JUDGMENT OF THE COURT (FIRST CHAMBER)
1 JULY 1976 [1]

Jan Eliza de Wind
v Commission of the European Communities

Case 62/75

Summary

Officials — Promotion — Choice — Criteria — Discretionary power of the administration
(Staff Regulations of Officials, Art. 45)

Even in a case in which it may be open to question whether the appointing authority did not give too much weight to the assessments made by departmental heads as compared to the other factors involved in the evaluation, that authority however, has power under the Staff Regulations when deciding on promotions to make a choice on the basis of a consideration, carried out in the manner which it considers to be the most appropriate, of the comparative merits of the candidates eligible for promotion and of the reports on them.

In Case 62/75

JAN ELIZA DE WIND, official of the Commission of the European Communities, residing at 1640 Rhode-Saint-Genèse, Oud Kloosterlaan 29, Belgium, represented by M. Denys, Advocate at the Cour d'appel of Brussels, with an address for service in Luxembourg at the Chambers of J. Loesch, Advocate, 2 rue Goethe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, R.C. Fischer, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Bâtiment CFL, Place de la Gare,

defendant,

Application for the annulment of the list of the best qualified officials published in the Communications of 28 October 1974, the appearance on

1 — Language of the Case: Dutch.

this list of the names of Mr E. and Mr P. and their promotion to Grade A 4, and the defendant's implied decision rejecting the request made by the applicant on 17 December 1974,

THE COURT (First Chamber)

composed of: A. O'Keeffe, President of Chamber, A. M. Donner and F. Capotorti, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments put forward by the parties during the written procedure may be summarized as follows:

I — Facts and procedure

The applicant, a Netherlands national, has been in the service of the Commission since 14 September 1964. On the following 1 October he was appointed as an official in Grade A 5 at the Directorate-General for Social Affairs, Vocational Training Division. From August 1969 to July 1972 he was attached to the Industrial and Professional Relations Division, in the section dealing with the sociology of labour. He is at present responsible for providing secretarial services for a certain number of committees and joint working parties, as well as meetings arranged in order to have contact with representatives of various professional organizations.

In autumn 1974 a decision was made concerning promotions from Grade A 5 to Grade A 4. The list of officials considered the best qualified was published in the 'Communications' of 28 October 1974. The applicant's name did not appear on this list.

The 'preliminary consultative procedure', adopted by a decision of the Commission of 21 December 1970 and amended by a decision of 14 July 1971 was followed, pursuant to which five promotion committees were set up for Categories A, B, C and D and the Language Service and were given the task 'of examining the position of officials who satisfy the conditions laid down under the Staff Regulations for promotion during a particular financial year'.

In order to facilitate the task of the Promotion Committee for officials in Category A, the Commission adopted on

18 June 1973 a 'Method of assessment of officials in Grade A 5 eligible for promotion to Grade A 4' according to which:

- The Directors-General of the various Directorates-General shall be required to draw up a list of the officials in Grade A 5 who are eligible for promotion and to submit this list to a 'Promotion Committee'. Each Director-General shall decide on the order of priority on this list of the officials whose names are suggested for promotion;
- The Promotion Committee which may modify both these proposals and the order of priority therein contained, shall award to each official a certain number of points determined by the abovementioned 'Method'. Thus, it shall give points to *all* the officials on this list according to the following 'objective' criteria:
  - age,
  - seniority in the grade,
  - seniority in the service,
  - staff report: the staff report shall be made up of three headings (ability, efficiency and conduct in the service), under each of which one of the following comments may be made: 'above average', 'average', 'inadequate'.

In addition, the Promotion Committee shall award points to a *certain number* of officials eligible for promotion on the basis of their priority in the list drawn up by the Directors-General. The number of officials eligible for these points shall vary according to the total number of officials whose names appear on this list.

- The Promotion Committee shall then be requested to draw up a draft list of officials 'considered to be the best qualified for promotion to Grade A 4' and to submit this draft to the Commission. The officials whose names appear on this draft list and who are subsequently not promoted shall receive 25 points for the next financial year.

