

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
24 January 1991 *

In Case T-63/89,

Edward Patrick Latham, an official of the Commission of the European Communities, residing at Wezembeek-Oppem (Belgium), represented by George Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by Sergio Fabro, Legal Adviser, acting as Agent, assisted by Claude Verbraeken, of the Brussels Bar, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the applicant's staff report for the period 1981 to 1983 and for damages,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

composed of D. Barrington, President of the Chamber, C. P. Briët and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator

having regard to the written procedure and further to the hearing on 10 July 1990,

gives the following

* Language of the case: French.

Judgment

The facts

- 1 The applicant, who has been an official of the Commission of the European Communities since 1971, worked from August 1973 in Directorate-General (DG) III (Internal Market), later known as the Directorate-General for the Internal Market and Industrial Affairs. He was subsequently transferred to DG XI (Environment, Consumer Protection and Nuclear Safety) with effect from 1 February 1983 where he worked in the division responsible for the protection and promotion of consumer interests.

- 2 The applicant's draft staff report for the period from 1 July 1981 to 30 June 1983 was drawn up by the Director of DG III/D, Ivo Schwartz, and was notified to the applicant on 30 March 1987. After discussions with the applicant on 13 April 1987, Mr Schwartz finalized the staff report on 6 May 1987. The applicant subsequently referred the report to the appeal assessor, who drew up his report on 7 July 1987, and to the Joint Committee on Staff Reports, which gave its opinion on 15 February 1988. In its opinion, the Joint Committee called on the appeal assessor to review the staff report. The appeal assessor decided not to make any amendment to the staff report, the final version of which, dated 17 March 1988, was notified to the applicant on 18 March 1988.

- 3 The applicant then lodged a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities against the appeal assessor's decision not to amend the staff report. By a decision of 11 November 1988, communicated to the applicant by letter of 22 November 1988 and notified on 24 November 1988, that complaint was expressly rejected.

- 4 On 16 September 1986, the applicant submitted his candidature for a grade A 3 post vacant in DG III. On 30 October 1986 he was informed that his candidature had been rejected by the Commission and on 20 November 1986 he submitted a complaint against that decision. Those administrative proceedings were not followed by an application to the Court.

Procedure

- 5 By application lodged at the Registry of the Court of Justice on 14 February 1989, the applicant brought the present action.
- 6 The written procedure followed the normal course before the Court of Justice.
- 7 By order of 15 November 1989, the Court of Justice referred the case 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.
- 8 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.
- 9 The hearing was held on 10 July 1990 at the end of which the President declared the oral procedure closed.

Forms of order sought by the parties

- 10 The applicant claims that the Court should:
 - (i) declare the application admissible and well founded;
 - (ii) annul the decision of 17 March 1988 of F. Braun, Director-General (DG III), acting as appeal assessor, not to amend the applicant's staff report;
 - (iii) award him compensation for material and non-material damage suffered of an amount equivalent to two years' salary in grade A 3 and the sum of BFR 200 000 respectively;
 - (iv) order the defendant to pay the costs in their entirety.

The Commission contends that the Court should:

- (i) dismiss all the heads of claim in the application as unfounded;
- (ii) order the applicant to bear his own costs, pursuant to Articles 69(2) and 70 of the Rules of Procedure of the Court of Justice.

The first head of claim: annulment of the appeal assessor's decision of 17 March 1988

- 11 In support of this claim, the applicant alleges that the drawing up of his staff report was vitiated by three procedural irregularities: first, infringement of Article 6 of the General Provisions implementing Article 43 of the Staff Regulations, adopted by the Commission by decision of 27 July 1979 (hereinafter referred to as the 'General Provisions'), secondly, a manifest error of fact which invalidated his staff report, and, thirdly, infringement of Article 3 of the General Provisions.

The first plea in law: infringement of Article 6 of the General Provisions

- 12 In support of his first plea in law, namely infringement of Article 6 of the General Provisions, the applicant claims that, under that article, the draft staff report for the period 1981 to 1983 should have been referred to him by 30 November 1983. However, his staff report was not finally drawn up until 30 March 1987, three years and four months after the prescribed date. That considerable delay is unacceptable and incompatible with the principle of sound administration (judgment of the Court of Justice in Joined Cases 173/82, 157/83 and 186/84 *Castille v Commission* [1986] ECR 497). Consequently, the staff report should be annulled and the defendant should be ordered to pay him the sum of BFR 200 000 by way of damages for maladministration. Where promotion is concerned, it is essential — as is confirmed by the case-law of the Court of Justice — for the reporting procedure to be conducted properly, and in particular for the time-limits expressly laid down for that purpose to be observed (judgment in Case 293/87 *Vainker v Parliament* [1989] ECR 23). In the present case, the administration

alone was responsible for the failure to observe the reporting procedure. It is not permissible to attribute any responsibility to the applicant.

13 Whilst not denying that the delay in drawing up the initial report and thereafter the final report was excessive, the Commission nevertheless contends that that delay cannot, of itself, affect the validity of the staff report and, consequently, justify its annulment. In that regard it relies on the judgments of the Court of Justice in Case 1/87 *Picciolo v Commission* [1988] ECR 711 and Case 140/87 *Bevan v Commission* [1989] ECR 701. The defendant also denies that the applicant can prove an interest in obtaining the annulment of his staff report on the ground of 'failure to comply with the time-limits laid down in the Guide to staff reports'. It states that the only result of annulment in that way would be that the staff report would have to be drawn up again, giving rise to an even longer delay.

14 With respect to the first plea, this Court considers that it must be stated that the staff report at issue covering the period from 1 July 1981 to 30 June 1983 was not drawn up by 13 November 1983, the latest date prescribed by the first paragraph of Article 6 of the General Provisions, and that it was not finally settled until 6 May 1987, that is to say after a considerable delay.

15 However, it has consistently been held that delay in completing the reporting procedure cannot in any event, of itself, affect the validity of the staff report or, in consequence, justify the annulment thereof (see judgments of the Court of Justice in Case 1/87 *Picciolo* and Case 140/87 *Bevan*, cited above).

16 That plea in law must therefore be dismissed.

The second plea in law: manifest error vitiating the applicant's staff report

17 In support of his second plea in law, namely that a manifest error of fact was committed, the applicant alleges that certain remarks contained in the staff report under the heading 'general assessment' are superfluous and incorrect. According to

the applicant, the defendant made certain assessments which were intentionally prejudicial to him, in the preparatory versions of his staff report of 30 March 1987, 6 May 1987 and 7 July 1987. Moreover, the defendant had, at least in part, acknowledged that they were unfounded. The defendant added to the version of 7 July 1987 further unpleasant and unfounded remarks about the applicant concerning, on the one hand, a trait of his character and, on the other, an alleged dispute between him and another official. The assessor is not permitted to make remarks of that kind in the general part of a staff report. The defendant committed manifest errors of fact, and also misused its powers in so far as the appeal assessor did not observe the principles of natural justice embodied in the maxims *audi alteram partem* and *nemo iudex in causa sua*.

- 18 The defendant replies that, in so far as those criticisms relate not to the contested decision but to the draft staff reports, they cannot be regarded as adversely affecting the applicant. It also refers to the Court of Justice's consistent case-law declining, in principle, to review value judgments contained in staff reports (judgment in Case 207/81 *Ditterich v Commission* [1983] ECR 1359, paragraph 15). It adds that, according to the same decisions, assessors enjoy the widest discretion concerning the appraisal of the work of persons on which they are responsible for reporting and that it is not the Court's function to take over the role of the assessor except in the case of error or manifest abuse (*Ditterich*, cited above; judgments in Case 105/81 *Oberthür v Commission* [1982] ECR 3781, paragraph 26, and Joined Cases 36/81, 37/81 and 281/81 *Seton v Commission* [1983] ECR 1789, paragraph 23). As regards the conflict between the applicant and another official, the defendant states that the applicant himself made certain remarks regarding that official in his comments to the appeal assessor, thereby choosing to pursue that dispute in the context of the staff report. Finally, the defendant contends that the procedure for drawing up a staff report is not one which leads to a judgment: neither the principle of *audi alteram partem* nor the principle that the judge must be impartial applies.

- 19 The Court considers that, according to established case-law, it does not have the function of determining whether the assessment by the administration of the occupational ability of an official is well founded when such an assessment involves complex value judgments which, by their very nature, are not capable of objective proof (judgments in Case 29/70 *Marcato v Commission* [1971] ECR 243 and in

Case 207/81 *Ditterich*, cited above). However, those cases concern only value judgments and the Court is required to carry out a review concerning any irregularities of form, manifest errors of fact vitiating the assessments made by the administration and any misuse of power.

- 20 In the present case, it is apparent from the information produced during the proceedings and the documents before the Court, in particular those produced by the applicant himself, that the remarks made in the staff report for the period 1981 to 1983 by the first assessor and then by the appeal assessor are not based on errors of fact, are not vitiated by a manifest error of assessment and do not disclose any misuse of powers.
- 21 It follows from the foregoing that this plea must be dismissed.

