JUDGMENT OF THE COURT (First Chamber)
6 February 1986 *

In Joined Cases 173/82, 157/83 and 186/84

Gilbert Castille, an official of the Commission of the European Communities, residing in Brussels, represented by Marcel Slusny of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt,

applicant,

v

Commission of the European Communities, represented in Cases 173/82 and 157/83 by its Legal Adviser, Joseph Griesmar, acting as Agent, assisted by Daniel Jacob of the Brussels Bar, and in Case 186/84 by its Principal Legal Adviser, Henri Étienne, and Marie-Ann Coninsx, a member of its Legal Department, both acting as Agents, with an address for service in Luxembourg at the office of Georges Kremlis, Jean Monnet Building, Kirchberg,

defendant,

THREE APPLICATIONS for the annulment of various stages of the 1982 procedure for promoting officials to Grade A 4 (Cases 173/82 and 157/83) and of the applicant's periodic report for the period 1977 to 1979, drawn up in 1983 (Case 186/84),

THE COURT (First Chamber),

composed of: G. Bosco, acting President of Chamber, T. Koopmans and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: P. Heim

after hearing the Opinion of the Advocate General delivered at the sitting on 14 November 1985,

gives the following

* Language of the Case: French.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 28 June 1982, Gilbert Castille, at that time a Commission official in Grade A 5, brought an action for the annulment of the Commission's decision not to include him on the list of officials proposed for promotion to Grade A 4 in 1982 (Case 173/82).

2 After the Commission had contended that that action, challenging a preparatory act, was inadmissible, the applicant, by application lodged at the Court Registry on 1 August 1983, brought a second action for the annulment of the Commission's decision not to include him on the list of officials promoted to Grade A 4 in 1982 and for the annulment, so far as necessary, of the promotions made (Case 157/83).

3 The two cases were joined for the purposes of the procedure and judgment by order of the Court (First Chamber) of 29 September 1983.

4 By application lodged at the Court Registry on 13 July 1984, the applicant brought a third action for the annulment of his periodic report for the period 1977 to 1979 and of the appeal assessor's decision of 7 July 1983 on that report and for an order requiring the Commission to pay him compensation in an amount to be fixed by the Court *ex aequo et bono* for the non-material damage he has suffered because of the considerable delay which occurred before his personal file was brought up to date (Case 186/84).

5 By order dated 22 May 1984 the Court (First Chamber) joined Case 186/84 with Joined Cases 173/82 and 157/83 for the purposes of the procedure and judgment.

6 In Cases 173/82 and 157/83 the applicant challenges the promotion decisions taken in respect of 1982 in so far as they did not lead to his promotion to Grade A 4. In this regard the applicant bases his case on a number of submissions, some relating to the negative attitude which he alleges his superiors adopted towards him, in particular the Director General for Agriculture, to whose Directorate General he was assigned until 1 April 1982, others relating to the fact that during the procedure for promoting oficials to Grade A 4 in 1982 his periodic reports for 1977 to 1979 and 1979 to 1981 were not yet ready.

7 In Case 186/84 the applicant challenges his periodic report for 1977 to 1979, which became definitive on 7 July 1983, as well as the appeal assessor's decision of that date upholding the report, including the assessor's appraisal of his efficiency and conduct in the service. The applicant also seeks compensation for the non-material damage which he claims to have suffered because of the considerable delay in the drawing up of his periodic report, which meant that his personal file was not brought up to date for about 40 months.

8 Consequently, in examining the three applications regard must essentially be had to the following matters:

(i) the fact that the applicant was not promoted in the 1982 promotion procedure;

(ii) the validity of the applicant's periodic report for the period 1977 to 1979;

(iii) the harm suffered owing to the delay in the drawing up of that periodic report.

(a) *The fact that the applicant was not promoted*

9 The applicant was appointed a probationary official of the Commission in Grade A 5 in 1969. He was established in his post in 1970. Until 1982 he was assigned to

various divisions of the Directorate General for Agriculture. In 1977 his name was put on the list of officials proposed by the Commission departments for promotion to Grade A 4. He was 17th on a list of 18 candidates. That list was re-adopted without change in 1978. In 1979 and subsequent years the applicant's name was not on the list of officials proposed for promotion to Grade A 4. After complaining to the Director General for Personnel and Administration in 1981 the applicant submitted a formal complaint under Article 90 (2) of the Staff Regulations when he found that his name was not on the list of officials proposed for promotion to Grade A 4 in 1982.

10 In the applicant's view, the reason for the decision to leave his name off the list of officials proposed for promotion is that the Director General for Agriculture considered that he was not able to perform his duties properly. He suffered a serious accident in February 1979 and very soon afterwards the Director General requested that he be retired on grounds of invalidity. After the competent departments of the Commission had refused his request the Director General adopted a negative attitude towards him, which was reflected in, amongst other things, a lack of cooperation in finding him a suitable position within the Directorate General and an office in a convenient location. In this regard the applicant points out that he went into hospital several times after his accident, that he was declared to be suffering from partial invalidity (35%) within the meaning of Article 73 of the Staff Regulations and that in 1979 and 1980 he was compelled to complain about his conditions and place of work, which took no account of his state of health.

11 The applicant claims that the fact that he was not promoted was the result of his superiors' animosity. Before his accident, he was one of the officials judged eligible for promotion by his superiors, but then his name ceased to appear on the lists of officials eligible for promotion in 1979, 1980, 1981 and 1982, which were drawn up after the accident had occurred and its impact had been felt. The applicant concludes from that turn of events that the proposals which were made were irregular because the only explanation for them was the Director General's negative attitude towards him. In any event, he takes the view that recommendations for promotion should have been made without taking account of his

absences on sick leave or of his state of health, which reduced his capacity for work.

12 In Case 173/82 the Commission initially contested the admissibility of the application on the ground that it was directed against the list of officials proposed for promotion to Grade A 4 in 1982, when the drawing up of that list merely constitutes a preparatory act in the promotion procedure. However, it admitted that the applicant's arguments could be examined in Case 157/83, which challenges the validity of the list of officials promoted to Grade A 4 in 1982.

13 As regards the substance, the Commission disputes the applicant's allegations concerning the negative attitude of his Director General or of his other superiors. In its view, the situation was quite the reverse since the applicant received special dispensations regarding his working hours and the location of his office and was excused from missions or travelling. In 1980 the Commission's Medical Service confirmed that in view of the various arrangments that had been made the applicant's working conditions were not likely to harm his health.

14 The Commission also maintains that the recommendations for promotion submitted by the Directorates General are drawn up after consultation with the directors and heads of division of the administrative unit concerned and that account is taken solely of the merits of the officials under consideration; absences for health reasons or similar circumstances are disregarded. The reason for which the applicant's name was left off the list of officials proposed in 1979 although his name was on the lists for 1977 and 1978 was probably that after 1979 the lists of the Directorate General for Agriculture were much shorter than previously (eight names in 1979, six in 1980). Besides, the applicant, who in the meantime has been assigned to another Directorate General, was promoted in 1984 to Grade A 4.

15 Since the Commission has denied the applicant's allegation that the reason for which he was not promoted in the 1982 promotion procedure was a lack of cooperation and even a degree of animosity on the part of his superiors, the onus of proving that allegation is on the applicant.

16 The applicant has produced a number of memoranda and letters showing the difficulties which he experienced in finding a position enabling him to perform suitable duties in the Directorate General to which he belonged at the time. However, they do not suggest any intention on the part of his superiors or the Commission departments to frustrate him in those efforts.

17 As far as concerns more particularly the promotions in 1982, it appears that, during its examination of the appeals lodged by the officials whose names did not appear on the list of officials proposed for promotion, the Promotion Committee for Category A found, as is stated in the minutes of its meeting held on 13 July 1982, that: 'Mr Castille's case was examined closely by the Committee, which notes with satisfaction that the recommendations made in 1981 have been put into effect: Mr Castille has found a new position which should enable him to demonstrate his merits in order to be considered at a future date.'

18 Consequently, it has not been established that the fact that the applicant was not promoted in the 1982 promotion procedure was due to unlawful discrimination or a misuse of power or to a negative attitude on the part of his superiors.

19 The applicant also claims that the promotion proposals were made at a time when his periodic reports for the periods 1977 to 1979 and 1979 to 1981 were still not ready.

20 In the particular circumstances of the case, having regard in particular to the applicant's problems of re-adjustment after his accident, the fact that he was promoted in 1984 and the absence of other irregularities in the 1982 promotion procedure, the fact that the applicant's periodic reports were not on his personal file cannot lead to the annulment of the promotions made. The question whether the applicant suffered harm as a result of the delay in the drawing up of his report for the period 1977 to 1979 will be dealt with in another part of this judgment.

21 It follows from the foregoing that the applicant's submissions concerning the fact that he was not promoted in the 1982 procedure for promoting officials to Grade A 4 must be rejected.

(b) *The validity of the periodic report*

22 The applicant's main submission is that his periodic report for the period 1977 to 1979 contains no statement of reasons. He claims that the absence of any explanation is especially worrying because the assessments in the report are substantially different from those in his previous reports. However, the Guide to Staff Reports, drawn up by the Commission, requires assessors to provide 'explanations . . . for any change in the analytical assessment since the previous report'.

23 The applicant adds that at his request the report was submitted to an appeal assessor, who decided, however, to uphold the report save on a minor detail. In its written opinion the Joint Committee on Staff Reports found in this regard that there was 'a significant change in the analytical and general assessment since the previous report', that 'no explanation is provided for that change' and that 'no reasons are provided in the general assessment for the analytical assessment'.

