not be relevant factors where the appointing authority, which has a wide discretion in this area, is able to decide between the candidates on the basis of an assessment of their qualifications and merits.

5. A promise of promotion made in disregard of the provisions of the Staff Regulations cannot give rise to a legitimate expectation on the part of the person to whom it is made.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

26 October 1993 *

In Case T-22/92,

Roderich Weißenfels, an official of the European Parliament, residing at Bereldange (Luxembourg), represented by Günther Maximini, Rechtsanwalt, Trier, with an address for service in Luxembourg at the premises of Marie-Berthe Weißenfels, 1 Rue de la Paix, Bereldange,

applicant,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, assisted by Johann Schoo, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for annulment of two decisions of the President of the European Parliament of 3 July 1991 appointing Mr T. and Mr L. to posts declared vacant under reference Nos II/A/645 and II/A/680,

* Language of the case: German.

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

composed of: C. W. Bellamy, President, H. Kirschner and C. P. Briët, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearings on 18 February and 5 May 1993,

gives the following

Judgment

The Facts

1 The applicant, Roderich Weißenfels, has worked for the European Parliament since 1 April 1982. He has been an administrator in Grade A6 since 1 January 1985 and has been assigned to the Directorate-General for Committees and Delegations (hereafter 'DG II') in the General Secretariat since 1 July 1987.

2 On 10 December 1990 the Parliament published Vacancy Notices Nos 6478 and 6479 for two posts of principal administrator in DG II (career bracket A5/A4), posts Nos II/A/680 and II/A/645 respectively. The deadline for applications was set at 21 December 1990. The applicant applied for these two posts by applications dated 19 December 1990, which were received by the Recruitment Department of the Directorate-General for Personnel, the Budget and Finance on 20 December 1990.

3 In an opinion sent on 1 February 1991 to the Director-General of Personnel, the Budget and Finance, the Director-General of DG II recommended that Mr T. be promoted to post No II/A/680 and Mr L. to post No II/A/645.

4 By two decisions of 3 July 1991, the appointing authority appointed Mr T. and Mr L. to the posts in question.

5 On 9 July 1991 the applicant was informed of the decision promoting Mr L. (post No II/A/645) and on 18 July 1991 he was informed of the decision promoting Mr T. (post No II/A/680).

6 By memorandum of 7 October 1991 the applicant lodged a complaint seeking annulment of the decision promoting Mr L. and by memorandum of 14 October 1991 he lodged a complaint seeking annulment of the decision promoting Mr T.

7 In his capacity as appointing authority, the President of the Parliament rejected those complaints by decision of 10 January 1992, received by the applicant on 13 January 1992.

8 Meanwhile, the applicant's staff report for the period 1 January 1989 to 1 January 1991 was signed by the final assessor on 14 February 1991. On 30 April 1991 the applicant submitted his comments on the report and on 25 June 1991 he lodged a complaint against that report. On 11 July 1991 the final assessor made two amendments to the report following an interview with the applicant and consultation with his superiors. By letter of 18 December 1991, in reply to a letter from the applicant dated 26 November 1991, the Secretary-General of the Parliament stated that he had no objection to reconsidering his file and had reconsidered all the aspects of his complaint of 25 June 1991. He informed him of his decision to uphold the staff report as amended in July 1991. By letter of 19 March 1992 the applicant lodged a

complaint against his final staff report. That complaint was rejected by decision of the President of the Parliament of 4 June 1992.

Procedure

9 In those circumstances, the applicant lodged this application at the Registry of the Court of First Instance on 23 March 1992.

10 The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. However, the Court put a question to the defendant by letter from the Registrar of 21 January 1993. The defendant replied by letter lodged with the Court Registry on 3 February 1993, to which a memorandum dated 1 February 1993 from the Director-General of DG II to the Jurisconsult of the Parliament was annexed.

11 The oral procedure was held on 18 February 1993. Oral argument was heard from the parties' representatives, who answered questions put by the Court. The Parliament lodged a document at the hearing.

12 After the oral procedure was closed, the Parliament replied to a question put by the Court at the hearing by letter lodged with the Court Registry on 19 February 1993. The applicant, for his part, lodged two letters on 5 and 8 March 1993 respectively.

13 By order of 16 March 1993 the Court reopened the oral procedure.

14 By letter from the Registrar dated 24 March 1993, the Court asked the Parliament to forward the complete files on Vacancy Notices Nos 6478 and 6479 intended to fill posts Nos II/A/680 and II/A/645. On 13 April 1993 the Parliament lodged those files with the Registry. In addition, the Court asked the Parliament to ensure that the Director-General of DG II might attend the next hearing in addition to its Agent.

15 After studying the files lodged by the Parliament, the applicant put forward a new plea, by letter lodged with the Registry on 28 April 1993, alleging breach of the application procedure set out in Staff Notice No 89/4 of 7 December 1989 concerning the procedure for filling vacant posts in the General Secretariat of the Parliament (hereafter 'Staff Notice No 89/4'). The parties were heard for a second time at the new hearing held on 5 May 1993. At that hearing, the Parliament waived the right open to it under Article 48(2) of the Rules of Procedure to reply in writing to the new plea raised by the applicant. It did, however, lodge two documents.

