JUDGMENT OF THE COURT (Fifth Chamber)

9 November 2000 *

In Case C-207/99 P,

Commission of the European Communities, represented by C. Berardis-Kayser and F. Duvieusart-Clotuche, of its Legal Service, acting as Agents, and D. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 25 March 1999 in Case T-76/98 *Hamptaux* v *Commission* [1999] ECR-SC I-A-59 and II-303, seeking to have that judgment set aside,

the other party to the proceedings being:

Claudine Hamptaux, an official of the Commission of the European Communities, residing in Brussels (Belgium), represented by L. Vogel, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of C. Kremer, 6 Rue Heinrich Heine,

* Language of the case: French.

applicant at first instance,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 31 May 1999, the Commission of the European Communities brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance (Fourth Chamber) of 25 March 1999 in Case T-76/98 *Hamptaux* v *Commission*

[1999] ECR-SC I-A-59 and II-303 (hereinafter 'the contested judgment'), in which the Court of First Instance annulled the Commission's decision not to promote Mrs Hamptaux to Grade B 2 in the course of the 1997 promotions procedure (hereinafter 'the contested decision').

Legal framework

2 Under the first subparagraph of Article 45(1) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations'),

'Promotion shall be by decision of the appointing authority. It shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.'

Facts

3 The facts giving rise to the appeal are set out in the contested judgment as follows:

'1 The applicant was recruited by the Commission on 1 October 1972 as a member of the auxiliary staff. She was appointed a probationary official in Grade C 3 on 1 December 1972 and established in her post on 1 June 1973.

2 Following her success in internal competition COM/B/2/82 for promotion in category, the applicant was promoted to Grade B 5 on 1 September 1985. Since 1 April 1992 she has been in Grade B 3.

3 In the course of the 1997 promotions procedure, at the proposal of the Directorate-General for Personnel and Administration (DG IX), the applicant was classified in 13th position out of 14, according to the list published in *Administrative Notices* No 992 of 16 May 1997.

4 On 30 May 1997, following the publication of that list, the applicant requested the Promotion Committee to reconsider her case.

5 By memorandum of 9 July 1997, the President of the Promotion Committee for category B informed the applicant that the committee had considered her case but had been unable to include her name on the draft list of officials considered most deserving of promotion.

6 The applicant's name did not appear on the list of officials considered most deserving of promotion to Grade B 2 published in *Administrative Notices* No 998 of 8 August 1997 and she was not among the officials promoted, the list of whom was published in *Administrative Notices* No 999 of 12 August 1997.

7 By memorandum of 8 October 1997, lodged at the Secretariat-General on 9 October 1997, the applicant lodged a complaint within the meaning of Article 90(2) of the Staff Regulations... against those two decisions of the appointing authority.

8 On 30 January 1998 that complaint was expressly rejected in a decision notified to the applicant on 11 February 1998.'

The contested judgment

4 In her action before the Court of First Instance, Mrs Hamptaux sought, first, the annulment of the contested decision and, second, damages against the Commission in the sum of BEF 833 000 for harm sustained.

5 In support of her action, Mrs Hamptaux relied on two pleas in law alleging, first, that the person who signed the decision of 30 January 1998 rejecting her complaint was not competent to do so and, second, infringement of Articles 5(3) and 45(1) of the Staff Regulations. The second plea consisted of two parts. In the first part, the applicant at first instance accused the Commission of having failed to consider the comparative merits of the officials eligible for promotion. In the second part she complained that the Commission had, first, accorded more importance to criteria other than those associated with merits and, second, discriminated between officials who had spent part of their career in a category below their current category and other officials.

6 The Court of First Instance rejected the first plea and upheld the first part of the second plea, as follows:

'35 It should be pointed out, first of all, that it is settled case-law that the appointing authority has power under the Staff Regulations when deciding on promotions to make a choice on the basis of a consideration of the comparative merits of candidates eligible for promotion carried out in the

manner which it considers to be the most appropriate (see Case 62/75 *de Wind* v *Commission* [1976] ECR 1167, paragraph 17, Case T-53/91 *Mergen* v *Commission* [1992] ECR II-2041, paragraph 33, and Case T-262/94 *Baiwir* v *Commission* [1996] ECR-SC II-739, paragraph 65).