As in the present case, the number of officials eligible for promotion whose names were put forward by the Director-General of DG/V (in which the applicant was employed) amounted to 12, only those whose names were among the first four were able to receive points on grounds of priority (under Article 1 (1) (c) of the 'Method of assessment' and the table annexed thereto, where the number of officials eligible for promotion is between 11 and 13, the first shall receive 70 points, the next two 45 points and the fourth 20 points).

The classification resulting from the original proposals was as follows:

1.: E., 2.: O., 3.: W., 4.: P2., 5.: P., 6.: *De Wind.*

At the request of the members appointed by the central Staff Committee, the Promotion Committee made a special examination of the cases of Mr Pasca and one other person and amended the classification as follows:

1.: E., 2.: 0., 3.: P., 4.: W., 5.: P2., 6.: *De Wind.*

The following points were obtained:

E.	Number of points
Age	54
Seniority in the grade	6
Seniority in the service	13
Staff report	20
	103
Order of priority for promotion: first	70
	173

0.	Number of points
Age	45
Seniority in the grade	16
Seniority in the service	8
Staff report	30
	99
	1169

Order of priority for promotion: second	45
	144

P.	Number of points
Age	59
Seniority in the grade	18
Seniority in the service	9
Staff report	20
	106
Order of priority for promotion: third	45
	151

De Wind	Number of points
Age	46
Seniority in the grade	20
Seniority in the service	10
Staff report	30
	106
Order of priority for promotion: sixth	0
	106

The file shows that the applicant received the highest number of points under three of the four *objective* criteria, that is, seniority in the grade, seniority in the service and the staff report. In fact, the latter includes the comment 'above average' under each heading, which was worth an award of 30 points to the applicant. In comparison Mr P., for example, twice obtained the comment 'above average' and once the comment 'average' under the heading 'efficiency', which was worth an award of 20 points to him. It is thus on the basis of the points awarded by way of the *order of priority* that the applicant was excluded from the list of officials considered to be the best qualified. As the applicant was in sixth place on the original list of proposals he was not eligible for any points on the basis of his classification and was overtaken by officials who received fewer points than he did under the 'objective' criteria.

The Committee submitted to the Commission a draft list containing, in alphabetical order, the names of 66 officials in Grade A 5. At its meeting on 23 October 1974 the Commission, which, on its own admission, was able to consult the personal file of each official, drew up a list of those who were the best qualified. At its meeting on 20 November 1974 it promoted 55 officials to Grade A 4.

For this reason, on 17 December 1974 the applicant lodged with the appointing authority a complaint within the meaning of Article 90 of the Staff Regulations of officials.

As the Commission's failure to reply within the prescribed time-limit amounted to an implied decision of rejection of the complaint the applicant brought the present application on 14 July 1975.

II — Conclusions of the parties

The applicant claims that the Court should:

(a) Annul the list of the best qualified officials published in the 'Communications' of 28 October 1974;

(b) Annul the decision whereby Mr E. and Mr P. appear on the list of officials seeking promotion to Grade A 4;

Annul the decision whereby Mr E. and Mr P. were promoted to Grade A 4 since it was adopted by the Commission without its having adequately considered the comparative merits of all candidates and in particular those of the applicant;

(c) Annul or at least declare void the implied decision of the Commission of the European Communities rejecting the request made by the applicant on 17 December 1974;

(d) Order the Commission of the European Communities to pay the costs of the action;
(e) Take note that the applicant reserves the right to raise submissions both of fact and of law to which the defence by the opposite parties or the documents produced by them may give rise;
(f) Alternatively;
Order the Commission to produce the minutes of the meeting of 23 October 1974 or at least that part thereof which relates to the nomination of the persons eligible for promotion to Grade A 4;
Order the Commission to produce the minutes of the meeting or at least that part thereof which relates to the promotion of Mr E. and Mr P.
(g) Summon the Director-General and the Head of the applicant's Division as witnesses;
(h) Order the Commission to produce the staff reports and personal files of Mr E. and Mr P.