Forms of order sought

16 The applicant claims that the Court should:

1. annul the defendant's decisions of 3 July 1991 promoting, with effect from 1 January 1991, officials L. and T. to the posts of principal administrator (A5/A4), in accordance with Vacancy Notices Nos II/A/645 and II/A/680;

2. annul as unfounded the defendant's decision of 10 January 1992, received by the applicant on 13 January 1992, rejecting his two complaints of 7 and 14 October 1991;

3. order the defendant to reconsider the applications made by the applicant on 19 December 1990 in response to Vacancy Notices Nos 6478 and 6479, and order it not to take any decision on promotion under Article 45(1) of the Staff

Regulations, with due regard for the opinion of the Court, until a valid staff report on the applicant for the 1989 and 1990 calendar years within the meaning of Article 43 of the Staff Regulations has been drawn up;

4. order the defendant to pay the costs, including the applicant's disbursements.

17 In its defence the Parliament contends, first, that the Court should:

— reject as inadmissible consideration of the complaint made by the applicant on 19 March 1992 in these proceedings;

In the alternative,

— stay these proceedings, pursuant to Article 76 of the Rules of Procedure, until a decision has been taken on the complaint of 19 March 1992.

Secondly, it contends that the Court should:

1. dismiss the application as unfounded;

2. make an order as to costs in accordance with Article 88 of the Rules of Procedure.

18 Following the decision of the President of the Parliament of 4 June 1992 rejecting the complaint he had made on 19 March 1992 concerning his staff report, the applicant further claims in the reply that the Court should:

1. declare the reporting procedure in respect of the applicant for the 1989 and 1990 calendar years void, including the final decision of the Secretary-General of 18 December 1991 and the individual assessments contained in paragraph 10(1) of the form;

In the alternative,

declare the assessment procedure in respect of the applicant for the 1989 and 1990 calendar years, the final decision of the Secretary-General of 18 December 1991 and the individual appraisals contained in paragraph 10(1) of the form invalid;

2. annul the defendant's decision of 4 June 1992 rejecting the applicant's complaint of 19 March 1992 as unfounded;

3. order the defendant to reopen the assessment procedure in respect of the applicant, subject to the appointment of an impartial assessor;

4. order the defendant also to pay the costs of this additional claim, including the applicant's disbursements.

19 In its rejoinder, the defendant contends that the Court should:

1. reject the additional claim as inadmissible or, in the alternative, as unfounded;

2. reject the application as unfounded;

3. make an order as to costs in accordance with Article 88 of the Rules of Procedure.

20 By letter lodged with the Court Registry on 5 March 1993, the applicant claims that the Court should:

reject as being out of time all allegations put forward subsequently (to the oral procedure) by the defendant, pursuant to the second paragraph of Article 48 of the Rules of Procedure.

Admissibility

The third head of claim seeking an order by the Court that the defendant reconsider the applicant's applications and that it take no decision to fill posts Nos II/A/645 and II/A/680 until a valid staff report has been drawn up

Arguments of the parties

21 The Parliament has raised an objection of inadmissibility against the third head of claim seeking reconsideration of the applicant's applications after a valid staff report has been drawn up. It argues that this head of claim must be rejected as inadmissible since the applicant can only seek the annulment of decisions which he considers to have affected him adversely. The institution is obliged to take the measures required under the judgment of the Court, but no separate claim to that effect need be submitted.

22 The applicant argues that the third head of claim is not only admissible but logical and necessary. He argues that his complaints may only be dealt with by reconsidering his applications for vacant posts Nos 6478 and 6479. He takes the view that he must be put back in the position in which he would have been if the legally

defective act which adversely affected him had not taken place. The measures sought aimed at preventing the Parliament, after the decisions in issue had been annulled, from subsequently putting them back into force by means of 'made to measure' vacancy notices with different grounds. During the oral procedure he also argued that Article 176 of the EEC Treaty does no more than set out the institution's obligation to comply with a judgment and that if the Court ordered the institution to take a particular measure, such compliance would be facilitated.

Findings of the Court

23 In this head of claim the applicant asks the Court to make orders directed at the authority responsible for complying with this judgment. The Court has consistently held that it is not the role of the Court, in judicial review proceedings, to make orders directed at the Community authorities, thereby usurping their prerogatives. Accordingly, this head of claim must be declared inadmissible.

The additional claim made in the reply

Arguments of the parties

24 In its rejoinder, the Parliament raises a plea of inadmissibility against the additional claim made by the applicant in his reply. First, it points out that there is no provision for any procedure for additional claims in the Rules of Procedure. The additional claim is thus an attempt by the applicant to put forward out of time pleas in law which were not relied on in the complaint made on 19 March 1992 against the decision adopting the final version of his staff report for 1989-1990. The applicant is thus attempting to circumvent the prohibition contained in Article 48(2) of the Rules of Procedure.

25 The Parliament further argues that the complaint of 19 March 1992 has an independent subject, namely the alleged unlawfulness of the assessment procedure, and is thus distinct both from the complaints of 7 and 14 October 1991, which related

to a different subject, and from the application as lodged on 23 March 1992. In making this additional claim the applicant is, moreover, depriving himself and, above all, the defendant of the opportunity to analyse the new arguments in detail.

26 At the hearing, the applicant argued that, according to generally recognized legal principles, an additional claim is admissible where its purpose is closely linked, as here, to that of the original claim. He takes the view that whatever is not expressly designated inadmissible in the Rules of Procedure is admissible. If, however, the Court of First Instance should consider the additional claim to be inadmissible, he asks it to separate it from these proceedings and treat it as separate proceedings.

Findings of the Court

27 The Court has consistently held (see, for example, Case T-41/89 *Schwedler* v *Parliament* [1990] ECR II-79) that, under Article 44(1) in conjunction with Article 48(2) of the Rules of Procedure, the subject-matter of the claim must be set out in the application, and a claim put forward for the first time in the reply modifies the original subject-matter of the application and must be regarded as a new claim and, accordingly, rejected as inadmissible. In this case, it is clear from the originating application that it only concerns the decisions promoting Mr L. and Mr T. respectively. It was not until the reply that the applicant extended and thereby modified the very subject-matter of the proceedings by seeking the annulment of the decision of 4 June 1992 rejecting his complaint of 19 March 1992 as unfounded.

28 It follows that the additional claim made in the reply is a new claim and, therefore, inadmissible.

29 Moreover, the Rules of Procedure do not allow the Court of First Instance to treat a new claim made in the reply as an application within the meaning of Article 44 of those Rules. Accordingly, the request made by the applicant at the hearing seeking the separation of the additional claim from these proceedings and its treatment as separate proceedings, must also be rejected.

The new plea put forward in the course of proceedings alleging violation of the application procedure set out in Staff Notice No 89/4

30 At the second hearing on 5 May 1993 the applicant argued that the promotion of Mr T. was unlawful on the ground that there was a breach in his case of the application procedure, as set out in paragraph IV of Staff Notice No 89/4 replacing Staff Notice No 87/3 of 11 November 1987 and establishing, in particular, the rules on the publication of notices of vacancy and the submission of applications. The applicant argued essentially that, in the two promotion procedures, Mr T. submitted his application after the deadline given in Vacancy Notices Nos 6478 and 6479.

Arguments of the parties

31 The Parliament raises a plea of inadmissibility against this new plea introduced during the course of proceedings, alleging the late submission of Mr T.'s application. It takes the view that the applicant could have asked the administration for leave to consult the applications for the two vacant posts before proceedings were brought or that he ought to have asked the Court to forward the entire file to him.

32 The applicant takes the view that his new plea is admissible. He claims that he had no knowledge of the facts he relies on in support of his plea until he consulted the files concerning Vacancy Notices Nos 6478 and 6479 after they had been lodged with the Registry at the Court's request. He avers that he had no opportunity to see the files on the applications of Mr T. and Mr L. until the Court had ordered their production.

Findings of the Court

33 First the Court points out that under Article 48(2) of the Rules of Procedure no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.

34 In this case, it is clear from the file that, first, the facts relied on in support of the plea in question came to the knowledge of the applicant when he studied the administrative files concerning vacant posts Nos 6478 and 6479, forwarded by the Parliament to the Court at the latter's request following the reopening of the oral procedure, and that these files would not otherwise have been available to the applicant. Secondly, it appears that the applicant was not in a position to have any knowledge of those facts in any other way. The suggestion by the Parliament that he could have asked the administration for leave to consult the applications of the other candidates cannot on its own alter this analysis of the situation.

35 Therefore, the plea in question is based, as required by Article 48 of the Rules of Procedure, on matters of fact which came to light in the course of the procedure and, accordingly, it must be allowed and the plea of inadmissibility raised against it must be rejected.

Substance

36 The applicant has forward three pleas in support of his application. The first alleges breach of Articles 45(1) and 5(3) of the Staff Regulations, the second breach of verbal assurances of promotion allegedly given to him and the third alleges breach of the application procedure set out in Staff Notice No 89/4. The third plea should be considered first.

The plea alleging breach of the application procedure set out in Staff Notice No 89/4

Arguments of the parties

37 In support of this plea the applicant points out that he discovered that one of the two officials promoted, Mr T., submitted his application after the deadline in the two promotion procedures without giving a satisfactory explanation to justify missing the deadline or adducing sufficient reasons to support a request for an extension of the deadline. Accordingly, he argues, the official responsible for the recruitment department initially rejected the applications of the official in question as being out of time but, two days later, on instructions from his superior and without any reasons being given, that official made a note that the applications in question had nonetheless been accepted. Since the applicant was himself a candidate for the vacant posts, he takes the view that the promotion of the official in question is unlawful and that the decision to promote him must be annulled.

38 The Parliament refers to paragraphs B and C of Chapter IV, 'Application procedure', of Staff Notice No 89/4, to explain that there is an administrative practice in general use which allows officials travelling on mission to Brussels or Strasbourg to submit their applications for vacant posts after the deadline, and this is not disputed by the applicant. Such officials are not bound by the deadline for the period of their mission, first, because they do not normally have the time to submit applications for vacant posts and, secondly, because they do not usually have the opportunity to see notices of vacancy. Although they have the option of submitting an application by facsimile, the administration considers that a mission constitutes an excuse.

39 The Parliament points out that Vacancy Notices Nos 6478 and 6479 were posted on the notice board from 10 to 21 December 1990. Throughout that period Mr T. had a valid excuse. He was on mission in Strasbourg during the week from 10 to 14 December 1990 and submitted a sick note for the period from 17 to 21 December 1990. Accordingly, it is argued, the administration considered his delay to be excusable.

Findings of the Court

40 Vacancy Notices Nos 6478 and 6479 informing the staff of the European Parliament of the two vacancies in issue refers to Staff Notice No 89/4 for details of the application procedure. That Staff Notice, signed by the Director-General of Personnel, the Budget and Finance, is addressed to all staff and is intended to guarantee to officials and other servants of the General Secretariat of the Parliament who wish to apply for a vacant post brought to their attention by a notice on the notice board a uniform procedure for filling vacant posts and uniform procedures for publication and the submission of applications. It is thus an internal directive, by which the administration imposes on itself indicative rules of conduct from which it may not depart without specifying the reasons which led it to do so, since otherwise the principle of equality of treatment would be infringed (see, for example, Case 25/83 *Buick* v *Commission* [1984] ECR 1773).