The third plea in law: infringement of Article 3 of the General Provisions

- 22 The applicant alleges that contrary to the General Provisions, as amplified by paragraph B.5.2.2(a) of the Guide to staff reports prepared by the Commission, neither the various draft staff reports nor the final report were signed by a competent official within DG XI, even though the applicant had worked in that DG for five months during the period covered by the staff report. He maintains that his new superiors could have qualified or corrected the observations relating to his conduct and the appraisals of the appeal assessor in that regard.
- 23 The defendant does not deny that the competent officials in DG XI were not consulted when the staff report was drawn up. Nevertheless, that error does not constitute 'a substantial irregularity of such a kind as to invalidate the reporting procedure' (judgment in Case 1/87 *Picciolo, supra*), or, consequently, a sufficient reason to justify annulment of the report. The consultation of the competent officials in DG XI would not have been capable of bringing about any change in the observations contained in the report under the heading 'general assessment'

which are disputed by the applicant, in so far as those assessments relate only to the applicant's activities in DG III, not in DG XI, and the reasons for his transfer to DG XI. The defendant asks whether its Guide to staff reports can reasonably be held to impose on it, in that regard, a binding obligation to which there can be no exceptions, regardless of the circumstances.

- 24 In the Court's view, the applicant is claiming in substance that the absence of consultation of his superiors in DG XI by the competent assessor, his former superior in DG III, even though he had been assigned to DG XI as from 1 February 1983, constitutes an infringement of the second paragraph of Article 3 of the General Provisions. That article provides that the superiors in other departments to which the official belonged during the reference period are first to be consulted by the assessor. As regards the lack of consultation, that statement is not contested.
- 25 It must be recalled that even though it cannot be regarded as a general implementing provision within the meaning of Article 110 of the Staff Regulations, a decision of a Community institution communicated to all its staff and intended to guarantee the officials concerned the same treatment regarding the reporting procedure constitutes an internal directive and must, as such, be regarded as a rule of conduct, indicating the practice to be followed, which the administration imposes on itself and from which it may not depart without specifying the reasons for doing so, since otherwise the principle of equality or treatment would be infringed (judgments of the Court of Justice in Case 148/73 *Lowwage v Commission* [1974] ECR 81 and Case 190/82, *Blomefield v Commission* [1983] ECR 3981). Moreover, the essential purpose of Article 3 of the General Provisions is to facilitate the drawing up of staff reports which are as objective and complete as possible.
- 26 It follows that, in the circumstances of the present case, in which the defendant has put forward no serious reason to justify derogation from the rules contained in the Guide to staff reports which it imposed on itself, the administration, by departing from the provisions of that guide without reason, has rendered its decision procedurally defective so as to deprive it of any legal basis.
- 27 As regards the defendant's argument that the infringement of the second paragraph of Article 3 of the General Provisions does not constitute a substantial

irregularity such as to invalidate the staff report, since consultation of the applicant's superiors in DG XI could in no way have brought about any change in the observations in the staff report which are disputed by the applicant, it must be stated that, according to the procedure laid down in the second paragraph of Article 3 of the General Provisions, the official's superiors in any other departments to which he belonged during the reference period, after being consulted by the assessor, are to sign the report and may append their comments if they disagree with the assessor. The primary function of the staff report is to provide the administration with periodic information, which is as complete as possible, on the performance of their duties by officials (judgment of the Court of Justice in Joined Cases 6/79 and 97/79 *Grassi v Council* [1980] ECR 2141). The staff report cannot fulfil that function in a truly comprehensive manner if the superiors in the other departments in which the official in question discharged his duties are not consulted in advance and given an opportunity to make any comments. That is so even if the official was assigned to another department only for a period of five months, even though the reference period is 24 months. It follows that the failure to consult senior officials in DG XI concerning the applicant's staff report constitutes a substantial procedural irregularity of such a kind as to render the staff report invalid.

28 Since the reporting procedure was thus unlawful, the decision of 17 March 1988 definitively adopting the applicant's staff report for the period 1981-83 must be annulled.

The second head of claim: damages

29 The applicant claims that the absence of a staff report when his candidature for a grade A 3 post in DG III was rejected constituted maladministration on the part of the Commission and that its wrongful act is of such a kind as to justify reparation for the material and non-material damage thereby caused to him.