The defendant contends that the Court should:
(a) Dismiss the applicant's conclusions as unfounded;
(b) Order the applicant to pay the costs;
(c) If it orders witnesses to be heard in accordance with the applicant's conclusions, hear in addition his Director, Mr J. Peel, whether or not in place of the applicant's Head of Division, Mr J. Danis.

III — Submissions and arguments of the parties

(a) The first submission: unequal treatment of candidates

The *applicant* maintains that, by making a discretionary award of additional points without applying objective criteria, the Directors General drew up a list of candidates eligible for promotion without any consideration of their comparative merits. In this way, officials whose staff reports bear three times the comment 'very good' may be excluded from the list of best qualified officials to the advantage of others whose reports only contain the comment 'very good' once or twice.

The *defendant* replies that the lists of best qualified officials are drawn up by the Commission alone on the basis of proposals made by the Promotion Committees. The powers and the function of the Directors-General is limited to putting forward in order of priority the names of those officials in their departments who are eligible for promotion. Of course, these priorities are taken into account in the deliberations of the Promotion Committees, but in no case do they constitute the only relevant criterion. The list of criteria set out in the 'Method of assessment' is not exhaustive and, according to the terms of Article 4 (3) thereof 'it is therefore for the Committee to assess the various factors in each individual case'. Since the initial proposals for promotion made by the Directors-General or heads of department and the order in which they were made are published in the Staff Courier before the first meeting of the Committee, the officials concerned are able to submit their observations on these proposals to the members of the Committee in good time.

All officials eligible for promotion are dealt with on an equal footing: in fact, after long discussions with the relevant Directors and heads of department, the Directors-General take into consideration such objective factors as age and seniority. As regards subjective factors, such as a comparative assessment of ability and conduct, the Advocate-General recalled in his opinion in Joined Cases 27 and 30/64 *(Fulvio Fonzi* v *Commission of the European Atomic Energy Community,* [1965] ECR 512) that:

'according to the case-law of the Court of Justice, a promotion is not justified only

by merit in respect of work, but also by other subjective facts that are considered concerning the character and the personality of officials. Furthermore, the Court has properly refused on several occasions to substitute its own judgment in respect of promotion for the subjective evaluation of the administration.'

The fact that one official whose staff report contained three times the comment 'above average' has not been promoted, whereas another who only received two such comments has been promoted does not constitute evidence of discriminatory treatment. The intention of the Staff Regulations is clearly that the choice shall not depend only on the staff reports.

The *applicant* replies that the system of points awarded on the basis of the order of priority and without any reasons being given which the Commission could have considered, vitiates the method of 'promotion on the basis of objective criteria'.

In fact, Mr E. whose staff report, like that of the applicant, contains three times the comment 'above average', has only three years' seniority in Grade A 5 (The applicant has ten. As he was classified in the last step of this grade and his report contains the comment 'above average' three times, it would have been in accordance with the normal practice for his name to have been put forward for promotion). The fact that the Director-General classified Mr E. in first place meant that he was awarded 70 points, enabling him to obtain a total of 173 points.

The example of Mr P. is even more conclusive. He is employed in the same Directorate as the applicant. Their reports were drafted by the same Director (with the applicant receiving the comment 'above average' three times and Mr P.'s only twice). Mr P. report bore the comment 'average' for his 'contributions' to the service, which is the most important heading for the purposes of the method of evaluation applied by the Commission:

Acquirements	Contributions	Conduct	Total number of points
above average	above average	average	27
average	above average	above average	24
above average	average	above average	20

Contrary to the statements made by the defendant, neither the Director-General of DG/V nor the defendant asked the applicant's Head of Division and Director for further details concerning the reports in question.

It may be thought that if the applicant had obtained 106 points on the basis of objective factors, the assessment of subjective factors (such as character and personality) was detrimental to him. In fact the heading 'conduct' in his staff report reads as follows: remarkably conscientious approach to his work; great discretion; relations with third parties and colleagues always marked by courtesy.

Finally, it is reasonable to wonder whether Mr E. could be regarded as eligible for promotion since his appointment to Grade A 5 dates from 1 October 1971 and, therefore, his staff report (drawn up on 30 June 1973) relates to a period of less than two years.