41 In Staff Notice No 89/4 the application procedure is dealt with in Chapter IV, paragraphs B and C. Those paragraphs read as follows:

'B. Staff based in or on mission to Brussels and Strasbourg and staff posted to the external offices may submit their applications via telecopier (No 43.58.45) provided that they also confirm this application by sending the original form in the special envelope at the same time.

This procedure will eliminate any delay that might result from problems in delivering the application to the Recruitment Service in Luxembourg.

C. *Applications received after expiry of the time limit will not be considered*, save in duly justified exceptional cases, such as absence on annual leave, mission or sick leave *during the entire period of display of the notice of vacancy*. In such cases, supporting documents must be attached to the application in the form of a copy of either the leave application, the mission order or form F 501 "Avis d'absence pour maladie ou accident" (Notification of absence due to illness or accident), which may be obtained from the Medical Service.

No action will be taken on any application which does not satisfy these requirements.'

42 It is clear from these provisions, first, that staff on mission in Brussels and Strasbourg have the option of applying for a vacant post by facsimile and, secondly, that an application submitted after the deadline by a candidate who is on mission or on sick leave throughout the time for which a vacancy is posted on the notice board is nonetheless taken into consideration. This means that the terms of the staff notice in question do not require candidates who are on mission in Brussels or Strasbourg to submit their applications, by facsimile or otherwise, before the expiry of the deadline for applications. Accordingly, the administrative practice in general use which the Parliament has described and has not been disputed by the applicant, allowing officials on mission in those two cities to submit their applications after the deadline, does not constitute a breach of the principle of equal treatment, especially since it is justified by the fact that the work-load of officials on mission in Brussels or Strasbourg may prevent them from applying for a vacant post before the deadline expires.

43 In this case, it is clear, first of all, from the explanations given by the Parliament at the hearing of 5 May 1993 that a session of the Parliament was held during the week from Monday 10 December to Friday 14 December 1990. Secondly, it is clear from the files concerning Vacancy Notices Nos 6478 and 6479, produced by the Parliament at the Court's request, that, to justify missing the deadline for applications, Mr T. submitted an extended sick note signed by Dr E. in Strasbourg on Monday 17 December 1990, recommending that he stay off work until 7 January 1991, that Mr T. signed his application forms on 8 January 1991 and that the Recruitment Department of the Directorate-General for Personnel, the Budget and Finance received them on 9 January 1991 and accepted them on 11 January 1991. It is also clear from those files that the Recruitment Department accepted applications dated 11 January 1991 submitted by another candidate who was on annual leave from 17 December 1990 until 6 January 1991 and subsequently attended a meeting in Brussels of the Political Affairs Committee of the Parliament from 7 to 10 January 1991.

44 In the light of these findings, the Court concludes that Mr T. was not bound to submit his applications for the vacant posts by 21 December 1990 at the latest as

stated in Vacancy Notices Nos 6478 and 6479 and that he was legitimately entitled to consider that he had acted in accordance with the administrative practice in force. It follows, first, that Mr T. did not breach the application procedure set out in Staff Notice No 89/4 by submitting his applications on 8 January 1991 and, secondly, that the administration was not in breach of that procedure in accepting those applications.

45 At the hearing on 5 May 1993 the applicant argued that the fact that Mr T.'s name already appeared in the memoranda dated 7 January 1991, in which Mr L. Katgerman, Adviser to the Directorate-General for Personnel, the Budget and Finance, after listing the qualifying applications received following the posting on the notice board of Vacancy Notices Nos 6478 and 6479, asked the Director-General of DG II to inform him within no more than 15 working days, starting on 15 January 1991, of his opinion as to the action to be taken to fill posts Nos II/A/680 and II/A/645, bears witness to the fact that the Parliament had pushed forward from the outset the applications of the two candidates who were promoted.

46 In this connection, the Court notes that Mr T.'s applications are indeed mentioned in the memoranda in question dated 7 January 1991, even though that official did not sign his applications until 8 January 1991. At the request of the Court and after consulting Mr Katgerman, the Parliament explained that the memoranda in question were drawn up using a standard pre-printed form on which the names of officials who had submitted an application were inserted. Although those memoranda were drawn up on 7 January 1991, they were not sent until after 11 January 1991, that is to say, after late applications, in particular those of Mr T, had been received and, where appropriate, accepted. This was proved, the Parliament argued, by the insertion by hand of the date of 15 January 1991 as the starting date for the period set for the opinion requested.

47 The Court notes, first, that Mr T.'s name does not appear in the tables dated 7 January 1991 analysing the most recent staff reports of the candidates for posts Nos II/A/680 and II/A/645, whilst his name does appear on the additional tables dated 11 January 1991, and, secondly, that all the tables in question were appended to Mr Katgerman's memoranda. Accordingly the Court concludes that those memoranda bear the date of 7 January 1991 as a result of an administrative error.

48 Thus it has not been proven that the applications mentioned in Mr Katgerman's memoranda dated 7 January 1991 were not actually submitted, and accordingly the application procedure has not been breached.

49 It follows that this plea cannot be upheld.

The plea alleging breach of Article 45(1) and Article 5(3) of the Staff Regulations

Arguments of the parties

50 The applicant takes the view that the appointing authority did not examine the comparative merits of the officials eligible for promotion or compare their staff reports.