24 The Commission points out that a new system of staff assessment was introduced as from 1979. As far as the analytical assessment headings are concerned, the system was so new that no serious comparison could be made with previous comments. The Commission expressly drew officials' attention to the difference between the two systems and requested them to disregard previous reports.

25 In this regard the Commission points out that a new Guide to Staff Reports was published in 1979, which introduced the new system of assessment. In that Guide it is stated that when mentioning any progress or area in which an official has fallen back the assessor must 'provide as explicit as possible a justification for the changes in the analytical assessment as compared with the previous staff report'. There then follows a footnote explaining that 'assessors are not required to make a comparison with the last staff report in reports covering the period 1977-1979'.

26 It must be observed first of all that the contrast between the report in question and the previous reports is considerable. Whereas for the period 1973 to 1977 the applicant's ability, efficiency and conduct in the service received the highest

possible rating on a scale of three possible ratings, for the period 1977 to 1979 he received average ratings (the third on a scale of five) except for his 'adaptation to the requirements of the service', which was judged 'adequate' (the second lowest rating). It must be added that the report in question was drawn up by the the same assessor who drew up the two previous reports and after consultation with the same head of division.

27 It should then be borne in mind that Article 5 of the General Provisions for Implementing Article 43 of the Staff Regulations, adopted by the Commission on 27 July 1979, requires an explanation to be provided 'for any change in the analytical assessment since the previous report'. Assessors are bound by that obligation and cannot be released from it by a footnote in the 1979 Guide to Staff Reports which is intended to give them practical advice.

28 It was particularly important that the assessors in this case should discharge that obligation because the differences between the assessments in the report in question and all the previous assessments were significant and because certain events in 1979 might have led the applicant to believe that his work was less appreciated by his superiors than before.

29 It follows that the applicant's staff report for the period 1977 to 1979 is irregular and that it must consequently be annulled. The appeal assessor's decision concerning that report is therefore redundant.

(c) *The delay in drawing up the report*

30 The applicant claims that the considerable delay in the drawing up of the report in question constitutes maladministration on the Commission's part which has been prejudicial to him since it has impaired the normal progress of his career. He considers that he should be awarded compensation of BFR 100 000.

31 It must also be borne in mind that, in the applicant's view, the fact that he was not promoted in 1982 might have been due to the delay in question since the decision on promotions was taken before his report for the period 1977 to 1979 had been placed on his personal file.

32 The Commission leaves it to the Court to decide this issue. It regrets that as a result of a number of circumstances, namely the different positions held by the applicant, the introduction of the new system of assessment and resort to the appeal and complaint procedure, the applicant's report was finalized only after a long delay. Should such delay constitute maladministration and have caused non-material damage to the applicant, the Commission might judge it appropriate for the Court to award him nominal damages.

33 The Court should point out that the report in question relates to the period from 1 July 1977 to 30 June 1979, that it was drawn up on 10 February 1981 and that it became definitive, after being referred to the appeal assessor and the Joint Committee on Staff Reports, on 7 July 1983, that is to say over four years after the end of the period of assessment.

34 Such delay is not compatible with the principle of sound administration. Since the Commission is responsible under the Staff Regulations for ensuring that the procedures for assessing its officials are properly conducted, it must bear the financial consequences arising from such maladministration.

35 On the question of the amount of compensation, it should be pointed out that the applicant has not been able to establish any link between his failure to obtain promotion in 1982 and the fact that the report in question was not ready at the time when the decisions on promotions in 1982 were taken. In particular, there is no evidence that the various departments, committees and superiors who in turn dealt with the promotion of officials to Grade A 4 within the Directorate General for Agriculture lacked information or assessments favourable to the applicant which they could have found in a staff report.

36 However, delays in the drawing up of staff reports may in themselves be prejudicial to officials for the simple reason that their career progress may be affected by the absence of such reports when decisions concerning them must be taken.

37 In the particular circumstances of this case the harm suffered by the applicant on that account must be assessed *ex aequo et bono* at BFR 50 000.

38 The Court must therefore:

(i) annul the applicant's staff report for the period 1977 to 1979 and the Commission's decision rejecting his complaint concerning that report;

(ii) order the Commission to pay the applicant BFR 50 000 as damages for maladministration;

(iii) dismiss the remainder of the application.

Costs

39 According to Article 69 (2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the Commission has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Annuls the applicant's report for the period 1977 to 1979 and the Commission's decision of 18 April 1984 rejecting the applicant's complaint concerning that report;

(2) Orders the Commission to pay the applicant BFR 50 000 as damages for maladministration;

(3) Dismisses the remainder of the application;

(4) Orders the Commission to pay the costs.

Bosco Koopmans O'Higgins

Delivered in open court in Luxembourg on 6 February 1986.

P. Heim
Registrar

G. Bosco
Acting President of the First Chamber