The *defendant* replies that, as, in addition to the staff reports, the Directors-General must take account of other objective and subjective factors, it is incorrect to claim that a suggested

promotion list in which the classification does not correspond exactly to that resulting from the staff reports means that on this ground alone special reasons must be given and that additional information must be considered by the Commission.

It is incorrect to state that it is normal practice to put forward for promotion an official who has reached the last step in the salary scale and whose staff report contains three times the comment 'above average'.

Finally, on 31 December 1973, Mr Erhard had more than two years' seniority in Grade A 5.

(b) The second submission: infringement of Article 45 (1) of the Staff Regulations

The *applicant* refers to the Opinion in Joined Cases 94 and 96/63 (judgment of 5 May 1964, *Bernusset* v *Commission of the European Economic Community,* [1964] ECR 316) according to which the *Raponi* judgment lays great emphasis on the fact that a decision on promotion requires an 'examen scrupuleux de dossiers comparables', in order that the decision on promotion may be taken 'en toute connaissance de cause' and stress is laid on the need to consider the comparative merits on a 'base égalitaire et au vu de sources d'informations et de renseignements comparables'. Article 45 stipulates that there must be a consideration of the comparative merits of the officials eligible for promotion and not only of those persons who appear on a list of officials considered to be the best qualified. The applicant was excluded from the consideration of merits since the heads of department only considered the merits of the officials whose names they had put forward for promotion. He was therefore excluded arbitrarily from the comparative consideration.

The *defendant* replies that at each stage of the procedure the comparative merits of all the officials eligible for promotion were considered. Moreover, had this consideration been limited to those officials whose names were put forward for promotion by the Directors-General the applicant's name would not have been set aside, since it appeared on the list of proposals.

Contrary to the applicant's allegations concerning the procedure followed, Mr M. Shanks, the Director-General of DG/5, drew up his list of proposals after discussing the question with the applicant's Director and Head of Division. Similarly, the Director-General did not 'decide arbitrarily that the applicant could not be promoted'. The applicant's name was in fact put forward, even though his chances had been relatively small once his name only appeared on the list in sixth place.

The consideration of the comparative merits carried out by the Commission is not limited to those officials whose names had been put by the Promotion Committee on its draft list. Furthermore, when the promotion decision was taken, the Commission had available the list of all the officials eligible for promotion (including the applicant) and was in a position to consult their individual files and staff reports.

The *applicants* replies that the entries in the minutes of the meetings of the Commission of 23 October and 20 November 1974, according to which it had the opportunity of consulting the personal files and staff reports of the officials who were eligible for promotion and that it considered their comparative merits, were 'standard clauses'.

The defendant must therefore produce the staff reports and personal files of Mr E. and Mr P.

The *defendant* disputes the applicant's statement that the entries in the minutes of the said meetings are standard clauses.

Following the order of the Court (First Chamber) of 19 February 1976, the Court heard Mr Michael Shanks, former

Director-General of DG V as a witness during the hearing on 1 April 1976. At this hearing the applicant was represented by Mr Denys, Advocate at the Cour d'appel of Brussels, and the defendant by its Legal Adviser, Mr R. C. Fischer, acting as Agent.

The Advocate-General delivered his opinion at the hearing on 21 May 1976.

Law

1 In an application lodged on 14 July 1975 the applicant requested the Court to annul (a) the list of best qualified officials published in the 'Communications' of 28 October 1974, (b) the inclusion in this list of the names of two officials, Mr E. and Mr P., and their promotion to Grade A 4 and (c) the defendant's implied decision to dismiss the applicant's complaint under Article 90 of the Staff Regulations.

2 In this instance the defendant followed the 'preliminary consultative procedure' which it had adopted by a decision of 21 December 1970, pursuant to which five Promotion Committees were set up for Categories A, B, C and D and the Language Service, and were given the task 'of examining the position of officials who satisfy the conditions laid down under the Staff Regulations for promotion during a particular financial year'.

