JUDGMENT OF THE COURT (Third Chamber)
17 December 1992 *

In Case C-68/91 P,

Heinz-Jörg Moritz, a former official of the Commission of the European Communities, represented by Lothar Mahlberg, Rechtsanwalt, Bonn, with an address for service in Bridel, Luxembourg, at the residence of Heinz-Jörg Moritz, Rechtsanwalt, 25A Rue de Schoenfels,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities of 13 December 1990 in Case T-20/89 between Heinz-Jörg Moritz and the Commission of the European Communities, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Götz zur Hausen, Legal Adviser, acting as Agent, assisted by Barbara Rapp-Jung, of the Brussels Bar, with an address for service in Luxembourg at the office of Roberto Hayder, of the Commission's Legal Service, Wagner Centre, Kirchberg,

THE COURT (Third Chamber),

composed of: M. Zuleeg, President of the Chamber, J. C. Moitinho de Almeida and F. Grévisse, Judges,

Advocate General: W. Van Gerven,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 October 1992,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 10 November 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 February 1991, Mr Moritz brought an appeal, under Article 49 of the Statute of the Court of Justice of the EEC and the corresponding provisions of the Statutes of the Court of Justice of the ECSC and the EAEC, against the judgment of the Court of First Instance of 13 December 1990 in Case T-20/89 *Moritz* v *Commission* [1990] ECR II-769 in so far as it, first, dismissed his claims that the Commission should be ordered to make good the loss allegedly caused to him by the decision of 2 July 1986 appointing Mr Dieter Engel as Director of the Investments and Loans Directorate in the Commission's Directorate-General for Credit and Investments ('DG XVIII') and, secondly, ordered the parties to bear their own costs.

2 According to the contested judgment, the facts of the case are as follows:

'1 Until the end of January 1990, when he entered retirement, the applicant was an official in Grade A 3 at the Commission of the European Communities where he occupied a post of head of division in Directorate-General XVIII (Credit and Investments). The applicant applied for the Grade A 2 post of Director of Investments and Loans in Directorate-General XVIII (Notice of Vacancy COM/24/86).

2 In Notice 17/86 of 22 April 1986 the Consultative Committee on Appointments to Grades A 2 and A 3 at the Commission (hereinafter "the Consultative Committee"), before which lay applications from the applicant and another Commission official, decided that neither of the candidates possessed all the required qualifications.

3 At its meeting on 30 April 1986 the defendant, having regard to Article 29(1)(a) of the Staff Regulations of Officials of the European Communities (hereinafter referred to as "the Staff Regulations"), which concerns the filling of vacant posts by promotion or transfer within the institution, examined the two applications together and decided not to fill the vacant post.

4 The defendant then decided to have recourse to Article 29(2) of the Staff Regulations, according to which a procedure other than that provided for in Article 29(1) may be adopted by the appointing authority for the recruitment of Grade A 1 and A 2 officials.

5 At its meeting held on 27 June 1986 the Consultative Committee decided that the application submitted pursuant to Article 29(2) of the Staff Regulations by Mr Dieter Engel, who at that time was not an official of the European Communities, had to be considered. On 2 July 1986, the defendant appointed Mr Engel, who at that time possessed Canadian nationality, to the post in question after a comparative examination of the merits of the three applicants. On 14 July 1986, Mr Matutes, the member of the Commission responsible for appointments within DG X-VIII, informed the applicant of that decision.

6 By letter of 13 October 1986 the applicant lodged a complaint seeking the annulment of the decision appointing Mr Engel to the post in question. That complaint was dismissed by a decision of the defendant of 7 May 1987.'

3 By application lodged at the Registry of the Court of Justice on 12 August 1987, Mr Moritz brought an action against the Commission seeking the annulment of the Commission's decision of 2 July 1986 appointing Mr Engel and of the decision rejecting his complaint against that appointment, and for compensation for the material and non-material damage which he had allegedly suffered as a result of those decisions.

4 By order of 15 November 1989 the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

5 By the contested judgment, the Court of First Instance dismissed Mr Moritz's application and ordered the parties to bear their own costs.

6 In support of his appeal, which is directly solely against the part of the judgment dismissing his claims for compensation, Mr Moritz relies on the following grounds of appeal: the Court of First Instance carried out an insufficient review of the contested decision; the assessment of the Court of First Instance as to the lawful nature of the procedure followed by the Consultative Committee was based on incorrect facts; the Court of First Instance wrongly considered that the Consultative Committee had duly remedied the incompleteness of his personal file by hearing only the views of the Director-General; it wrongly considered that the appellant's presumptions did not constitute sufficient evidence to cast doubt on the objectivity of the views expressed about him to the Consultative Committee by his Director-General, Mr Cioffi; it failed to find several procedural irregularities (omissions in the minutes of the Consultative Committee's meeting of 22 April 1986; insufficient statement of reasons of the opinion delivered by that committee on that date; failure on the part of the Consultative Committee to check Mr Engel's qualifications; lateness of the appellant's recruitment interview); the Court of First Instance failed to rule on the appellant's claim that Mr Engel's individual file and candidature should be produced; it wrongly held that Mr Engel's appointment was not vitiated by a manifest error of assessment; it also wrongly held that Mr Engel's appointment was contrary neither to Articles 27 and 28 of the Staff Regulations nor to Article 1(1)(i) of Annex III to the Staff Regulations, and that the Commission had not failed to fulfil its duty to have regard to the interests of officials; the Court of First Instance wrongly took account of the appellant's delay — which was, moreover, excusable — in responding to the draft periodic report for 1983-1985 whereas that delay occurred after Mr Engel had been appointed and therefore had no bearing on the alleged service-related fault; and the Court of First Instance should have ordered the Commission to pay the whole of the costs, since its incorrect statements prompted the appellant's action.

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

8 It should be observed *in limine* that, whilst the applicant merely requested compensation for the material and non-material damage which he had allegedly suffered, the Court of First Instance drew a distinction in Mr Moritz's application between, on the one hand, the claim and pleas seeking compensation for the material damage allegedly caused to him by Mr Engel's appointment and, on the other hand, the claim and pleas seeking compensation for the non-material damage allegedly caused by that decision, and ruled on them separately.

9 In those circumstances, it is appropriate to consider successively the grounds of appeal concerning the part of the judgment dismissing the claim for compensation for material damage and the grounds of appeal concerning the part of the judgment dismissing the claim for compensation for non-material damage.

The part of the judgment relating to the claim for compensation for material damage

10 It is appropriate first to consider the ground of appeal alleging that the Court of First Instance erred in considering that the Consultative Committee could lawfully remedy the incompleteness of Mr Moritz's personal file simply by hearing the views of the Director-General.

11 Before the Court of First Instance, Mr Moritz argued, on the one hand, that his personal file was incomplete on the ground that it lacked three of his periodic reports, in particular that for 1983-1985, and, on the other, that the Consultative Committee could not lawfully remedy that shortcoming by hearing, without hearing the other side, the views of his Director-General, who did not have the power to report on him and had probably expressed unfavourable views about him.

12 In order to dismiss Mr Moritz's arguments, the Court of First Instance, in paragraphs 30 and 31 of the judgment, rehearsed the course of the appointment procedure and held that the Consultative Committee was lawfully entitled to hear the Director-General, Mr Cioffi, without infringing the right to a fair hearing, above all, since, first, it was clear from the minutes of the Consultative Committee's meeting of 22 April 1986 that the Director-General confined himself to explaining, on the basis of the vacancy notice, the qualifications required of the occupant of the post and, secondly, no factor had been brought forward to support the assertion that the Director-General might have expressed unfavourable views about Mr Moritz.

13 It should also be observed that, in order to dismiss the appellant's argument relating to the service-related fault which the appointing authority allegedly committed in drawing up his periodic report late, the Court of First Instance held, in paragraph 41 of the judgment, that it was not proven that Mr Moritz would have had a greater chance of being appointed Director of Investments and Loans if his file had contained the final periodic report for 1983-1985, since it embodied only minor changes compared with the draft periodic report.

14 Before this Court, Mr Moritz submits that the Court of First Instance wrongly held that the procedure followed by the Commission was lawful, since his merits were assessed on the basis of an incomplete personal file which did not contain, in particular, his periodic report for the most recent period (1 July 1983 — 30 June 1985) and on the basis of the — probably unfavourable — assessments as to his capabilities expressed by his Director-General, Mr Cioffi. In his view, the Consultative Committee should, in those circumstances, have given him a hearing in order to comply with the principle *audi alteram partem*.

15 The Commission considers for its part that, as the Court of First Instance held, the Consultative Committee lawfully heard the Director-General's views of Mr Moritz's competence and did not hear Mr Moritz's counter-arguments.

16 As the Court has consistently held (see, in particular, the judgment in Case 7/86 *Vincent* v *Parliament* [1987] ECR 2473, paragraph 16) the periodic report constitutes an indispensable criterion of assessment each time the official's career is taken into consideration by the administration and a promotion procedure is tainted with irregularity in so far as the appointing authority has not been able to consider the comparative merits of the candidates because there has been a substantial delay on the part of the administration in drawing up the periodic reports of one or more of them.

17 However, that case-law does not mean that when the appointment decision is made all applicants must be at exactly the same stage regarding the state of their periodic reports or that the appointing authority must postpone its decision if the most recent report on one or other of the applicants is not yet final because it has been referred to the appeal assessor or to the Joint Committee (judgment in Case 263/81 *List* v *Commission* [1983] ECR 103, paragraph 27).

18 The Court has also held that in exceptional circumstances the absence of a periodic report may be compensated for by the existence of other information on an official's merits (judgment in Joined Cases 156/79 and 51/80 *Gratreau* v *Commission* [1980] ECR 3943, paragraph 22).

19 The circumstances in which Mr Moritz's periodic report for the period 1 July 1983 to 30 June 1985 was drawn up are described in paragraph 43 of the contested judgment.

20 It appears from the findings made by the Court of First Instance in paragraph 43 of the contested judgment that, on the date on which the contested decision was taken, namely 2 July 1986, the most recent periodic report for the appellant, that is to say, the report for 1983-1985, was not contained in the file submitted to the Consultative Committee owing to the Commission's delay in drawing up the proposal for the periodic report.

21 In those circumstances, in order to respond to the plea raised before it, the Court of First Instance had to set out, on the one hand, the reasons showing that the absence of that periodic report from the file was compensated for by other information and, on the other hand, the reasons why it considered that the hearing of the Director-General by the Consultative Committee — whatever was stated about Mr Moritz — were sufficient to offset the absence of the periodic report without its being necessary to enable Mr Moritz to be heard at the same time as the Director-General or, at least, in refutation of him.

22 Paragraphs 30 and 31 of the contested judgment are essentially confined to holding that the Consultative Committee was entitled to hear the views of the Director-General without this making the procedure unlawful. They do not state any views either on the reasons justifying recourse in this case to information other than the periodic report or on the sufficiency of hearing the Director-General in order to compensate for the absence of the periodic report.

23 Nor does paragraph 41 of the contested judgment rule on those two issues. It relies on minor differences between the draft periodic report and the periodic report, that is to say, on facts which occurred after the date of the contested decision, as appears from paragraph 43 of the contested judgment, in order to deny that the absence of the periodic report had any effect on the lawfulness of the decision.

24 Consequently, the Court of First Instance failed to show that the hearing of the Director-General, without hearing the other party, validly compensated for the absence from the file of the periodic report and that therefore the procedure followed by the Consultative Committee was not unlawful.

25 Next, the Court of First Instance did not show that the Commission could not be accused of any unlawfulness or, as a result, of any service-related fault in this connection, and has not justified paragraph 42 of the contested judgment, according to which, since none of the complaints advanced by the appellant in order to demonstrate the existence of a service-related fault committed by the Commission can be upheld, the claim for compensation for material damage must be dismissed.

26 It follows that that part of the contested judgment must be set aside.

The part of the judgment relating to the claim for compensation for non-material damage

27 It should be recalled that in the Court of First Instance Mr Moritz claimed compensation for the damage — both material and non-material — allegedly caused to him by Mr Engel's appointment. In order to justify the amount of his claims, the appellant referred to the judgment in Joined Cases 173/82, 157/83 and 186/84 *Castille* v *Commission* [1986] ECR 497 and, in the alternative, to the judgment in *Gratreau* v *Commission*, cited above.

28 As stated in paragraph 8 above, it was the Court of First Instance which distinguished between compensation for material damage and compensation for non-material damage and set out those two claims for compensation as being based on different pleas.

29 As regards compensation for non-material damage, the Court of First Instance first found that the draft periodic report for 1983-1985 was drawn up on 31 July 1986, after the expiry of the time-limit laid down in the first paragraph of Article 6 of the General Provisions for the Implementation of Article 43 of the Staff Regulations, that that draft was rejected by Mr Moritz on 26 November 1986, that

is to say nearly four months after the draft was received, and that the periodic report was drawn up on 10 February 1987 (paragraph 43 of the contested judgment).

30 The Court of First Instance went on to find (in paragraphs 45 and 46) that, according to the case-law of the Court of Justice, the administration had to ensure that reports were drawn up periodically on the dates laid down by the Staff Regulations (judgment in *Gratreau* v *Commission*, cited above), and that it had a reasonable period at its disposal in which to do this but any failure to act within that period must be justified by the existence of special circumstances (judgment in Case 207/81 *Ditterich* v *Commission* [1983] ECR 1359). It found, however, that the duty of loyalty and cooperation which all officials owed to the administration precluded them from complaining of delay in the drawing up of their periodic reports when that delay was attributable to them.

31 It further observed (in paragraph 47) that delay in the drawing up of staff reports might in itself be prejudicial to officials for the simple reason that their career progress might be affected by the absence of such reports when decisions affecting them were taken (judgment in *Castille* v *Commission*, cited above).

32 Referring to the judgment of the same date in Case T-29/89 *Moritz* v *Commission* [1990] ECR II-787, whose terms it essentially reiterated, the Court of First Instance found (in paragraph 48) that the delay in the procedure for drawing up a periodic report for the period 1983-1985 was due not only to the lateness with which the draft periodic report was drawn up but also to the appellant's dilatory response to that draft. It went on to find (in paragraph 49) that, by failing to respond to the draft within a reasonable time, the appellant was in breach of the duty of cooperation and loyalty to which he was bound, and that therefore the alleged delay could not, in the circumstances of the case, constitute non-material damage.

33 In his appeal, Mr Moritz submits that the Court of First Instance could not legally take account of the delay, which was, moreover, excusable, which he took in responding to the draft report, since that conduct occurred after the decision of 2 July 1986 which was the source of the damage for which compensation was sought.

34 The Commission contends principally that the appellant's claims come up against the authority of *res judicata* of the judgment of the Court of First Instance of the same date in Case T-29/89 *Moritz* v *Commission*, which dismissed Mr Moritz's claim for compensation for the damage caused by the fact that his periodic report for 1983-1985 was drawn up late. In the alternative, the Commission argues that the Court of First Instance was right in law to consider that the appellant's fault precluded the award of any compensation.

35 The fault allegedly committed by the appointing authority in drawing up late Mr Moritz's periodic report for 1983-1985 constitutes a source of damage separate from that consisting of the fault allegedly committed by the appointing authority in appointing Mr Engel in irregular circumstances. Moreover, Mr Moritz claimed that compensation should be awarded for both types of damage in two separate proceedings in the Court of First Instance (T-20/89 and T-29/89), which gave rise to two judgments delivered on 13 December 1990.

36 In these proceedings, the only matter at issue is the damage — both material and non-material — which the appellant allegedly suffered as a result of the unlawful appointment of Mr Engel.

37 Consequently, by rejecting the claim for compensation for the non-material damage alleged to have been sustained by the appellant on the ground, set out in the judgment in Case T-29/68, that the appointing authority's delay in drawing up his periodic report caused him no damage, whereas that delay, according to the terms in which it was described by the Court of First Instance, occurred after Mr Engel was appointed, the Court of First Instance did not respond to the pleas and form of order sought as they were raised before in it Case T-20/89.

38 In those circumstances, the Commission cannot effectively rely on the authority of *res judicata* attaching to the judgment in Case T-29/89 *Moritz* v *Commission*, cited above, which in fact relates to a dispute separate from that underlying the present appeal.

39 It follows from the foregoing that the Court of First Instance has not legally justified paragraph 51 of its judgment rejecting the claim for compensation for non-material damage.

40 Consequently, the Court should, without its being necessary to consider the other grounds of appeal, uphold the appellant's claims and set aside the contested judgment, first, in so far as it dismissed Mr Moritz's claims for compensation for the damage allegedly sustained by him as a result of Mr Engel's appointment and, secondly, in so far as it ordered the parties to bear their own costs.

Referral of the case back to the Court of First Instance

41 According to the first paragraph of Article 54 of the Statute of the Court of Justice of the EEC, 'If the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment'.

42 In the circumstances of the case, the Court considers that the case should be referred back to the Court of First Instance for judgment on Mr Moritz's claims for compensation for the damage allegedly caused to him by the Commission's decision of 2 July 1986 appointing Mr Dieter Engel as Director of the Directorate for Investments and Loans in the Commission's Directorate-General for Credit and Investments ('DG XVIII').

On those grounds,

THE COURT (Third Chamber)

hereby:

1) **Sets aside the judgment of the Court of First Instance of 13 December 1990 in Case T-20/89 Moritz v Commission, first, in so far as it dismissed Mr Moritz's claims for compensation for the damage allegedly sustained by him as a result of the Commission's decision of 2 July 1986 appointing Mr Dieter Engel as Director of the Directorate for Investments and Loans in the Commission's Directorate-General for Credit and Investments ('DG XVIII') and, secondly, in so far as it ordered the parties to bear their own costs;**

2) **Refers the case back to the Court of First Instance for judgment on Mr Moritz's claims for compensation for the damage allegedly caused to him by the Commission's decision of 2 July 1986 appointing Mr Dieter Engel as Director of the Directorate for Investments and Loans in the Commission's Directorate-General for Credit and Investments ('DG XVIII');**

3) **Reserves the costs.**

Zuleeg Moitinho de Almeida Grévisse

Delivered in open court in Luxembourg on 17 December 1992.

J.-G. Giraud
Registrar

M. Zuleeg
President of the Third Chamber