action brought in Case T-82/89

- 36 In this case, the Commission has also raised an objection of inadmissibility in accordance with Article 91 of the Rules of Procedure. Referring to the judgment in *Bossi* which, in its view, forms part of a consistent line of decisions by the Court (judgment of 7 April 1965 in Case 11/64 *Weighardt v EAEC Commission* [1965] ECR 285; order of 24 May 1988 in Joined Cases 78/87 and 220/87 *Santarelli v Commission* [1988] ECR 2699, at p. 2703), the Commission reiterates the arguments which it put forward in Case T-47/89 in support of its contention that there is an absolute bar to proceeding with the case. As the applicant did not lodge a complaint seeking the annulment of the list of officials promoted to Grade B 2, he is now barred from calling that list in question in legal proceedings.
- 37 The applicant argues that — in this case — he has complied in full with the preliminary procedure for lodging a complaint. He refers to his argument to the effect that the list of officials adjudged the most deserving of promotion constitutes an act adversely affecting him. The applicant also maintains that the Commission has already exhausted the arguments concerning inadmissibility in the objection of inadmissibility which it raised in Case T-47/89. In his view, the judgment in *Bossi* constitutes a change of case-law which cannot give rise to an absolute bar to proceeding with the case. Finally, the application to promotion procedures of the principles laid down by the Court in *Bossi* would substantially reduce the possibilities of a 'rectification' in favour of officials not included on the list of those most deserving of promotion.
- 38 Since the preliminary procedure ran its full course before the action was brought, the Court will consider the objection of inadmissibility raised by the defendant institution at the same time as the substance of the case.

Costs in Case T-47/89

- 39 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to the Court of First Instance and pursuant to the third paragraph of Article 11 of the aforesaid Council Decision of 24 October 1988, the

unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure, the institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- (1) Dismisses the application in Case T-47/89 as inadmissible;**
- (2) Orders the parties to bear their own costs in Case T-47/89;**
- (3) In Case T-82/89 the objection of inadmissibility raised by the defendant will be considered at the same times as the substance of the case.**

Kirschner

Briët

Biancarelli

Delivered in open court in Luxembourg on 20 June 1990.

H. Jung

Registrar

H. Kirschner

President of the Fifth Chamber