3 In order to facilitate the task of the Promotion Committee for officials in Category A, the Commission adopted on 18 June 1973 a 'Method of assessment of officials in Grade A 5 eligible for promotion to Grade A 4' which requires each Director-General to put forward, in order of priority, the names of the officials in Grade A 5 in his department who are eligible for promotion.

4 These promotions proposed are submitted to the Promotion Committee which may modify them; it awards to each official a certain number of points determined on the basis of objective criteria such as age, seniority in the grade, seniority in the service and staff reports; additional points are also awarded to a certain number of officials who are eligible for promotion on the basis of their place in the order of priority established by the Director-General concerned. The number of officials eligible for these points varies according to the total number of officials in each Directorate-General whose names appear on the list.

5 In this instance, having followed the procedure laid down by the 'Method of assessment' the number of officials eligible for promotion in Directorate-General V was 12, with the result that only the first four listed were able to receive points on the basis of their priority.

6 As the applicant was classified in sixth place he could not receive any points on the basis of his classification.

7 He maintains that as a result of the discretionary award of additional points the candidates eligible for promotion were treated unequally and that this infringed Article 45 of the Staff Regulations.

8 He points out in particular that the staff report on Mr P., one of the two candidates whose names the applicant wishes to see withdrawn from the list of best qualified officials, contains twice the comment 'above average' and once the comment 'average' under the heading 'efficiency' which is the most important heading appearing on the file for the purposes of the method of evaluation applied by the Commission whilst the applicant's report contained the comment 'above average' under each heading.

9 The applicant received a higher number of points than Mr P. under another two of the four objective criteria, seniority in the grade and seniority in the service.

10 Thus, it was the assessment of the subjective factors by his Director-General which had adversely affected his position, since the heading in his report 'conduct in the service', which was by nature more objective, was more favourable.

11 The applicant maintains that the Commission has adopted a method of assessment of officials eligible for promotion which, although presented as 'objective', in fact leaves a very wide margin of choice to the Directors-General and Promotion Committees by allowing the points awarded according to objective criteria and those awarded according to the order of priority of the officials on the lists drawn up by the Directors-General to be balanced on against the other.

12 He criticizes in particular the award of additional points to candidates E. and P. on the basis of the order of priority established by the Director-General of Directorate-General V.

13 When the list was drawn up Mr E. had only three years' seniority in Grade A 5 and although Mr P. had been nine years in that grade he received only 20 points in his report as compared to the 30 (the maximum possible) obtained by the applicant.

14 However, the oral testimony of Mr S., Director-General of Directorate-General V, shows that Mr E. was placed first in the order of priority by virtue of the high quality of his work.

15 This testimony also shows that Mr P. was first classified fifth in the order of priority and that his classification was subsequently so altered as to place him third: this was done at the request of the Staff Committee which put forward in particular the view that as a general rule, an official in Grade A 5 ought to be promoted to A 4 before his retirement and that therefore his age (59) justified his promotion.

16 If the applicant had been classified in fifth place instead of Mr P. it does not seem likely the Staff Committee would have intervened to put him in third place, which it did for Mr P. on the basis of his age.

17 Even if it be open to question whether the Commission did not give too much weight to the assessments made by the Directors-General as compared to the other factors involved in the evaluation, the Commission however has power under the Staff Regulations when deciding on promotions to make a choice on the basis of a consideration carried out in the manner which it considers to be the most appropriate, of the comparative merits of the candidates eligible for promotion and of the reports on them.

18 It does not appear that by promoting Mr E. and Mr P. the Commission has exceeded its powers.

19 For this reason the application must be dismissed.

Costs

20 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

21 The applicant has failed in his submissions.

22 However, under the terms of Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, institutions shall bear their own costs.

23 It is appropriate that the costs incurred in the measures of inquiry shall be borne by the defendant.

On those grounds,

THE COURT (First Chamber)

hereby rules:

1. **The application is dismissed;**
2. **The parties shall bear their own costs;**
3. **The costs of hearing the witnesses shall be borne by the defendant.**

O'Keeffe Donner Capotorti

Delivered in open court in Luxembourg on 1 July 1976.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber