

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

7 May 1991 *

In Case T-18/90,

Egidius Jongen, an official of the Commission of the European Communities, residing in Bertem (Belgium), represented by J. N. Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson S. à r. l., 1 rue Glesener,

applicant,

v

Commission of the European Communities, represented by J. Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of G. Berardis, a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 21 August 1989 classifying the applicant in Grade A 7, Step 4, upon his appointment as a probationary official,

THE COURT OF FIRST INSTANCE (Third Chamber),

composed of: C. Yeraris, President of the Chamber, A. Saggio and B. Vesterdorf, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 6 March 1991,

* Language of the case: French.

gives the following

Judgment

Facts and procedure

- 1 The applicant, who was born on 31 August 1941, entered the service of the Commission on 1 March 1986. As a physics engineer, he was able to demonstrate 20 years' professional experience in industry. He worked in the Commission as a member of the auxiliary staff in Category A, Group I, Class 3, from 1 March 1986 to 28 February 1987, and subsequently as a member of the temporary staff in Grade A 7, Step 3, from 1 March 1987 to 31 May 1989. He was promoted to Step 4 with effect from 1 March 1989.

- 2 The applicant participated successfully in Open Competition COM/A/531, which was organized for the purpose of constituting a reserve for future recruitment of administrators in Grade A 7/A 6. The Notice of Competition expressly stated that recruitment would be at Grade A 7. The applicant was appointed a probationary official in Grade A 7, Step 4, with effect from 1 June 1989, his seniority in step taking effect from 1 March 1989, and was posted by a decision of 21 August 1989 to the 'Mechanical and Electrical Engineering and Metrology' Unit within DG III (Internal Market and Industrial Affairs). The decision to appoint the applicant was taken on the basis of Article 31, concerning classification in grade, and Article 32, relating to classification in step, of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations').

- 3 On 18 September 1989 the applicant lodged a complaint against the above decision of 21 August 1989 for the purpose of having his classification in grade and step re-examined in the light of the duties which he was carrying out and of his training and professional experience. To that end, he relied in particular on the principle of equal pay for equal work and argued that 'work at the same level must be treated in the same manner'. In his complaint, Mr Jongen stated his view that the classification in dispute ought to have been made at Grade A 5 or, at the very least, at Grade A 6, Step 8.

- 4 In the absence of a reply to his complaint by the Commission within the four month period laid down in Article 90(2) of the Staff Regulations, the applicant, by application lodged at the Registry of the Court of First Instance on 13 April 1990, requested the annulment of the decision on classification of 21 August 1989 and of the implied decision dismissing his complaint. The Commission expressly dismissed the complaint by a decision of 26 April 1990. The written procedure followed the normal course. On hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

Forms of order sought by the parties

- 5 The applicant claims that the Court should:

— declare the application admissible and well founded;

— consequently, annul:

- (1) the decision of 21 August 1989 by the appointing authority inasmuch as the applicant was classified in Grade A 7, Step 4, when he was appointed as a probationary official;

- (2) in so far as is necessary, the implied decision rejecting his administrative complaint submitted through official channels on 18 September 1989 pursuant to Article 90(2) of the Staff Regulations;

— order the defendant to pay the costs of the proceedings, pursuant either to Article 69(2) or the second subparagraph of Article 69(3) of the Rules of Procedure of the Court of Justice, as well as the expenses necessarily incurred for the purpose of the proceedings, in particular the cost of maintaining an address for service, travel and subsistence expenses and lawyers' fees, pursuant to Article 73(b) of those Rules of Procedure.

The Commission contends that the Court should:

- dismiss the application;
- make an order as to costs in accordance with the law.

The substance of the case

- 6 In support of his application, the applicant relies on four pleas in law based respectively on: (1) infringement of Article 32 of the Staff Regulations; (2) breach of the principle that there must be a correspondence between grade and post; (3) failure to observe the principle of equal treatment of officials; (4) failure to observe the principle of the protection of legitimate expectations and the duty to have regard for the interests of officials.

The first plea in law

- 7 The applicant claims that his classification in Grade A 7, Step 4, at the time of his appointment as an official is contrary to Article 32 of the Staff Regulations. He claims in that connection that 'the appointing authority was wrong to take the view that there was in his case "continuity" of career by applying in particular the automatic advancement in step laid down in Article 44 of the Staff Regulations'. According to the applicant, the infringement of Article 32 lies specifically in the fact that the Commission failed to take account of his experience prior to entering the service of that institution in order to determine his classification in grade and step.
- 8 The applicant pointed out at the hearing that, although he had confined himself during the written procedure to relying expressly on Article 32 for the purpose of contesting his classification in grade and step, he had also implicitly referred to Article 31. That, he argues, follows from the express request to be reclassified in

his grade contained in his complaint and subsequently in his application, and from the procedure which, in his view, the Commission is required to follow, when an official is classified at the time of his appointment in order to take his experience into account. The applicant argues in that regard that the administration, in order to take account of the experience of the official recruited for the purpose of his classification, must first of all apply Article 32. If the additional seniority authorized by Article 32 does not allow adequate consideration to be taken of the experience of the official in question, the administration must, according to the applicant, automatically apply Article 31(2), which allows it to derogate from the principle of appointment at the starting grade. In this case, Mr Jongen notes that it was open to the Commission under Article 31(2) to classify him in Grade A 6.

- 9 The Commission, for its part, points out that the applicant did not refer to Article 31 in his application. It notes in this regard that Article 32, which is relied on in the application, concerns only classification in step and not classification in grade, which is governed by Article 31 of the Staff Regulations. The first plea in law is therefore based exclusively on infringement of Article 32.

- 10 The Commission claims that the plea is inadmissible on the ground that the applicant has shown no interest in bringing proceedings. It argues that 'had the applicant not originally been recruited as a member of the temporary staff who was still employed at the time of his appointment, a strict application of Article 32 ought to have led to his classification, in order to take account of his training and special experience, at the very most in Step 3, by virtue of the grant of the (maximum possible) additional seniority of 48 months'. The Commission stresses that the applicant was classified in Step 4 with seniority of three months pursuant to Article 8 of the General Decision of 1 September 1983 dealing with the criteria applicable to appointment in grade and classification in step on recruitment (*Administrative Notice* No 420 of 21. 10. 1983), paragraph 1 of which provides that:

'Any temporary member of staff, with the exception of those engaged pursuant to Article 2(c) of the Conditions of Employment of Other Servants of the European Communities, who is appointed a probationary official in an identical post shall, at the date of his appointment as a probationary official, have the same grade and seniority in step as that which he has acquired up to that date.'

The principle of continuity of career resulting from the aforementioned provision was therefore applied to the applicant's advantage in so far as, being a newly appointed official, he would have been classified by virtue of Article 32 only in Step 3. It follows that Mr Jongen cannot rely on Article 32 in order to claim a more favourable classification. He has for that reason no relevant interest in relying on an infringement of that article.

- 11 In addition, the Commission contends that the first plea is unfounded on the ground that 'the experience of the applicant was . . . properly taken into account, within the limits authorized by Article 32 of the Staff Regulations, as early as 1987', in view of the fact that the applicant had benefited from the maximum additional seniority authorized by that article.

- 12 It should be noted *in limine* that the classification of officials on recruitment is governed by Article 31 of the Staff Regulations so far as grade is concerned. Article 32 governs the classification in step of the newly recruited official.

So far as concerns classification in grade, Article 31(1) establishes the principle that officials in Category A or the Language Service are to be appointed 'to the starting grade of their category or service'. Article 31(2), however, provides for derogations from that principle within certain limits. On this point, the Court of Justice has held that the appointment of a newly-recruited official to the upper grade in the starting or intermediate career bracket must be construed as an exception to the general classification rules and as a decision which in any event lies within the discretion of the administration (judgment in Case 219/84 *Powell v Commission* [1987] ECR 339).

So far as classification in step is concerned, Article 32 provides that an official is to be recruited at the first step in his grade, although additional seniority — which may not exceed 48 months in grades other than A 1 to A 4, LA 3 and LA 4 — may be allowed in order to take account of the training and special experience for the post of the person concerned.

- 13 Before examining the first plea in law, the Court must first determine its scope. In that regard, the Court notes that the applicant, for the purpose of contesting his classification in grade and step, limits himself in his application to relying expressly on Article 32 of the Staff Regulations. However, it is clear from the formulation of his plea and from the content of his application that, for the purpose of contesting his classification in Grade A 7, Mr Jongen relies, in the context of the first plea, on his previous experience for the purpose of obtaining under Article 31(2) a more favourable classification than that in Grade A 7 granted to him by the contested decision in accordance with the Notice of Competition which expressly pointed out that recruitment as an administrator would be at Grade A 7. The applicant has thus indicated to the satisfaction of the Court the legal principles on which he bases his application and it is not necessary that Article 31 of the Staff Regulations, paragraph 2 of which permits in a general way derogations from the principle that appointment should be to the starting grade of the particular category or service, should have been expressly referred to in the application (see in this regard, *inter alia*, the judgments of the Court of Justice in Case 74/74 *CNTA v Commission* [1975] ECR 533, paragraph 4, and in Case 62/65 *Serio v Commission* [1966] ECR 561, in particular at 568). In the light of the arguments developed by the applicant in his application and of the additional particulars supplied during the proceedings, the absence of an express reference to Article 31 in the application initiating the proceedings is not such as to prevent the Commission from adequately defending its interests and the Court from exercising its supervision. In those circumstances, the Court must also give its views on the application of Article 31 in the context of the first plea which is based on infringement of Articles 31 and 32.
- 14 With regard to the objection of inadmissibility raised by the Commission in respect of the first plea, on the ground that it is based on infringement of Article 32, it should be noted that the assessment of the plea of inadmissibility put forward by the defendant institution is very closely dependent on the interpretation to be given to that article. Viewed in this light, the examination of the admissibility of the plea based on infringement of Article 32 cannot therefore be severed from an examination of the substance of that plea, with the result that it must be carried out in conjunction with the latter.

- 15 With regard to the substance, it should be borne in mind, so far as the applicant's classification in grade is concerned, that the decision on classification in grade under Article 31(2) falls, according to well-established case-law, within the discretion of the administration. In the circumstances, judicial control is limited to ensuring that the decision making the appointment was not adopted 'on the basis of a misappreciation of the facts' (judgment of the Court of Justice in Case 219/84 *Powell v Commission*, cited above, paragraphs 8 and 9; see also its judgments in Case 280/85 *Mouzourakis v Parliament* [1987] ECR 589, paragraph 5, and in Case 190/82 *Blomefield v Commission* [1983] ECR 3981, paragraph 26). The Court finds in that regard that the applicant has failed to establish that the Commission fixed his classification in Grade A 7 on the basis of a misappreciation of the facts.

Moreover, the reference to Article 32 lacks relevance in so far as the challenge to the classification in grade is concerned, inasmuch as the sole purpose of that article is to set out the details of classification in step. The application of Article 32 cannot therefore in any event involve consideration of the training and experience of the person concerned in the form of classification in a grade other than the starting grade of his category.

For all those reasons, the first plea must accordingly be declared unfounded inasmuch as it relates to the applicant's classification in grade.

- 16 So far as classification in step is concerned, it should be noted that Article 32 permits an official to be classified, on recruitment in career bracket A 7/A 6, in a step up to the third in his grade. Mr Jongen was classified in Grade A 7, Step 4, when he was recruited as an official on 21 August 1989, pursuant to Article 8 of the General Decision of 1 September 1983, cited above, which defines the classification criteria applicable at the time of recruitment. In those circumstances, it is quite clear that he was not entitled under Article 32 to a classification higher than that conferred on him by the contested decision. It is for that reason unnecessary to decide on the complaint that the Commission incorrectly took the view that there was a continuity of career.

It follows that the first plea is unfounded in so far as it relates to the applicant's classification in step.

- 17 The first plea in law must therefore be dismissed as unfounded.

