JUDGMENT OF THE COURT (Second Chamber)
14 February 1989 *

In Case 346/87

Giancarlo Bossi, an official of the Commission of the European Communities, residing in Ottignies-Louvain-la-Neuve (Belgium), assisted and represented by Jacques Putzeys and Xavier Leurquin, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Georges Nickts, Huissier de Justice, 87 avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Joseph Griesmar, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Promotion Committee drawing up the list of officials for promotion, the decision of the appointing authority drawing up the list of officials actually promoted and the Commission's implied decision rejecting the applicant's complaint, and for damages,

THE COURT (Second Chamber),

composed of T. F. O'Higgins, President of the Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator

* Language of the case: French

having regard to the Report for the Hearing and further to the hearing on 8 November 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 1 December 1988

gives the following

Judgment

1 By an application lodged at the Court Registry on 11 November 1987 Mr Giancarlo Bossi, an official in Grade B 2 in Directorate-General IX of the Commission of the European Communities, brought an action seeking the annulment of:

(i) the decision of the Promotion Committee drawing up the list of officials found to be most worthy of promotion to Grade B 1 in the 1987 financial year, published in *Administrative Notices* No 520 of 2 March 1987;

(ii) the decision of the appointing authority drawing up the list of officials actually promoted in the 1987 financial year, published in *Administrative Notices* No 545 of 14 December 1987;

(iii) the Commission's implied decision rejecting the applicant's complaint through official channels which sought the annulment of the appointing authority's decision not to enter his name on the abovementioned list of officials found to be most worthy of promotion to Grade B 1 in 1987;

and (b) an order that the Commission pay him as damages,

(i) the sum of BFR 100 000 as compensation for material damage suffered in 1987, representing the annual difference in salary and other benefits between Grades B 2 and B 1 and the loss of seniority in Grade B 1 for the subsequent steps therein;

(ii) an additional sum, to be calculated on a similar basis, as compensation for the material damage suffered in 1988 and during the subsequent financial years as long as he is not promoted to Grade B 1;

(iii) the sum of BFR 100 000 fixed *ex aequo et bono* as compensation for the non-material damage suffered.

2 It is apparent from the documents before the Court that in the 1987 promotion procedure Mr Bossi appeared, pursuant to Article 45 (1) of the Staff Regulations of Officials of the European Communities (hereinafter referred as the 'Staff Regulations'), on the list of officials eligible for promotion to Grade B 1 on the ground that they had completed a minimum of two years in their present grade.

3 However, Mr Bossi was not among the 15 officials of his Directorate-General whose names were entered on the list of officials proposed by the Directorates-General for promotion in 1987, which was published in the *Administrative Notices* of 15 December 1986.

4 Furthermore, Mr Bossi's name did not appear on the list of officials considered most worthy of promotion to Grade B 1 which was drawn up by the appointing authority following the recommendation of the Promotion Committee. The first 10 officials on the list drawn up by the Directorates-General appeared on that list. Finally, it was the first eight officials of DG IX appearing in the abovementioned list who were promoted to Grade B 1 in the 1987 financial year.

5 On 14 April 1987 Mr Bossi brought a complaint through official channels under Article 90 (2) of the Staff Regulations seeking the annulment of the appointing authority's decision not to enter his name on the abovementioned list of officials found to be most worthy of promotion. That complaint was unsuccessful.

6 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the submissions and arguments of the parties which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The conclusions seeking the annulment of the contested decisions

7 As regards the implied decision rejecting the applicant's complaint seeking the annulment of the appointing authority's decision not to enter his name on the list of officials found to be most worthy of promotion to Grade B 1 in the 1987 financial year, the Commission has argued that the rejection merely confirmed the previous express decision and was not subject to challenge.

8 In that respect, it should be stated that under Article 91 (1) of the Staff Regulations the Court has jurisdiction in any dispute regarding the legality of an act adversely affecting a person to whom the Staff Regulations apply. Under Article 90 (2) of the Staff Regulations the act having adverse effects consists either in a decision adopted by the appointing authority or in a failure by the appointing authority to adopt a measure prescribed by the Staff Regulations. Article 91 (2) of the Staff Regulations provides that an appeal to the Court lies only if the official has previously submitted a complaint to the appointing authority and the complaint has been rejected by express decision or by implied decision.

9 The complaint through official channels and the express or implied rejection thereof form an integral part of a complex procedure and only represent one condition precedent for bringing the matter before the Court.

10 In those circumstances, even if the appeal to the Court is formally directed against the rejection of the official's complaint, its effect is to bring before the Court the act adversely affecting the official in respect of which the complaint was submitted. In this case, the appeal must therefore be considered to be directed against the appointing authority's decision not to enter the applicant's name on the list of officials found to be most worthy of promotion to Grade B 1 in the 1987 financial year.

11 Consequently the objection of inadmissibility raised by the Commission against the applicant's action in this respect must be dismissed.

12 As regards the appointing authority's 'decision' on the list of officials actually promoted to Grade B 1 in the 1987 financial year, it must first be stated that, as the Commission pointed out, that list was not published until 14 December 1987, that is to say after the originating application was lodged.

13 The conclusions seeking the annulment of that list must therefore be regarded as new inasmuch as they were not made in the complaint through official channels provided for by Article 90 (2) of the Staff Regulations. Consequently the action must be dismissed as inadmissible in so far as it seeks the annulment of the appointing authority's decision on the list of officials actually promoted to Grade B 1 in the 1987 financial year.

14 In so far as the applicant seeks the annulment of the Promotion Committee's 'decision' on the list of officials found to be most worthy of promotion to Grade B 1 in 1987, it must be stated that the Promotion Committee's act of drawing up such a list cannot be regarded as a decision capable of adversely affecting the applicant since, pursuant to the Commission's decision of 21 December 1970 as amended by the decision of 14 July 1971 (*Administrative Notices* No 42 of 13 May 1975) that Committee's role is merely consultative and consists in submitting a draft list to the appointing authority which alone has power to adopt the definitive list.

15 However, it may be inferred from the context of the application that in fact the applicant was intending to refer not to the act of the Promotion Committee but the drawing-up by the appointing authority of the list of most deserving officials.

16 In order to identify the contested decision, the applicant refers in his application to *Administrative Notices* No 520 of 2 March 1987 in which the list adopted by the appointing authority is reproduced.

17 Furthermore, in his complaint through official channels of 14 April 1987 the applicant expressly referred to the appointing authority's act.

18 Since there can be no doubt as to the real subject-matter of the applicant's claim, the view should be taken that despite the words used the application is for the annulment of the appointing authority's decision drawing up the list of officials found to be most worthy of promotion to Grade B 1 in 1987. Furthermore, it was in that sense that the Commission interpreted the application.

19 However, the Commission asks what interest the applicant could have in the annulment of a decision of this nature since he did not challenge the promotion decisions in due time and consequently they have become final.

20 It is apparent from *Administrative Notices* No 520 of 2 March 1987 that the list of officials found to be most worthy of promotion is valid only for 1987 and according to the Commission's undisputed declaration the promotions made on the basis of that list exhausted the quotas of posts available for the 1987 financial year.

21 It follows that, even if a judgment were to annul that list and, subsequently, the applicant's name were entered on the new list of most deserving officials, he could still not be promoted from Grade B 2 to Grade B 1 in the 1987 financial year since he did not challenge in due time the promotion decisions which alone are capable of adversely affecting him.

22 According to the abovementioned amended decision of the Commission of 21 December 1970 the drawing-up of the list of officials found to be most worthy of promotion is only one of the successive stages for selecting officials for promotion which culminates in a decision specifying the officials promoted.

23 The Court has already held, with regard to Article 173 of the EEC Treaty, that only measures the legal effects of which are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment (see the judgment of 11 November 1981 in Case 60/81 *IBM* v *Commission* [1981]

ECR 2639). In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are a culmination of an internal procedure, it was stated in the same judgment that in principle an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure and not the provisional measure intended to pave the way for the final decision. Furthermore, as regards staff cases, the Court has held that acts preparatory to a decision do not adversely affect the applicant within the meaning of Article 90 (2) of the Staff Regulations and can only be contested incidentally in an appeal against measures capable of being annulled (see the judgment of 7 April 1965 in Case 11/64 *Weighardt* v *Commission* [1965] ECR 285).

24 It follows from the foregoing that although the omission of an official from one of the lists drawn up during the course of the promotion procedure may have some influence on the promotion decision, it is not an independent decision in particular where, as in this case, those lists are drawn up only for the purpose of promotions within a specific financial year. On the contrary, that step represents a preparatory act which is a necessary preliminary to the final decision on the promotions. The regularity of such preparatory acts may only be called into question in an application brought against the decision concluding the promotion procedure.