The plea in law seeking compensation for alleged material damage

30 The applicant seeks, as compensation for the material damage which he considers that he has suffered, a payment equivalent to two years' salary in grade A 3.

- 31 The defendant contends that that claim should be rejected on the ground that the applicant did not bring an action in due time against the rejection of his candidature for the vacant post in DG III. Moreover, according to the defendant, the material damage alleged by the applicant is neither sufficiently direct nor sufficiently certain to justify compensation.
- 32 This Court considers that it is apparent from the case-law of the Court of Justice that, in order to obtain compensation for material damage caused by an irregular staff report, the official concerned must establish with sufficient precision a causal link between the alleged maladministration, that is to say in the present case the irregularity of the staff report, and the damage allegedly suffered (judgments in Case 207/81 *Ditterich*, in Joined Cases 173/82, 157/83 and 186/84 *Castille*, and in Case 1/87 *Picciolo*, cited above).
- 33 In the present case, it appears from the documents before the Court that the applicant has not established that the absence of his staff report had a decisive influence on his failure to be promoted. In those circumstances, without its being necessary to consider whether the Commission was guilty of maladministration, the claim for compensation for material damage must in any event be dismissed.

The plea in law seeking compensation for non-material damage

- 34 The applicant seeks the award of a sum of BFR 200 000 by way of compensation for non-material damage on the ground that the delay in drawing up his staff report in itself caused him damage.
- 35 The defendant contends in that regard that the applicant has not specified the exact nature of the alleged damage and that, consequently, his claim must be dismissed as unfounded. In any event, the defendant considers that the sum asked for is excessive.
- 36 The Court considers that, as regards the delay in drawing up the draft staff report, three things must be taken into account: first, the first paragraph of Article 43 of the Staff Regulations according to which 'the ability, efficiency and conduct in the

service of each official . . . shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110'; secondly, the first paragraph of Article 6 of the General Provisions which provides 'the assessor shall compile the report and refer it to the official assessed by 30 November of the year in which the reference period ends'; and, thirdly, the judgment in Joined Cases 173/82, 157/83 and 186/84 *Castille*, cited above, in which it was held that 'delays in the drawing up of staff reports may in themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions concerning them must be taken'.

As this Court held in its judgment in Case T-73/89 *Barbi v Commission* [1990] ECR II-619 'an official in possession of an irregular and incomplete personal file thereby suffers non-material damage as a result of being put in an uncertain and anxious state of mind with regard to his professional future' (see the judgments of the Court of Justice in Case 61/76 *Geist v Commission* [1977] ECR 1419 and Case 140/87 *Bevan*, cited above). On the other hand, an official is not entitled to any compensation for alleged non-material damage if he himself contributed significantly to the delay complained of or if the administration did not fail to refer its draft report to him within a reasonable period — any failure to make the report available within that period must be justified by the existence of special circumstances (judgment in Case 207/81 *Ditterich*, cited above).

In the present case, it was not until 30 March 1987 that the applicant received a draft staff report for the period 1981 to 1983, whereas it should have been made available to him no later than 30 November 1983. Thus, the Commission's delay in preparing the provisional staff report provided for in the first paragraph of Article 6 of the General Provisions amounted in this case to three years and four months. Moreover, the Commission has not invoked any special circumstance to justify such a delay and the applicant did not contribute to the delay in any way.

It must therefore be held that the Commission has committed an act of maladministration in respect of which the applicant is entitled to compensation for non-material damage. In the circumstances of the present case, the Court considers that such damage may be fairly assessed in the sum of BFR 100 000.

40 Accordingly, it is appropriate to:

- (i) annul the decision of 17 March 1988 definitively adopting the applicant's staff report for the period 1981 to 1983;
- (ii) order the defendant to pay the applicant the sum of BFR 100 000 by way of damages in respect of maladministration;
- (iii) dismiss the application in other respects.

Costs

41 Pursuant to Article 69(2) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to proceedings before the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they are asked for in the successful party's pleadings. Since the Commission has failed in its main pleas, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- (1) Annuls the decision of 17 March 1988 definitively adopting the applicant's staff report for the period 1981 to 1983;**
- (2) Orders the Commission to pay the applicant the sum of Bfr 100 000 by way of compensation for the non-material damage suffered by him;**
- (3) For the rest, dismisses the application;**

(4) Orders the Commission to pay the costs in their entirety.

Barrington

Briët

Biancarelli

Delivered in open court in Luxembourg on 24 January 1991.

H. Jung
Registrar

C. P. Briët
President