51 First, he argues that the defendant did not take account of the applications he made on 19 December 1990 following publication of Vacancy Notices Nos 6478 and 6479 for promotion within career bracket A5/A4 even though he satisfied the conditions for promotion.

52 Secondly, the applicant argues that the promotions in issue should not have been decided on until after his staff report for 1989-1990 had been definitively drawn up.

53 He points out that at the relevant time there was no valid staff report on him available for that period, although such reports had already been drawn up on the two officials who were promoted. At the hearing on 18 February 1993 he argued further that, as the reporting officers and those who had to take the decision on the promotion were in fact the same people or were very closely connected, the duty

to provide assistance or to have regard to the interests of officials should have ensured that the staff reports were drawn up rapidly, particularly as there were several applications for the same post. He alleges moreover that, in this case, the deadlines for staff reports were not respected. The applicant takes the view that the administration could have postponed the promotion decisions until July 1991, by which date the staff reports of all the candidates could have been taken into account.

54 Thirdly, the applicant alleges, that the reference made in his case to only his staff report for 1987-1988, in the absence of a report for 1989-1990, and thus to a report for a period between two and a half and four and a half years before the time at which the decision on promotion was taken, lacks objectivity and thus constitutes a serious error of assessment. Furthermore, he points out that in other cases more recent staff reports were taken into account and that it was consequently impossible to compare the reports of all the candidates.

55 Referring to the memorandum sent on 1 February 1991 by the Director-General of DG II to the Director-General of Personnel, the Budget and Finance, the applicant argues, first, that it is clear that it was not the appointing authority which had made the 'selection' required by Article 45(1) of the Staff Regulations and also that the decisions on promotion were not taken 'at the proposal of the Secretary-General', contrary to their very wording.

56 The applicant goes on to argue that it is plain from the memorandum of 1 February 1991 that DG II did not select candidates in accordance with Article 45 of the Staff Regulations. He points out that that memorandum does not name the 15 candidates for internal promotion within DG II and that there is no real consideration of their comparative merits. He adds that it is clear from that memorandum that it was the staff reports for 1989-1990 of those concerned which were used as a basis for the proposal to promote.

57 By way of precaution, the applicant disputes that those reports had not yet been completed on 1 February 1991 and that the discussions between the officials promoted and the first reporting officer took place after that date. He also disputes that the staff reports of the officials promoted were better than his.

58 Lastly, the applicant points out that, when the comparative merits of the candidates for promotion were examined, no account was apparently taken of comparable data or such data were erroneously applied. For example, there were differences in the assessment of the duties performed, of qualifications and of professional experience gained outside the institution, of seniority in grade, and of age. Referring to the memorandum of 1 February 1991 sent by the Director-General of DG II to the Director-General of Personnel, the Budget and Finance, he observes that, whilst the Parliament does have a wide discretion, the Community judicature must at least have an opportunity to understand the considerations behind a decision on promotion in order to distinguish unimpeachable conduct from arbitrary conduct (Case T-25/90 *Schönherr* v *ESC* [1992] ECR II-63). In this connection, he does not see why the work of the two officials promoted is of higher quality than his own. He argues that his merits (full legal training, seven years' experience as a lawyer, nine years' professional experience) are greater and give him great versatility.

59 The defendant points out first of all that in his application the applicant did not put forward any specific arguments regarding the alleged breach of Article 5 of the Staff Regulations.

60 The defendant claims that the procedure for the promotion of Mr L. and Mr T. was conducted properly and in accordance with the principle of sound administration, and that the promotion decisions of 3 July 1991 were taken in compliance with Articles 45 and 5 of the Staff Regulations.

61 The vacancy notices relating to posts Nos II/A/645 and II/A/680 were posted on the notice board from 10 to 21 December 1990 and, subsequently, the administration of the Personnel Department sent a list of those who had applied in four memoranda to the Director-General of the Directorate-General responsible for the posts, asking him to give his opinion on the filling of the posts in question. Tables giving details of the candidates' most recent staff reports were appended to those memoranda. On the basis of that information and, where appropriate, other data, the Director-General of the relevant Directorate-General made a preliminary selection and informed the Director-General of Personnel, the Budget and Finance of his opinion by memorandum dated 1 February 1991. That opinion was forwarded by the administration of the Personnel Department to the Secretary-General, who considered it and approved the preliminary choice made by the responsible Director-General. The formal proposal of the Secretary-General should be mentioned in the draft decision sent to the President together with the other documents on the file, showing that he adopted the preliminary choice made in the memorandum from the competent Director-General. Finally, on 3 July 1991, the President signed the draft decisions which already bore the signature of the Secretary-General.

62 The defendant argues that, since the staff reports for 1989-1990 on the persons concerned had not been completed by 1 February 1991, the proposals for promotion made at that date were all based on staff reports for 1987-1988, including that of the applicant. That was clear from the memorandum of 1 February 1991 and from the tables drawn up on 7 January 1991. Moreover, the defendant takes the view that the appointing authority had the right to base the promotion decisions, first, on the staff reports on the officials promoted for 1989-1990 which had already been finalized and, secondly, on the applicant's most recent definitive staff report. The defendant argues further that the administration could not be accused of any substantial delay or breach of the principle of sound administration as regards the preparation of the applicant's staff report for 1989-1990, given that it was not until 11 July 1991, rather than 30 May 1991, that the final reporting officer replied to the comments made by the applicant on his report. It takes the view that the applicant could not require the appointing authority to postpone its decision on promotion until there had been a final ruling on all the legal grounds raised by the applicant against his staff report. Such a delay would be incompatible with the principles of sound administration or of good administrative practice.