36 In order to evaluate the merits to be taken into account in connection with the decision on promotion provided for in Article 45 of the Staff Regulations, the appointing authority has a wide discretion, and in that respect review by the Community judicature must be confined to the question whether, having regard to the bases and procedures available to the administration for its assessment, it has remained within the proper bounds and has not used its authority in a manifestly incorrect manner. The Court cannot therefore substitute its assessment of candidates' qualifications and merits for that of the appointing authority (see Case T-25/90 *Schönherr* v *ESC* [1992] ECR II-63, paragraph 20, Case T-11/91 *Schloh* v *Council* [1992] ECR II-203, paragraph 51, and *Baiwir* v *Commission*, cited above, paragraph 66).

37 It is clear from the [Practical Guide to the Procedure for the Promotion of Officials of the Commission of the European Communities] and the explanations which the Commission provided at the hearing that officials who had already appeared on the list of most deserving candidates drawn up by the appointing authority for the previous year but who had not been promoted were automatically included on the list of most deserving candidates the following year unless they were now considered "no longer deserving" of promotion. The Commission further stated that in those circumstances the officials concerned are automatically promoted.

38 It must be ascertained whether that procedure infringed the applicant's rights in regard to the promotions procedure.

...

41 It follows from the first subparagraph of Article 45(1) of the Staff Regulations that any official eligible for promotion, that is to say, who has completed a minimum period in grade, is entitled to have his comparative merits and his reports considered by the appointing authority (Case T-167/97 *Skrikas* v *Parliament* [1998] ECR-SC II-857, paragraph 37).

42 The applicant was therefore entitled to have the appointing authority undertake a comparative examination of her merits and of the reports on her in the context of the promotions procedure in issue.

43 Article 45(1) of the Staff Regulations does not distinguish between the position of officials who have already appeared on the list of officials considered most deserving of promotion drawn up by the appointing authority for the previous year and that of other officials. It does not lay down any condition in addition to that of completion of a minimum period in grade (*Skrikas* v *Parliament*, cited above, paragraph 38).

44 It follows both from the written submissions lodged by the Commission and from the explanations which it provided at the hearing that officials who were on the list of most deserving officials drawn up by the appointing authority for the previous year and who were not promoted are automatically included on the list of most deserving officials the following year, unless they are now considered "no longer deserving" of promotion. Contrary to its obligation under Article 45(1) of the Staff Regulations, therefore, the appointing authority did not, in the context of the promotions procedure in issue, undertake a comparative examination of the applicant's merits and her reports and those of the two officials who had already appeared on the list of most deserving officials drawn up by the appointing authority the previous year, and thus acted in breach of a right which the applicant was unquestionably entitled to exercise in the promotions procedure.

45 At the hearing, the Commission justified that approach by claiming that the applicant's merits had been compared with those of all her colleagues the previous year. Furthermore, the proposals made the previous year give rise to a legitimate expectation on the part of the officials concerned. Last, it emphasised that an official who was on the list of candidates most deserving of promotion drawn up by the appointing authority the previous year but was not promoted, and who is not considered "no longer deserving" of promotion, is regarded by the Commission as having thereby acquired the right to be placed on the list for the current year.

46 In that respect, the Court observes that officials are entitled to have the appointing authority undertake a comparative examination of their merits and their reports in the context of each promotions procedure, more particularly because the officials who were most deserving of promotion the previous year are not necessarily those most deserving of promotion the following year. Likewise, the Commission has not shown either that the applicant's merits were compared in the course of the 1996 promotions procedure with those of the officials considered most deserving in 1996.

47 Nor can the Court accept the Commission's arguments that the principle of legitimate expectations is applicable in the present case. The right to claim protection of legitimate expectations extends to any individual who is in a situation in which it appears to him that the Community administration, by giving him precise assurances, has led him to entertain legitimate expectations (Case T-43/97 *Adine-Blanc* v *Commission* [1998] ECR-SC II-1683, paragraph 31, and the case-law cited there). However, promises which do not take account of the provisions of the Staff Regulations cannot give rise to a legitimate expectation on the part of the person to whom they are made (Case 162/84 *Vlachou* v *Court of Auditors* [1986] ECR 481, paragraph 6, and Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131, paragraph 30).

48 Therefore, even if the Commission had given assurances to the officials on the previous year's list of candidates considered most deserving of promotion,

those assurances were manifestly illegal and could not give rise to a legitimate expectation on the part of those officials. Furthermore, the Commission did not claim to have given them "precise assurances" capable of leading them to entertain a legitimate expectation. On the contrary, it is common ground that, at least when that list was published in 1997, it was accompanied by a caveat to the effect that "officials on those lists who are not promoted on that date [would] not be automatically entitled to be included on subsequent lists" (see *Administrative Notices* No 998, 8 August 1997, p. 4).

49 As regards the argument that the officials on the previous year's list of most deserving officials drawn up by the appointing authority thereby acquired the right to be promoted the following year unless they were then considered "no longer deserving" of promotion, it should be observed that the Staff Regulations do not confer a right to promotion, even on officials who meet all the conditions for promotion (see Case T-3/92 *Latham* v *Commission* [1994] ECR-SC II-83, paragraph 50, Case T-507/93 *Branco* v *Court of Auditors* [1995] ECR-SC II-797, paragraph 28, and *Baiwir* v *Commission*, cited above, paragraph 67).

50 It follows from all the foregoing that the promotions procedure in issue is vitiated by an irregularity constituting a substantive defect in that the consideration of the comparative merits of the applicant and the two officials on the previous year's list of most deserving officials drawn up by the appointing authority fell short of the requirements of Article 45(1) of the Staff Regulations (see Case T-144/95 *Michaël* v *Commission* [1996] ECR-SC II-1429, paragraph 62).'

7 In those circumstances, the Court of First Instance annulled the contested decision, without its being necessary to consider the other grounds of annulment relied on by Mrs Hamptaux, and also dismissed her claim for compensation for damage.

The appeal

8 By its appeal, the Commission submits that the Court should set the contested judgment aside and dismiss Mrs Hamptaux's action for annulment or, in the alternative, refer the case back to the Court of First Instance.

9 In support of its appeal, the Commission relies on a single ground alleging a contradiction in the grounds of the contested judgment and an error of law.

10 The Commission claims that there is a contradiction between the assertion in paragraph 44 of the contested judgment that the procedure which it set up did not satisfy the requirement of consideration of the comparative merits of officials eligible for promotion and the statement in paragraph 37 that, as a result of that procedure, officials who were on the list of most deserving candidates the previous year and have not been promoted are entered on the same list the following year only if they are not considered 'no longer deserving' of promotion.

11 The Commission contends that the fact that an official is considered 'no longer deserving' of promotion means that that there is no longer justification for including him on the list of most deserving officials for the following promotions procedure. An assessment of that nature assumes a comparison with the merits of the other candidates for promotion. In that way, consideration of the question whether an official is 'no longer deserving' of promotion is equivalent to 'consideration of the comparative merits' for the purposes of the first subparagraph of Article 45(1) of the Staff Regulations.

12 The Commission further states that there is a 'rebuttable presumption' that officials who were on the list of most deserving candidates but were not promoted will again be included on the list of most deserving candidates for the following promotions procedure. In the vast majority of cases officials have a relatively consistent performance over the years and it is rare for a candidate deemed to be more deserving than another during one procedure to suddenly be 'no longer

deserving' of promotion the following year. Furthermore, the merits of a candidate for promotion cannot be assessed in relation to a single year, but should be evaluated over a longer period, since otherwise officials who confined themselves to making a special effort in the years during which they might hope to be promoted would be unduly favoured.

13 The Commission observes that the fact that an official is not promoted in one year despite having been on the list of most deserving candidates is the consequence of the budgetary constraints that limit the number of posts available in the next higher grade.

14 Accordingly, it is proper, and indeed necessary, for the appointing authority, when considering the comparative merits of candidates as provided for in the first subparagraph of Article 45(1) of the Staff Regulations, to take into consideration the fact that a candidate has already appeared on the list of most deserving officials during the previous year. In that respect, the Commission refers to settled case-law to the effect that, in assessing candidates' merits, the appointing authority is not bound to rely solely on the staff reports of those concerned but may also base its assessment on other aspects of their merits, such as information about their administrative and personal situation of such a kind as to qualify the assessment made solely on the basis of the staff reports (see, in particular, Joined Cases T-89/91, T-21/92 and T-89/92 *X* v *Commission* [1993] ECR II-1235, paragraphs 49 and 50).

15 Mrs Hamptaux maintains that the Commission's reasoning is based on a false premiss, namely that consideration of the question whether an official who was on the list of most deserving officials during a previous procedure may now be 'no longer deserving' of promotion implies that an assessment is made of the question whether such an official can still be given priority on the list of officials eligible for promotion. The finding that an official is 'no longer deserving' of promotion calls only for an individual assessment of his professional qualities over a period of time and is not based on a comparison between the performance of the official concerned and the professional merits of the other candidates for promotion.

16 Thus, according to Mrs Hamptaux, the mere fact that an official has been considered 'most deserving' of promotion in the course of one promotions procedure and is not 'no longer deserving' of promotion — which means that his professional qualities have not deteriorated over a period of time — does not mean that in the course of a subsequent procedure the official concerned has continued to be 'most deserving' of promotion on the basis of a comparison between his professional merits and those of other candidates for promotion who may perhaps not have been eligible for promotion during the previous procedure.

17 Admittedly, the appointing authority may, when drawing up the list of most deserving candidates, take account of the fact that an official has already been on the list drawn up for the previous year, but it is not relieved of its duty to undertake a comparison of the merits of the person concerned with the qualities of all candidates for promotion in the current procedure. Mrs Hamptaux specifically calls in question the automatic inclusion by the appointing authority of officials 'left over' from the previous year's list on the list of most deserving officials for the current procedure.

Findings of the Court

18 For each promotions procedure, the first subparagraph of Article 45(1) of the Staff Regulations places the appointing authority under an obligation to undertake a consideration of the comparative merits of the officials eligible for promotion and of the reports on them.

19 Although, as the Commission rightly observes, the requirement of a consideration of the candidates' comparative merits does not preclude the appointing authority from taking into consideration the fact that a candidate has already been on the list of most deserving officials in a previous procedure, it none the less requires that the merits of each candidate be assessed in comparison with those of other

candidates for promotion, including officials who have not been previously on the list of most deserving candidates.

20 In paragraph 44 of the contested judgment the Court of First Instance held:

'It follows both from the written submissions lodged by the Commission and from the explanations which it provided at the hearing that officials who were on the list of most deserving officials drawn up by the appointing authority for the previous year and who were not promoted are automatically included on the list of most deserving officials the following year, unless they are considered "no longer deserving" of promotion. Contrary to its obligation under Article 45(1) of the Staff Regulations, therefore, the appointing authority did not, in the context of the promotions procedure in issue, undertake a comparative examination of the applicant's merits and her reports and those of the two officials who had already appeared on the list of most deserving officials drawn up by the appointing authority the previous year, and thus acted in breach of a right which the applicant was unquestionably entitled to exercise in the promotions procedure.'

21 The Court of First Instance also held in paragraph 46 that 'the Commission has not shown either that the applicant's merits were compared in the course of the 1996 promotions procedure with those of the officials considered most deserving in 1996'.

22 The Commission has merely reiterated before the Court of Justice the arguments already submitted to the Court of First Instance, which seek to show that when the appointing authority ascertains whether an official on the previous year's list of candidates considered most deserving for promotion is 'no longer deserving' of promotion, it compares the merits of all officials eligible for promotion and the reports on them. However, the Commission has not established that the reasoning of the contested judgment and the conclusion which the Court of First Instance reached on the basis of that reasoning are contradictory.

23 There is no inconsistency in finding that, on the one hand, in the context of the promotions procedure in issue, the officials on the previous year's list of candidates considered most deserving of promotion are included on the current year's list only on condition that they are not 'no longer deserving' of promotion and, on the other hand, that, in proceeding in this way, the appointing authority did not consider the comparative merits of candidates for promotion, in accordance with the requirements of the first subparagraph of Article 45(1) of the Staff Regulations. An assessment of the question whether a candidate is 'no longer deserving' of promotion, which is of a purely individual nature, does not mean that the merits of all the officials eligible for promotion were actually compared.

24 For the same reason, the Court of First Instance did not err in law in holding that consideration of the question whether an official eligible for promotion is 'no longer deserving' of promotion was not equivalent to a consideration of the comparative merits, as required by the first subparagraph of Article 45(1) of the Staff Regulations.

25 Since the Commission's single ground of appeal cannot be upheld, its appeal must be dismissed.

Costs

26 Under Article 69(2) of the Rules of Procedure, which apply to the appeals procedure pursuant to Article 118, the unsuccessful party is to be ordered to pay the costs, if they are applied for in the successful party's pleadings. Since Mrs Hamptaux applied for costs and the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Dismisses the appeal;**

2. **Orders the Commission of the European Communities to pay the costs.**

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 9 November 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber