JUDGMENT OF THE COURT (Third Chamber)
13 December 2001 *

In Case C-446/00 P,

Pascual Juan Cubero Vermurie, an official of the Commission of the European Communities, represented by E. Boigelot, avocat, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 3 October 2000 in Case T-187/98 *Cubero Vermurie* v *Commission* [2000] ECR I-A-195 and II-885, seeking to have that judgment set aside and the same form of order as that sought by the appellant at first instance,

the other party to the proceedings being:

Commission of the European Communities, represented by C. Berardis-Kayser, acting as Agent, and B. Wägenbaur, Rechtsanwalt, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT (Third Chamber),

composed of: C. Gulmann, acting for the President of the Chamber, J.-P. Puissochet and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 28 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 1 December 2000, Mr Cubero Vermurie brought an appeal under Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and Euratom Statutes against the judgment of the Court of First Instance of the European Communities of 3 October 2000 in Case T-187/98 *Cubero Vermurie* v

Commission [2000] ECR I-A-195 and II-885 ('the contested judgment') by which the Court of First Instance dismissed his application for annulment of the Commission's decision of 6 April 1998 not to promote him to Grade A 5 in the context of the 1998 promotions exercise and for compensation for the material and non-material damage allegedly suffered by him as a result of that decision.

Facts and procedure before the Court of First Instance

2 The facts and procedure before the Court of First Instance are set out as follows at paragraphs 1 to 18 of the contested judgment:

'1 The annual promotions exercise with respect to Commission officials takes place according to a procedure set out in the *Guide pratique de la procédure de promotions des fonctionnaires à la Commission européenne de la catégorie A et du cadre linguistique*, as produced by the parties in this case ("the promotions guide"). That procedure is divided into five stages.

2 The first stage is the publication by the administration of the list of officials eligible for promotion, including all those officials who meet the requirement of a minimum period in their grade as prescribed by Article 45 of the Regulations and Rules applicable to Officials and other Servants of the European Communities ("the Staff Regulations"). That publication enables the officials concerned to point out possible errors or omissions to the administration.

3 In the second stage, each Director-General carries out a preliminary examination of the comparative merits of the officials eligible for promotion in his directorate-general and notifies his proposals, ranked in order of priority, to the Promotions Committee.

4 In the third stage, that committee draws up a list of the most deserving officials by comparing the merits of the officials eligible for promotion according to a method of assessment adapted to the grade in question. In the applicant's case, the Promotions Committee used the method of assessment applicable to A 6 officials eligible for promotion to Grade A 5. That method is based on the award of a certain number of points to the candidates according to the order of priority drawn up by each Director-General, the staff reports, seniority in grade and service and age. In particular, the order of priority drawn up by each Director-General enables the candidates for promotion to be awarded a certain number of points (70, 45, 20 or 0), according to their ranking, which are allocated to each directorate-general on the basis of the number of candidates eligible for promotion in that directorate-general.

5 During that stage, the case of those officials, such as the applicant, who have, *inter alia*, moved to a different post, is first considered by a select joint working party which reports to the Committee on the cases referred to it.

6 In the fourth stage, the appointing authority adopts or amends the Committee's draft list and publishes the list of the most deserving candidates. The fifth and final stage is a matter for the member of the Commission responsible for personnel who adopts a promotion decision on the basis of that list, and then signs the individual decisions.

7 There are two types of promotion: promotion within a career bracket and promotion from one career bracket to the next. The present case concerns a promotion falling within the latter situation, namely, from Grade A 6 to Grade A 5, that is to say, from administrator to principal administrator.

8 The applicant, Mr Cubero Vermurie, was assigned to the Directorate-General of Financial Control (DG XX) during the period from 16 September 1986 to

31 August 1996. From 1 January 1989 to 31 December 1990 he was on secondment, in the interests of the service, to the Court of Justice of the European Communities. [With effect from 1] September 1996 he was assigned to the Directorate-General of Consumer Policy (DG XXIV) as assistant to the Director -General. Since 1 April 1997 he has been assigned to the Directorate-General for Audiovisual Media, Information, Communication and Culture (DG X).

9 The applicant, an official in Grade A 6 since 1 January 1993, was proposed for promotion to Grade A 5 by DG XX and was ranked sixth for the 1996 promotions exercise and fourth for the 1997 exercise without any priority points.

10 DG XXIV placed him third on its list for the 1998 promotions exercise.

11 By letter dated 13 January 1998, the applicant brought the matter before the President of the Promotions Committee in the following terms:

"In the context of the procedure, under the 1998 exercise, for promotion from one career bracket, my name does not appear in a 'promising' position in the list drawn up by DG XXIV. I came from DG XX to DG XXIV in the interests of the service (given the nature of the duties to be fulfilled) to carry out important tasks assisting the Director-General. If I had not been so transferred, I would have been promoted to Grade A 5 in the course of the current promotions procedure by remaining on the list of DG XX (2nd reserve from the previous year).

Unless something is done to remedy this situation, it is clear that mobility will have seriously prejudiced my career development (even though the Commission is consistently in favour of a policy of mobility).

..."

12 By letter of 2 April 1998, the President of the Promotions Committee wrote to the applicant as follows:

"[Further to] your request of 13 January 1998, the select joint working party responsible for examining applications and problems connected with mobility has considered your case.

Having considered your file, the select joint working party is not in a position to recommend a favourable assessment to the Promotions Committee.

At its plenary meeting on 5 March 1998 the Promotions Committee adopted the position taken by the select joint working party with regard to your application."

13 The applicant's name did not appear in the list of the most deserving officials or in the list of promoted officials published in the *Administrative Notices* No 1033 of 16 March 1998 and No 1036 of 6 April 1998 respectively.

14 The applicant then lodged a complaint on 21 April 1998 in which he stated, *inter alia*:

"It is clear from the facts [set out in the complaint] that mobility, even though the Commission is consistently in favour of a policy of mobility, has seriously prejudiced my career development because [the appointing authority], in its decision of 6 April 1998 on the 1998 promotions, did not promote me to Grade A 5 as would have been the case if I had not been transferred in the interests of the service from DG XX to DG XXIV."

15 By letter of 12 May 1998, the Director-General of DG X (the directorate to which the applicant is currently assigned) intervened in support of the applicant's complaint. In that letter, addressed to the Director-General of the Personnel and Administration Directorate (DG IX), he explained, *inter alia*, that the applicant was moved in the interests of the service, that he fulfilled his duties as assistant to the Director-General very efficiently, and that he would have been promoted to Grade A 5 if he had remained in DG XX, pursuant to the rules governing the award of promotions within the Commission. In conclusion, he was of the view that the applicant had suffered injury not only to his career, but also of a non-material nature.

16 The applicant's former Director-General in DG XX also intervened in support of the complaint in a letter of 15 May 1998 to the Director-General of DG IX, which states, *inter alia*:

"Without wishing to interfere with the decision on the merits of the case, I can confirm that, [if] Mr Cubero Vermurie had not left DG XX, he would have been promoted — unless he had become less deserving — to Grade A 5 under the present 1998 exercise.

Since the 1996 round, Mr Cubero Vermurie has appeared in DG XX's list of candidates for promotion to Grade A 5, being placed just behind [M.H.] in the order of priority, and, in 1998, DG XX obtained two promotions to Grade A 5, including [M.H.] (the sole reserve from 1997) plus an official ranked after the latter in our order of priority (that is, in the place made vacant by Mr Cubero Vermurie's departure)."

17 The applicant's complaint was dismissed by a decision of 9 October 1998 which stated, *inter alia*:

"In the light of the foregoing, [the appointing authority] considers that it cannot be criticised as having used its power of assessment in a manifestly erroneous way or for an improper purpose. The Promotions Committee considered the comparative merits of the officials in strict application of the rules published in the *Administrative Notices* No 309 of 26 February 1981, that is by having regard to the proposals of the Directorates-General and the career profile of the candidates for promotion. Furthermore, the specific case of Mr Cubero Vermurie was taken into consideration by the Promotions Committee, which nevertheless considered that, on [the] basis of the information available to it, notwithstanding Mr Cubero Vermurie's obvious merits, which moreover enabled him to be proposed by DG XXIV and which are acknowledged in [a] note [drawn up for the attention of the select joint working party], he did not meet the conditions which would justify the award to him of the additional points enabling his name to be included in the list of the most deserving candidates and, possibly, to be promoted".

18 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 25 November 1998, the applicant brought the present action.'

3 By that application the applicant sought the annulment of the decision of 6 April 1998 not to promote him and the decision of 9 October 1998 rejecting his

complaint of 21 April 1998 ('the complaint'), and an order for payment of compensation in the sum of BEF 250 000 for the material and non-material damage allegedly suffered by him.

The contested judgment

4 By the contested judgment the Court of First Instance dismissed the application and ordered the parties to bear their own costs.

5 The Court of First Instance first declared inadmissible an allegation of infringement of the third and fourth paragraphs of Article 24 of the Staff Regulations on the ground that it had not been put forward in the complaint. The Court also rejected allegations of breach of the principles of legality, proportionality and the protection of legitimate expectations on the ground that they were insufficiently clear.

6 As for the merits, in paragraph 77 of the contested judgment the Court of First Instance rejected as unfounded an allegation of infringement of Article 45 of the Staff Regulations, on the ground that both the select joint working party and the Promotions Committee had in fact specifically considered the appellant's case and did not confine themselves to a strict application of the rules on mobility contained in the promotion guide. Next, at paragraph 79, the Court rejected an allegation of breach of the principles of equality of treatment and fairness, on the ground that the select joint working party and the Promotions Committee had taken account, in their assessment of the appellant's merits, of his particular situation, *inter alia*, in contemplating awarding him additional priority points. Finally, the appellant raised an argument based on the fact that M.G., an official in his former Directorate-General, who had been ranked behind him before he was moved to a different post, had been promoted in the exercise in question. The Court rejected that argument at paragraphs 83 to 87 on the ground that there was no manifest error of assessment in the method by which the respective merits of M.G. and the applicant were assessed.

7 Consequently, at paragraphs 91 to 93 the Court of First Instance dismissed the claim for compensation in the sum of BEF 250 000 for the material and non-material damage that the applicant claimed to have suffered as a result of the fact that he was not promoted to Grade A 5, on the ground that he had adduced no evidence of unlawful acts on the part of the Commission.

The appeal

8 In his appeal the appellant asks the Court of Justice to set aside the contested judgment, to grant the relief sought at first instance and to order the Commission to pay the costs of both sets of proceedings.

9 The Commission asks the Court to dismiss the appeal and to order the appellant to pay the costs in full.

10 In support of his appeal, the appellant puts forward a single plea, alleging errors of law and contradictions in the grounds of the contested judgment. That plea is divided into four parts which it is appropriate to examine separately.

11 In the first part of the plea the appellant challenges the finding in the contested judgment that his allegation of infringement of the third and fourth paragraphs of Article 24 of the Staff Regulations was inadmissible. Those provisions concern the 'further training and instruction' of the official and provide that this must be taken into account for purposes of promotion in their careers. In that respect, the

appellant cites various passages from his complaint and from his letter of 13 January 1998, to the effect that, *inter alia*, mobility is an important element in an official's career development since it increases his or her knowledge and skills, and concludes that the Court of First Instance could not lawfully hold that there was nothing in that complaint from which the Commission could have inferred that the appellant intended to rely on the allegation in question.

12 On this point, it is settled case-law that, in staff cases, the claims before the Community court may be based only on grounds of challenge having the same legal basis as those raised in the complaint, and that the former may be developed before the Court by the submission of pleas and arguments which do not necessarily appear in the complaint, but must be closely linked to it (see, in particular, Case 242/85 *Geist* v *Commission* [1989] ECR 2181, paragraph 9, and Case 133/88 *Del Amo Martinez* v *Parliament* [1989] ECR 689, paragraph 10).

13 It is not in dispute that the complaint does not expressly refer either to the third and fourth paragraphs of Article 24 of the Staff Regulations or to the concept of 'further training and instruction' which is the subject of those provisions, but only to mobility and the career development of officials.

14 In the context of Article 24 of the Staff Regulations the concept of 'further training and instruction' is concerned essentially with actions of a more or less formal educational nature, such as language courses and shorthand tests (see Case 218/80 *Kruse* v *Commission* [1981] ECR 2417, paragraph 9, and Case 280/80 *Bakke-d'Aloya* v *Council* [1981] ECR 2887, paragraph 13, respectively).

15 Whilst mobility of officials may contribute to expanding their professional experience, and even to their knowledge, it must none the less be held that it does not fall within the concept of further training and instruction in the sense contemplated in Article 24 of the Staff Regulations.

16 It follows that, even on a very liberal construction, the complaint contained nothing from which the Commission could have inferred that it included an allegation of infringement of the third and fourth paragraphs of Article 24 of the Staff Regulations.

17 It follows that the allegation of the infringement of the third and fourth paragraphs of Article 24 of the Staff Regulations, put forward in the application, was not closely linked to the complaint, and that the finding of the Court of First Instance that that allegation was inadmissible is not vitiated by error.

18 Consequently the first part of the plea must be rejected as unfounded.

The second part of the plea

19 Under the first limb of the second part of the plea, the appellant claims that the Court of First Instance wrongly held that the Commission had not committed a manifest error of assessment as regards his merits. He claims in this respect that

there is a contradiction between paragraph 75 of the contested judgment, in which it is noted that the Commission recognised Mr Cubero Vermurie's 'obvious... and... acknowledged merits', and paragraph 76 of that judgment, which states that one of the reasons why the Commission did not award him any additional points was precisely his lack of merit. As a result of that contradiction, in the appellant's submission, paragraph 87 of the contested judgment is vitiated by an error of law in that it finds that the Commission did not commit a manifest error of assessment.

20 It should be noted that the question whether the grounds of a judgment of the Court of First Instance are contradictory is a question of law which is amenable, as such, to judicial review on appeal (Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53).

21 It is clear, however, that there is no contradiction in the present case between paragraphs 75 and 76 of the contested judgment such as to entail its annulment. The fact that an official has obvious and acknowledged merits does not exclude the possibility that, in the context of consideration of the comparative merits of candidates for promotion, other officials may have higher merits. Furthermore, notwithstanding the Commission's acknowledgment of the appellant's undeniable merits, that institution was entitled to find that they did not justify the award of additional points for the purposes of promotion. The plea must therefore be rejected so far as the first limb of its second part is concerned.

22 Under the second limb of the second part of the plea, the appellant claims that paragraph 77 of the contested decision the Court of First Instance is also vitiated by contradictory grounds in that it accepts that the select joint working party and then the Promotions Committee had specifically examined the appellant's case. According to the appellant, that examination should have been held to be manifestly flawed, since, first, the Commission acknowledged his obvious merits and, second, it maintained that those merits did not justify the award of additional priority points.

23 It should be pointed out in this respect that, at paragraph 77 of the contested judgment, the Court of First Instance concludes, from the information it had previously considered, that the abovementioned working party and committee did in fact specifically consider the appellant's case and did not confine themselves to a strict application of the rules relating to mobility set out in the promotions guide. That conclusion relates only to the existence or otherwise of a specific examination of the appellant's particular case and leaves open the separate question whether the outcome of that examination was erroneous or not so far as the appellant's merits were concerned. It follows from this that the second limb of the second part of the plea concerns a question that is not addressed in paragraph 77 of the contested judgment. It must therefore be held to be irrelevant.

24 In any case, even if it were not irrelevant, the second limb of the second part of the plea would be unfounded for the same reason as the first limb of that part of the plea, namely the absence of any contradiction between paragraphs 75 and 76 of the contested judgment.

25 Consequently, the second part of the plea must be rejected in its entirety.

The third part of the plea

26 By the third part of the plea, the appellant claims that the Court of First Instance wrongly failed to acknowledge the superiority of his merits as compared with those of M.G. He puts forward two arguments in support of that part of the plea.

27 First, he contends that the Court of First Instance wrongly held, in paragraph 85 of the contested judgment, that he had not pointed to any manifest error of assessment in the comparison between his merits and those of M.G.

28 The only element put forward by the appellant to substantiate that argument is his assertion that the alleged error arises 'from the matters set out at paragraphs 6 and 7 above', namely those paragraphs of his appeal setting out the second part of the plea. Since that part of the plea has been rejected in paragraph 25 of the present judgment, the first argument must be rejected on the same grounds.

29 The second argument seeks to demonstrate that there is a contradiction between the two observations which appear in the first and second sentences of paragraph 84 of the contested judgment respectively, namely, first, the statement that the appellant did not claim that, in the context of his duties in DG XXIV, he had merits superior to those of M.G. who was an official in DG XX, and second, the statement that the appellant confined himself to pointing out that he was ranked ahead of M.G. in the preceding promotions exercise and that it followed from the important nature of the tasks assigned to him in DG XXIV that his merits increased after his transfer to that directorate-general.

30 It is clear that the two observations in question are not contradictory. The fact that an official points out, on the one hand, that he was ranked ahead of another official in an earlier promotions exercise and claims, on the other, that his merits increased after his assignment to a given post is not such as to establish a comparison of the merits of those officials for the purposes of the promotions exercise in progress. Since the contradiction between the two observations in

paragraph 84 of the contested judgment has not been established, the second argument under the third part of the plea must be rejected.

31 Furthermore, to the extent that the third part of the plea criticises the Court of First Instance for not having held that the appellant had merits superior to those of M.G., it must be borne in mind that it is settled case-law that the Community court cannot substitute its assessment of the merits and qualifications of candidates for that of the appointing authority (see, in particular, Case 282/81 *Ragusa* v *Commission* [1983] ECR 1245, paragraph 13).

32 It follows that the third part of the plea must be rejected in its entirety.

The fourth part of the plea

33 By the fourth part of the plea, the appellant claims that the contested judgment is vitiated by contradiction and by error in law inasmuch as it is held, in paragraph 79, that the principles of equal treatment and fairness were not breached in the present case. According to the appellant, contrary to what is stated in paragraph 79, his merits were not taken into consideration by the select joint working party or the Promotions Committee because, if they had been, then, given the Commission's acknowledgment of his merits, he would have been promoted. In paragraph 79 it was found that there was no discrimination or unfair decision, on the sole ground that the abovementioned working party and committee contemplated awarding additional priority points to the appellant. As the Court of First Instance acknowledged in paragraph 67 of the contested judgment, the objective under the Staff Regulations is that mobility should not have a penalising effect; however, in the present case, that objective was not attained because the appellant did not receive the promotion that would have been his had he not shown mobility by obtaining an assignment to a different post. The system introduced entails discrimination because, without any justification, an official

who has moved from one post to another is worse placed even than a less deserving official who has not moved.

34 It should be pointed out that this part of the plea is based on the assumption that the applicant would necessarily have been promoted in the 1998 exercise if he had not shown mobility by obtaining an assignment to a different post.

35 In this regard it should first be pointed out that the Staff Regulations do not confer any right to promotion, even to officials who fulfil all of the conditions for promotion.

36 Second, a practice of automatically promoting, save where they have become less deserving, officials who, in the preceding promotions exercise, appeared on the list of the most deserving officials but who had not been promoted, would clearly infringe Article 45(1) of the Staff Regulations. Promotion decisions presuppose that the appointing authority has considered the comparative merits of the officials eligible for promotion and the reports on them, in the context of each promotions procedure. That consideration must indeed take account, to an appropriate extent, of the periods preceding that to which the current promotions exercise relates, but it must take account of that period as well.

37 The appellant is therefore wrong in claiming that he would in any event have been promoted if he had not obtained an assignment to a different post. He

cannot claim, under the Staff Regulations, the maintenance for the 1998 promotions exercise of the advantageous position he considered to be his in the light of the proposals of DG XX in the context of the 1997 exercise. On the contrary, in the context of the promotions exercise in question it was necessary to compare his merits with those of other officials eligible for promotion. As the Advocate General pointed out at point 76 of her Opinion, it cannot be excluded that, when such a comparison was made, the merits of certain officials who may have demonstrated mobility proved to be superior to those of the appellant.

38 In those circumstances the Court of First Instance rightly held, at paragraph 79 of the contested judgment, that the Commission had not breached the principles of equality of treatment or fairness with regard to the appellant. The fourth part of the plea must therefore be rejected as unfounded.

39 Consequently, the appeal must be dismissed in its entirety.

Costs

40 Under Article 69(2) of the Rules of Procedure, applicable to appeals by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 70 of those Rules, institutions are to bear their own costs in proceedings brought by their servants. However, by virtue of the second paragraph of Article 122 of those Rules, Article 70 does not apply to appeals brought by an official or other servant of an institution against that institution. Since the appellant has been unsuccessful, he must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Third Chamber),

hereby:

1. **Dismisses the appeal;**

2. **Orders Mr Cubero Vermurie to pay the costs.**

Gulmann Puissochet Cunha Rodrigues

Delivered in open court in Luxembourg on 13 December 2001.

R. Grass

Registrar

F. Macken

President of the Third Chamber