The second plea in law

- 18 The second plea in law is based on a breach of the principle that grade and post should correspond.
- 19 The Commission argues that that plea is inadmissible on the ground that it was not relied upon in the complaint. There is, according to the Commission, nothing in the complaint from which it could have inferred that the applicant intended to rely on a breach of the principle that grade and post should correspond (judgment of the Court of First Instance in Case T-57/89 *Alexandrakis v Commission* [1990] ECR II-143, paragraph 9; judgment of the Court of Justice in Case 133/88 *Del Amo Martinez v Parliament* [1989] ECR 689, paragraph 13).
- 20 The applicant takes the view that the plea based on the principle that grade and post should correspond is admissible on the ground that it is closely linked to the principle of 'equal pay for equal work' relied on in the complaint.
- 21 The Commission denies that the principle of 'equal pay for equal work' corresponds to the rule under the Staff Regulations that grade and post must correspond: 'the first principle [would have the effect] of drawing the inferences, as regards salary, from the performance of a certain type of work . . . On the other hand, the rule in the Staff Regulations [would have the result] that, once the grade and consequently the salary level of the official have been determined in advance, the person concerned would not be given a post which did not correspond to his grade. In other words [according to the Commission], it is not the type of work actually performed which determines grade and therefore salary, but quite the reverse.'
- 22 With regard to the admissibility of the second plea, it should be noted that the complaint does not expressly refer to the principle that grade and post should correspond. However, for that plea to be admissible, it is sufficient that the applicant should have referred to it implicitly. The Court of Justice has held that 'since the pre-litigation procedure is informal in character and those concerned are

generally acting without the assistance of a lawyer at that stage, the administration must not interpret the complaints restrictively but, on the contrary, must consider them with an open mind' (judgment in Case 133/88 *Del Amo Martinez v Parliament*, cited above, paragraph 11).

- 23 In that regard, the Court notes that in his complaint the applicant referred to the second plea in the following manner. He emphasized that members of the temporary staff who could prove similar experience to his own 'are carrying out the same tasks as [he], are performing the same work and were appointed at Grade A 4'. He went on to state that 'work at the same level must be treated in the same manner', irrespective of the nature of the contract and regardless of the budget. The applicant thus referred implicitly, but none the less clearly, to the need for a correlation between the level of the post occupied and the classification in grade, as is clear from the passages quoted above. In those circumstances, the plea based on a breach of the principle that grade and post should correspond must be examined without its being necessary (as the Commission submits) to take a view on the question whether the principle of equal pay for the same work, expressly relied on in the complaint, is closely linked to the principle that grade and post should correspond. The objection of inadmissibility raised by the Commission against the second plea must therefore be rejected.
- 24 With regard to the substance, the applicant maintains, in support of his second plea, that he is in fact performing, in his capacity as head of the metrology service, all the functions of a principal administrator — corresponding to Grades 5 and 4 of Category A — and that he is qualified to occupy that post, as evidenced by his hierarchical superiors in his probationary report and in the observations which they made in connection with his complaint.
- 25 In contrast, the defendant institution considers that the second plea is neither well-founded nor relevant. It maintains in the first place that the principle that grade and post must correspond, as set out in Article 7(1) of the Staff Regulations, means in the present case that an official cannot be compelled to perform duties corresponding to a grade higher than his own, except on a temporary posting. On the other hand, the fact that an official has agreed, after his appointment, to

perform duties corresponding to a grade higher than his own is no more than a factor to be borne in mind in connection with promotion and does not give him the right to be reclassified. The Commission bases its argument on this point on the case-law of the Court of Justice, in particular its judgment in Case 25/77 *De Roubaix v Commission* [1978] ECR 1081, paragraph 17. It also submits that the second plea raised against the decision appointing the applicant is not relevant on the ground that the applicant's acceptance of duties corresponding to a grade higher than his own was given subsequent to the contested decision and is therefore unconnected with that decision.

- 26 The applicant replies that the plea is relevant inasmuch as his assignment, in the contested decision, was to a specific post which he already occupied as a member of the temporary staff. Furthermore, he admits in response to the arguments put forward by the Commission that it is not the impropriety of his classification in Grade A 7, Step 4, with regard to the principle that grade and post should correspond, which as such entitles him to be reclassified. Unlike the defendant institution, however, he claims that the plea based on a breach of that principle is none the less well founded in so far as it is made in conjunction with the third plea based on breach of the principle of equal treatment. In the applicant's view, the combined application of those two principles is dictated by their common objective. The principle that grade and post should correspond has as its objective 'to avoid differences in treatment between officials who have properly been given comparable duties'.

- 27 With regard to the substance, the Court finds that the facts relied on by the applicant in support of the second plea are not relevant. As the Commission correctly pointed out, the fact relied on by the applicant in support of his request that the decision determining his classification be annulled, namely that he is performing the duties of a person who is head of a department, does not follow from the contested decision, which merely provides for his appointment as an administrator at Grade A 7 and his assignment to a specific unit within DG III.

Moreover, the Court points out that in any event the principle that grade and post must correspond, as laid down in Article 7(1) of the Staff Regulations, was introduced for the benefit of officials inasmuch as it guarantees in theory that each official shall be assigned to a post in his category or service which corresponds to his grade and not to a lower one. That principle also allows any official to refuse

assignment to a post corresponding to a grade higher than his own, except in the case of a temporary post, provided for under Article 7(2) and satisfying a number of conditions. The principle that grade and post must correspond does not, however, confer any right to reclassification in a higher grade in a case where an official agrees to perform duties corresponding to a grade which is higher than his own. That being so, the applicant, by agreeing to perform duties at a level admittedly higher than that corresponding to his grade, has not in principle acquired any right to be reclassified by virtue of the principle that grade and post should correspond. The Court of Justice has held that 'though the administration cannot compel an official to fulfil tasks on a level higher than his grade, the fact that he agrees to fulfil them can be a factor to be borne in mind in connection with promotion, but does not give him the right to be reclassified' (judgment in Case 28/72 *Tontodonati v Commission* [1973] ECR 779, paragraph 8; see also the judgments in Case 189/73 *Van Reenen v Commission* [1975] ECR 445, paragraph 6, and in Case 25/77 *De Roubaix v Commission*, cited above, paragraph 17).

- 28 For all the above reasons, the second plea in law must therefore be dismissed as unfounded.

The third plea in law

- 29 Turning to the third plea, based on a breach of the principle of equal treatment as between officials, the applicant submits that at least two colleagues in his division occupy posts similar to his own and to which they were recruited at Grade A 4 with experience similar to his own. In his reply he refers in particular to 'Notice of the external competition' organized to fill at Grade A 5/A 4 the post of Head of the 'Electronics' section in his division. Those facts do not only establish the unequal treatment alleged by the applicant, but also, in his view, confirm the lack of correspondence between his grade and the post which he occupies. Mr Jongen also believes that he has suffered discrimination vis-à-vis Mr Angelidis, the applicant in Case 17/83 brought before the Court of Justice. He claims that the discriminatory treatment results from the fact that he was classified in Grade A 7 after two years' experience as a member of the temporary staff, whereas Mr Angelidis, who was also a member of the temporary staff in Grade A 7 for two years, was appointed to Grade A 5 and assigned to the post which he had previously occupied when he was appointed an official following a competition for the recruitment of principal administrators (see judgment in Case 17/83 *Angelidis v Commission* [1984] ECR 2907).

30 The Commission, on the other hand, takes the view that the third plea is unfounded. It maintains that the applicant cannot as an official rely on the principle of equal treatment vis-à-vis members of the temporary staff classified in Grade A 4 who, according to him, perform duties similar to his and can give proof of comparable experience. The Commission explains that it is well established in the case-law of the Court that the position of a member of the temporary staff differs in many respects from that of an official (judgments of the Court of Justice in Joined Cases 118/82 to 123/82 *Celant and Others v Commission* [1983] ECR 2995, paragraph 22; Case 8/85 *Bevere v Commission* [1986] ECR 1187, paragraph 12; and Case 37/87 *Sperber v Court of Justice* [1988] ECR 1943, paragraph 8). It points out that discrimination consists in treating similar situations differently or different situations identically (judgment in Case 13/63 *Italy v Commission* [1963] ECR 165, particularly at pp. 177 and 178).

So far as concerns in particular the 'Notice of external competition' alluded to by the applicant, the Commission notes that this really refers to Request for Applications No 31 T 89 for the purpose of engaging members of the temporary staff. In addition, the defendant institution reiterates, in this connection, its view that the applicant's contention is irrelevant so far as the propriety of the decision appointing him to a post of administrator in Grade A 7 is concerned, on the ground that his arguments are based on circumstances arising subsequent to that decision; the applicant is in effect comparing the posts to be filled in the context of the request for applications, mentioned above, with the duties which he was called upon to assume following the adoption of the contested appointing decision. The Commission also contends that in any event the principle of equal treatment, as understood by the applicant, who was appointed and assigned to a post at Grade A 7, cannot lead to his reclassification in Grade A 4 in order to place him on an equal footing with members of the temporary staff appointed to perform duties at A 5/A 4 level, by virtue of the rule laid down by the Court of Justice, cited above, to the effect that acceptance of responsibilities of a level higher than those corresponding to his grade does not give the official concerned the right to be reclassified.

So far as concerns the position of Mr Angelidis, classified in Grade A 5, the Commission notes that in view of the fact that he was a successful candidate in Competition COM/A/377 for the recruitment of principal administrators, his position is not comparable to that of the applicant, who was established following a competition intended for the recruitment of administrators at Grade A 7.

31 With regard to the third plea the Court notes that, for the purpose of establishing that there has been a breach of the principle of equal treatment as between officials, the applicant compares the level of his classification when appointed as an official to that of a number of members of the temporary staff performing identical duties and possessing comparable experience. Such a procedure cannot be accepted. By reason of his status as an official, the applicant is in a different legal position to that of members of the temporary staff. The principle of equal treatment requires that similar situations should be treated similarly and that situations which are objectively different should be treated differently (judgments of the Court of Justice in Joined Cases 118/82 to 123/82 *Celant and Others v Commission*, paragraph 22; Case 8/85 *Bevere v Commission*, paragraph 12; and Case 37/87 *Sperber v Court of Justice*, paragraph 8, all cited above). The applicant cannot therefore effectively rely on the principle of equal treatment in order to claim a classification which is identical to that of the members of the temporary staff to whom he refers in his observations.

32 It follows that the third plea in law must be rejected as unfounded.

The fourth plea in law

33 The fourth plea is based on a breach of the principle of the protection of legitimate expectations and the duty to have regard for the interests of officials. The applicant alleges that 'when [he] was engaged as a member of the temporary staff, it was pointed out that, as a member of the temporary staff, he could be classified no higher than in Grade A 7, Step 3. However, if he were successful in a competition and were appointed as an official, his classification in grade and step would be adapted to take account of his training and experience, as is in any case provided for under Article 32 of the Staff Regulations'. He charges the Commission with having thereby given him inaccurate information and suggests that it is necessary to take account of this for the purpose of applying Article 31(2) of the Staff Regulations, which allows the administration to derogate within certain limits from the rule that officials should be appointed to the starting grade of the category or service for which they have been recruited. He argues in that regard that the Commission's discretion in applying that article must be limited in particular by its duty to have regard for the interests of officials, which is no more than a translation of the principle of the 'balance of reciprocal rights and obligations' established by the Staff Regulations in the relationship between the public authority and civil servants (judgment of the Court of Justice in Case 167/86 *Rousseau v Court of Auditors* [1988] ECR 2705).