25 Consequently, the action must also be dismissed as inadmissible in so far as it is directed against the appointing authority's decision not to include the applicant's name on the list of officials found to be most worthy of promotion to Grade B 1 in the 1987 financial year.

The conclusions seeking the award of damages

26 The Commission raises an objection of inadmissibility against these heads of claim on the ground that they did not appear in the complaint through official channels.

27 The Court has consistently held that in staff cases the conclusions submitted to the Court must have the same subject-matter as those raised in the complaint and that they may not contain heads of claim based on matters other than those relied on in

the complaint. The submissions and arguments made to the Court in support of those heads of claim need not necessarily appear in the complaint but must be closely linked to it (see the judgment of 20 May 1987 in Case 242/85 *Geist* v *Commission* [1987] ECR 2181).

28 A complaint whereby an official is contesting the fact that his name has not been entered on the list drawn up within a promotion procedure calls on the appointing authority to remedy the alleged illegality and take all necessary measures to place the applicant in the situation in which he would have been had the illegality not been committed. Those measures necessarily include redress for the harm which the applicant may have suffered by reason of the alleged illegality and which the adoption of a new act not vitiated by such illegality would not guarantee.

29 In those circumstances the objection of inadmissibility raised in this respect by the Commission to the applicant's action cannot be upheld.

30 On the other hand, it must be examined whether the claims for compensation for material damage are admissible in so far as the applicant did not apply in due time for the annulment of the decisions on promotions from Grade B 2 to Grade B 1 in the 1987 financial year.

31 In this respect the Court has held that an official may not, by means of a claim for compensation, circumvent the inadmissibility of an application which concerns the same act and has the same financial end in view (judgment of 15 December 1966 in Case 59/65 *Schreckenberg* v *Commission* [1966] ECR 543). The Court has also held that the inadmissibility of an action for annulment entails the inadmissibility of a claim for damages with which it is closely connected (judgment of 12 December 1967 in Case 4/67 *Muller (née Collignon)* v *Commission* [1967] ECR 365). The Court has further ruled that an official who has failed to contest in due time a decision of the appointing authority adversely affecting him may not rely on the alleged unlawfulness of that decision in an action for damages (judgment of 7 October 1987 in Case 401/85 *Schina* v *Commission* [1987] ECR 3911).

32 It follows from the foregoing that an official may not, by means of an action for damages, seek to obtain the same result as he would have obtained had he been successful in an action for annulment which he failed to commence in due time.

33 In this case the applicant is seeking, in respect of each year as from the promotions to Grade B 1 decided in 1987 and until he is promoted to Grade B 1, compensation for material damage attributable to his not being promoted and consisting in the difference between the salary for Grade B 1 and that attaching to his present grade and to the loss of seniority in step in Grade B 1.

34 If these claims were allowed the applicant would obtain exactly the same result as he would have obtained from promotion to Grade B 1 in the 1987 financial year. However, the applicant did not challenge in due time the 1987 promotion decisions in order to show that he was unlawfully passed over.

35 It follows from the foregoing that the claims for damages as compensation for the material harm allegedly suffered by the applicant by reason of his not being promoted from Grade B 2 to Grade B 1 in 1987 must be dismissed as inadmissible.

36 As regards the claim that the Commission should be ordered to pay the sum of BFR 100 000 fixed *ex aequo et bono* as compensation for the non-material damage suffered, the applicant submits that the claim is based on the Commission's maladministration in not drawing up Mr Bossi's periodic reports for 1981-83 and 1983-85 within a reasonable time.

37 In this respect it must be stated that the applicant has failed to specify the exact nature of the alleged non-material damage.

38 Furthermore, nothing in the documents before the Court indicates that the applicant would have been likely to be promoted in 1987 or at least have his name

entered on the list of most deserving officials if, at the time of the promotion procedure for the 1987 financial year, his personal file had contained the 1981-83 and 1983-85 periodic reports.

39 It follows that the claim that the Commission be ordered to pay BFR 100 000 fixed *ex aequo et bono* as compensation for non-material damage suffered must be dismissed as unfounded.

Costs

40 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those Rules provides that, in proceedings brought by servants of the Community, the institutions are to bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

(1) Dismisses the application.

(2) Orders the parties to bear their own costs.

O'Higgins Mancini Schockweiler

Delivered in open court in Luxembourg on 14 February 1989.

J.-G. Giraud
Registrar

T. F. O'Higgins
President of the Second Chamber