63 Furthermore, the defendant points out that in its decision of 10 January 1992 rejecting the applicant's complaint, the President of the Parliament compares the applicant's staff report for 1989-1990 as improved in the meantime with the staff reports on the officials promoted for the same period. Their reports were better than the applicant's and the President was thus convinced that the promotion decisions had been taken in compliance with the legal rules.

64 The Parliament points out that, where promotions are concerned, the appointing authority has in assessing the merits of officials, a wide discretion, which is particularly wide when it comes to assessing qualifications acquired outside the institution which have no connection with the duties performed at the Parliament. In this case, the particular merits of the officials promoted which bore a relationship to their present work were completely taken into account, as is shown by the memorandum of 1 February 1991 from the Director-General of DG II, which emphasizes them. As the assessment of the officials' merits was the determining factor, it argues that age and seniority could not have played any decisive role in this case. It was clear from the memorandum of 1 February 1991 that greater importance was attached to duties performed within the institution before establishment than to experience gained outside Parliament, which was, it is argued, a legitimate choice. Thus, professional experience gained in a Member's private office or in a political group, directly connected with duties performed subsequently in Parliament's administration, were mentioned in that memorandum, whereas, for the same reason, the professional experience gained by the applicant outside Parliament was not referred to in it.

65 At the hearing on 18 February 1993, the Parliament, referring once again to the memorandum of 1 February 1991 from the Director-General of DG II, argued that the appointing authority had remained within the limits of its discretion in proposing that Mr T. and Mr L. should be promoted, and that the choice made could not be contested. The Parliament explained that it was a matter of filling posts for principal administrators of the secretariats of parliamentary committees, which work directly with Members of Parliament, which requires great aptitude in drawing up reports and working documents, great expertise in the specialized fields of activity of the relevant committee and, above all, the ability and flexibility needed to work in a small team, sometimes under pressure. The two officials promoted were

chosen because they displayed these qualities to a particular degree. Comparison of the staff reports of the two officials promoted and those of the applicant with respect to the abilities and aptitudes in question revealed very great differences. As regards the requirement for an aptitude for team work mentioned in the two vacancy notices, the Parliament described an incident which occurred in the summer of 1990 which showed that the applicant did not possess the required team spirit.

Findings of the Court

66 As regards this plea, the first point needs to be made that the consideration of applications for transfer or promotion pursuant to Article 29(1)(a) of the Staff Regulations must comply with Article 45 of the Staff Regulations, which provides expressly for 'consideration of the comparative merits of the officials eligible for promotion and of the reports on them'. The requirement for this consideration of comparative merits reflects both the principle of equality of treatment of officials and the principle that officials are entitled to reasonable career prospects (see Joined Cases 20/83 and 21/83 *Vlachos* v *Court of Justice* [1984] ECR 4149).

67 The Court must therefore determine whether the Parliament actually did give due consideration to the comparative merits of the applications for the posts advertised as vacant in Notices Nos 6478 and 6479, within the limits of its discretion.

68 In this case it is clear from all the documents on the file, the documents lodged by the Parliament at the request of the Court and the explanations given by the parties at the hearings that the procedure leading to the promotions in issue was conducted as follows.

69 After publishing Vacancy Notices Nos 6478 and 6479 for filling two principal-administrator posts in DG II on 10 December 1990 and having received applications, the Directorate-General for Personnel, the Budget and Finance informed the

Director-General of DG II of the names of the candidates who had submitted eligible applications by two memoranda dated 7 January 1991, supplemented by two memoranda dated 15 January 1991, all four signed by Mr L. Katgerman, Adviser in that directorate. The applicant's name appears in the two memoranda dated 7 January 1991. In those memoranda the Director-General of DG II was asked for his opinion on the filling of the two posts mentioned. Tables giving, *inter alia*, an analysis of candidates' staff reports for 1987-1988 accompanied those four memoranda. The applicant's name appeared in those tables as did an analysis of his staff report. On receipt of those memoranda, the management team of DG II, including the three directors and the various deputy directors, discussed the selection to be made.

70 By memorandum of 1 February 1991, the Director-General of DG II informed the Director-General of Personnel, the Budget and Finance of the outcome of that discussion. According to that memorandum, the Director-General and his colleagues in the management team had compared the respective merits of the candidates and did not choose any of the applications for transfer within the institution for various reasons. Apart from the candidates' staff reports, the members of the management team had other data for assessing all the candidates, either because they were working in DG II at the time or had worked there or because they had had contact with them from time to time before the discussion took place. The team thus identified those who were more deserving of promotion than the rest, taking into account a scheme of 'upgrading from career bracket to career bracket', and recommended the promotion of Mr T. and Mr L., whose competence, quality of work and dedication it had been able to assess over several years.

71 At the hearing on 5 May 1993, the Director-General of DG II explained the procedure underlying the memorandum of 1 February 1991. To ensure that the various data on all the candidates were comparable the team took account of their staff reports for 1987-1988. In the case of candidates who did not work in DG II, it also examined their personal files in order to glean further information. This had not been done in the case of candidates who were working or had worked in DG II, as the members of the management team already had additional information on those candidates through their personal contacts. Taking account of a number of procedures for promotion and for the upgrading of posts which were being conducted alongside the procedure in issue and provided other opportunities for promotion

at the same time, the management team made a general assessment of the candidates based on the staff reports considered generally and the additional information in its possession, and narrowed down the number of candidates for the posts in issue to a small select group. It then compared the candidates in that small group from the point of view of their abilities as assessed in their staff reports. That assessment confirmed the overall disparity between the staff reports of Mr T. and Mr L. and that of the applicant. Lastly, the management team assessed the merits of the candidates in the small group in the light of the particular qualifications required by the vacancy notices, and selected Mr T. and Mr L.

72 By memorandum of 28 February 1991, the Director-General of Personnel, the Budget and Finance asked the Director-General of DG II to reconsider his proposal in the light of the comparative table, which showed that seven of the candidates eligible for promotion had better staff reports than Mr T. and Mr L.

73 The Director-General of DG II replied to that memorandum by memorandum of 12 March 1991. He stressed that the management team of DG II had considered the comparative merits of the officials eligible for promotion and their reports, and pointed out that the department making the request had an element of choice. The team had taken the view that its job was to compile as much information as possible, including the staff reports of those eligible for promotion, in order to be able to recommend one or more candidates, up to the number of posts available, whom it considered to be the most suitable in the light of the duties to be carried out. Accordingly, it confirmed its proposals.

74 The Secretary-General then forwarded the proposal of the management team of DG II to the President of Parliament, in his capacity as appointing authority, together with his formal opinion for a draft decision. By memorandum of 16 May 1991, the head of the President's office asked the Director-General of Personnel, the Budget and Finance to describe the criteria used as a basis for the selection of candidates recommended for promotion.

75 The Director-General of DG II replied to the question asked by the head of the President's office by memorandum of 22 May 1991 to the Director-General of Personnel, the Budget and Finance. He pointed out that the promotion of Mr T. and Mr L. was proposed solely on the basis of the criteria set out in Article 45 of the Staff Regulations in conjunction with the nature of the duties and the qualifications required described in the two vacancy notices. He went on to explain that the staff reports of the various candidates, as set out in the tables analysing the staff reports for 1987-1988, had to be assessed in the light of the date on which they had been drawn up, according to whether that date was before or after the introduction of the new assessment method devised in 1989 (giving percentages for the various heads of assessment). This was how four applications, including those of Mr T. and Mr L., came to be selected.

76 Those four candidates had the same number of points (57) on the basis of their staff reports for 1989-1990. The management team therefore compared the age and seniority of all the candidates and as a result confirmed the proposal to promote Mr T. and Mr L.

77 The President signed the two promotion decisions on 3 July 1991.

78 The Court finds, first of all, that it appears from the foregoing that the appointing authority did take into consideration the applications made by the applicant for the posts declared vacant by Vacancy Notices Nos 6478 and 6479. The applicant's name appears on the tables analysing the candidates' staff reports for 1987-1988, together with an analysis of his staff report. It was on the basis of those tables that the management team of DG II considered the candidates' comparative merits. The applicant's complaint in this regard must therefore be rejected.

79 As to the applicant's complaint that the administration could have postponed the promotion decisions until July 1991, when the staff reports for 1989-1990 of all the candidates could have been taken into account, the Court points out that, first, it is clear from the foregoing that the proposal made on 1 February 1991 by the management team of DG II was based on an analysis of the staff reports for 1987-1988 and, secondly, that the Director-General of DG II confirmed at the second hearing

that the reports for 1989-1990 were not available for any of the candidates at that date. The assessment procedure for 1989-1990 was in progress but not yet completed.

80 Accordingly, the fact that there were no staff reports on the candidates for 1989-1990 did not preclude a proper consideration of the candidates' comparative merits and thus did not have a decisive effect on the procedure for filling the posts in question (Case T-25/92 *Vela Palacios* v *ESC* [1993] ECR II-201). This finding is not affected by the fact that between two and a half and four and a half years had elapsed since the reference period for the 1987-1988 staff reports. Nor did that fact prevent consideration of candidates' comparative merits since the management team of DG II had other information for assessing the duties carried out by all the candidates and their conduct in the service.

81 As for the applicant's complaint that the Parliament took account of some staff reports for 1989-1990 but not of his, the Court points out, first, that it is clear from the memorandum of 22 May 1991 that the management team of DG II only consulted staff reports for 1989-1990 after the Director of the President's office had asked them to justify the proposals they had made and that the consultation was confined to the reports of the four candidates who had been selected in early 1991 on the basis of an analysis of their staff reports for 1987-1988.

82 The Court finds, in the first place, that it appears from the procedure followed that the applicant's argument that the proposal concerning promotion of 1 February 1991 was based on staff reports for 1989-1990 is unfounded. Secondly, it takes the view that the consultation, in the case of the candidates who had already been selected at the beginning of 1991, of the staff reports for 1989-1990, which were by then completed, following a request by the Director of the President's office to justify the proposals made at the beginning of 1991, only served to confirm the

selection that had already been made and was thus in the interests of sound administration. Accordingly, that consultation did not constitute an infringement of the promotion procedure. The fact that the final version of the applicant's staff report for 1989-1990 was not yet available at that time cannot affect this finding.

83 Thirdly, the Court takes the view that, by initially selecting candidates on the basis of their staff reports, considered generally, and additional information available, thus narrowing down the candidates to a select few, and subsequently comparing the abilities of those candidates and assessing them in the light of the particular qualifications required by the notices of vacancy, the management team did make a proper consideration of candidates' comparative merits.

84 This finding is corroborated by the fact that, in the light of the express requirement in the two vacancy notices for an 'aptitude for teamwork', the management team considered the applicant's ability to work as a team with colleagues, as appears from the remarks made by the Parliament's representative at the hearing of 18 February 1993 concerning a memorandum, which is not disputed, sent by the applicant on 25 June 1990 to the Director-General of DG II stating that he found it quite impossible to work in any way with his superior, Mr V. ('..., daß es mir schlechterdings unmöglich ist, in irgendeiner Form mit Herrn V. zusammenzuarbeiten'). In view of the freedom of choice available to the appointing authority in this sphere, it was entitled to take that memorandum into account as an important assessment factor.

85 As for the applicant's complaint that, when considering the comparative merits of the candidates, the administration did not compare the candidates' other merits, such as professional experience acquired outside the institution, seniority in grade, and age, the Court points out that it has been consistently held that the appointing authority may take account of the age of candidates and their seniority in their grade or in the department as a decisive factor where the qualifications and merits of the candidates are otherwise equal (Case 298/81 *Colussi* v *Parliament* [1983] ECR 1131).

86 Analysis of the staff reports for 1987-1988 shows that the officials promoted were given a markedly more favourable assessment than the applicant. Accordingly, neither seniority in grade nor age were relevant factors in this case. As for the applicant's argument that his merits (full legal training, seven years' experience as a lawyer, nine years' professional experience) were superior and meant that he was very versatile, the Court of First Instance takes the view that the consideration and assessment of such factors falls within the appointing authority's wide discretion and that, in this case, it did not exercise that discretion in a manifestly incorrect manner.

87 Lastly, it is clear from the above findings that the President of the Parliament, in his capacity as appointing authority, adopted the formal proposals submitted to him by the Secretary-General and that, after checks had been made by the head of his office, he signed the decisions promoting Mr T. and Mr L. The Court takes the view, first, that it was the appointing authority responsible within the meaning of Article 45 of the Staff Regulations which decided to promote Mr T. and Mr L., and, secondly, that, as is stated therein, the decisions in issue were indeed made at the proposal of the Secretary-General. The applicant's arguments on this point must therefore be rejected.

88 It follows from the whole of the foregoing that the appointing authority, which enjoys a wide discretion, not only as regards consideration of the comparative merits of officials eligible for promotion, as prescribed by Article 45 of the Staff Regulations, but also as regards the decision to promote, exercised its powers in accordance with Article 45 of the Staff Regulations, while remaining within the proper limits and without using its powers incorrectly.

89 As the complaints made by the applicant have not made out a case for infringement of Article 5(3) of the Staff Regulations, the plea must be rejected as unfounded.

Plea alleging breach of purported verbal assurances of promotion

Arguments of the parties

90 The applicant avers that Mr M., the deputy Director-General of DG II, repeatedly promised him, though the intermediary of the Chairman of the Committee on the Rules of Procedure, that he would be promoted to Principal Administrator with effect from 1 January 1991. The applicant argues that the contested decisions are at odds with those assurances. Whilst he concedes that the deputy Director-General does not represent the appointing authority, he takes the view that the defendant is bound by such assurances and cannot act in breach of them. He argues that the appointing authority is bound to guarantee him the promotion he deserves to one of the vacant posts in issue on the basis of the principle of protection of legitimate expectation. At the first hearing, the applicant added that the promise of promotion had been made by a Director-General, an important person who played an important role within the Parliament and in whom he was therefore entitled to place reliance.

91 First, the defendant disputes that any such assurance was given to the applicant. Secondly, it takes the view that verbal assurances given by officials or even by Members of Parliament are not binding on the appointing authority, which alone is called upon to decide on appointments at the end of formal procedure. It argues that such assurances have no legal value and cannot create a legitimate expectation on which a candidate for promotion may rely.

Findings of the Court

92 On the subject of the promise allegedly made by the deputy Director-General of DG II concerning the promotion of the applicant to the grade of principal administrator, the Court points out that such a promise, even assuming that it were proven, could not create a legitimate expectation on the part of the applicant, given that it was made without regard to the provisions of the Staff Regulations (see, for example, Case T-30/90 *Zoder* v *European Parliament* [1991] ECR II-207).

93 Accordingly this plea cannot be upheld.

94 It follows from the foregoing that application as a whole must be rejected and there is no need to determine whether the applicant's complaint óf 19 March 1992 concerning his staff report for 1989-1990 can be taken into account in these proceedings.

Costs

95 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 in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings between the Communities and their servants the institutions are to bear their own costs.

96 Since, however, in the first place the Parliament rejected the applicant's complaints of 7 and 14 October 1991 by a letter from its President of 10 January 1992 which did not set out the procedure followed by the management team of DG II in order to arrive at their proposals to promote Mr T. and Mr L. or the procedure subsequently followed by the administration in reaching the promotion decisions taken by the appointing authority, and since in the second place it cannot be ruled out that that failure to provide clarification may have encouraged the applicant to bring this application, the Parliament must be ordered, under Article 87(3) of the Rules of Procedure, to pay half of the applicant's costs.

97 Accordingly, the Parliament must pay its own costs and half of the applicant's costs. The applicant must bear the remaining half of his own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Parliament to pay its own costs and half of the applicant's costs and orders the applicant to bear the other half of his own costs.**

Bellamy Kirschner Briët

Delivered in open court in Luxembourg on 26 October 1993.

H. Jung C. P. Briët

Registrar President