- 34 The Commission rejects that line of argument. In the first place, it disputes the claim that such incorrect information or assurances were given to the applicant. Secondly, it notes that promises which are contrary to provisions in the Staff Regulations 'cannot . . . give rise to a legitimate expectation on the part of the person concerned, even if it is proved that they were made', as the Court of Justice held in its judgment in Case 162/84 *Vlachou v Court of Auditors* [1986] ECR 481, paragraph 6. As regards the duty to have regard for the interests of officials, the Commission points out that 'the safeguarding of rights and interests of officials must always be limited by compliance with existing rules of law'. The Commission stresses in that regard that the applicant cannot escape from 'the law governing the competition which requires that recruitment be at Grade A 7'.
- 35 The Court finds in that connection that the alleged information relied on by the applicant could not in any event, by reason of its general nature and lack of precision, give rise to a legitimate expectation on his part regarding his classification in the event that he should be recruited as a result of Competition No COM/A/531 (judgments of the Court of Justice in Case 81/72 *Commission v Council* [1973] ECR 575 and in Case 289/81 *Mavridis v Parliament* [1983] ECR 1731, paragraph 21).
- 36 Furthermore and in any event, even the existence of incorrect information and assurances (assuming that these have been established, which is hardly the case) concerning the classification of the applicant in the event of his recruitment following Competition No COM/A/531 could not have led to the setting aside of the applicable provisions relating to classification in grade and step, that is to say Articles 31 and 32 of the Staff Regulations respectively, and the Notice of Open Competition COM/A/531, which provided that that competition was to be organized for the purpose of constituting a reserve for the recruitment of administrators in the career bracket A 7/A 6. Assurances which do not take account of the relevant provisions cannot give rise to a legitimate expectation on the part of the person concerned (judgment of the Court of Justice in Case 162/84 *Vlachou v Court of Auditors*, cited above, paragraph 6, and judgment of the Court of First Instance in Case T-123/89 *Chomel v Commission* [1990] ECR II-131, paragraph 30). It should be noted in this regard that the notice of competition in the present case had limited the discretion which the administration enjoys under Article 31 regarding the classification in grade of newly-recruited officials by expressly stipulating that appointment would be to the starting grade of the career bracket, namely Grade A 7. Having regard in particular to the budgetary constraints imposed on the administration, such a self-imposed limitation does not *per se* appear to be at variance with the Staff Regulations since Article 31(2) provides no more than an option to derogate from the rule in the Staff Regulations that the classification of officials on appointment should be in the starting grade of their

category or service. That possibility was examined and applied by the Commission when it adopted the notice of competition, having regard to the characteristics of the competition, the requirements of the administration and the availability of budgetary funds. It follows that the Commission was therefore entitled to classify the applicant in Grade A 7, as provided for in the notice of competition.

37 The fourth plea must therefore be dismissed as unfounded.

38 It follows from all the foregoing that the application must be dismissed.

Costs

39 The applicant requests that all costs be borne by the Commission, even if the Court should declare the application to be unfounded. He points out in this regard that he was first informed of the Commission's arguments in the decision of 26 April 1990 expressly rejecting his complaint, that is to say, after he had already lodged his application to the Court and a few days before the expiry of the period prescribed for the initiation of proceedings.

40 The Commission, on the other hand, contends that the normal order as to costs should be made. It argues that it cannot be ordered to pay the applicant's costs if the application is dismissed. So far as concerns the costs relating to the lodging of the reply and to the presentation of oral argument, the Commission contends that the applicant could have discontinued his action, which he had brought on 13 April 1990, once he had received the express decision rejecting his complaint or indeed even the defence which was dated 21 May 1990. As regards expenses relating to the application, the Commission notes that 'in a number of cases which were brought following an implied decision rejecting a complaint and in which the application was dismissed, it was as a rule decided that the parties should bear their own costs'. It adds that the continuation by the applicant of the proceedings following the express decision rejecting his complaint provides grounds for assuming that the action would have been brought even if an express reply had been made to the complaint within the period laid down in Article 90(2) of the Staff Regulations.

- 41 The Court would point out in that regard that although it is admittedly desirable that the administration should reply to complaints by way of express decisions made within the prescribed period, the absence of an express decision does not in itself justify allowing the applicant's claim. Furthermore, the applicant has failed to prove the existence of other circumstances imputable to the Commission which would justify, in the event of dismissal of the application, ordering that institution to pay the costs of the applicant on the basis of the second subparagraph of Article 69(3) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to proceedings before the Court of First Instance, according to which 'the Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur'.
- 42 Under Article 69(2) of the Rules of Procedure of the Court of Justice, 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 OF FIRST INSTANCE (Third Chamber),

hereby:

- (1) Dismisses the application;
- (2) Orders the parties to bear their own costs.

Yeraris

Saggio

Vesterdorf

Delivered in open court in Luxembourg on 7 May 1991.

H. Jung

Registrar

C. Yeraris

President of the Third Chamber