

even when he moves from one category or service to another after a competition.

experience acquired by an official before taking up his duties, the second paragraph of Article 32 must be applied, whatever his seniority when notice of the competition in which he took part was published, because discrimination on such a basis between officials who have been successful in a competition cannot be justified.

However, when the application of Article 46 would not allow any account to be taken of the training and the specific professional

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

28 September 1993 \*

In Joined Cases T-103/92, T-104/92 and T-105/92,

**Jean Baiwir, Antonio Gonçalves and Dominique Besohé**, officials of the Commission of the European Communities, residing in Court-Saint-Étienne, Evere and Namur-Saint-Servais (Belgium) respectively, represented by Georges Vanderstanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

applicants,

v

**Commission of the European Communities**, represented by Sean van Raepenbusch, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Nicola Anzecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

\* Language of the case: French.

APPLICATION for annulment of decisions classifying the applicants in step on their appointment to the basic grade of the category higher than the one to which they previously belonged,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: D. P. M. Barrington, President, K. Lenaerts and A. Kalogeropoulos,  
Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 7 July 1993,

gives the following

**Judgment**

**The facts**

*The first applicant*

- 1 On 1 May 1988 the first applicant, Jean Baiwir, was appointed a probationary official in Grade C 5 at the Commission. He was classified in Step 3, having been granted 48 months additional seniority under Article 32 of the Staff Regulations to take account of his previous experience.
- 2 On 1 November 1988 he was established in his post.

- 3 On 1 March 1989 he was promoted from Grade C 5, Step 3, to Grade C 4, Step 2, without a change in post.
- 4 He then took part in Competition EUR/B/21, organized by the Commission and the Court of Auditors of the European Communities to constitute a reserve for future recruitment of administrative assistants (OJ 1990 C 270, p. 34). He was placed on the reserve list drawn up following the competition and on 27 February 1992 was appointed to a post in Category B with effect from 1 March 1992. He was classified in Step 1 of Grade B 5.

*The second applicant*

- 5 On 1 March 1988 the second applicant, Antonio Gonçalves, was appointed a probationary official in Grade B 4 at the Commission. He was classified in Step 3 for the same reasons as the first applicant.
- 6 On 1 December 1988 he was established in his post.
- 7 He then took part in Competition COM/LA/706 organized by the Commission to constitute a reserve for future recruitment of Portuguese-language translators (OJ 1990 C 239, p. 28). He was placed on the reserve list drawn up following the competition and on 22 January 1992 was appointed to a post in Category LA with effect from 1 December 1991. He was classified in Step 1 of Grade LA 7.

*The third applicant*

- 8 On 1 January 1988 the third applicant, Dominique Besohé, was appointed a probationary official in Grade C 5 at the Commission. Like the first two applicants, and for the same reasons, she was classified in Step 3.

- 9 On 1 July 1988 she was established in her post.
- 10 She then took part in Competition No EUR/B/21 mentioned above and, after being placed on the reserve list, was appointed on 29 January 1992 to a post in Category B with effect from 1 January 1992. She was classified in Step 1 of Grade B 5.
- 11 By letters dated 11 May 1992 the applicants lodged complaints under Article 90(2) of the Staff Regulations against the instruments appointing them, on the ground that, in classifying them in the first step of their new grades, no account had been taken of experience acquired before they first took up their duties. They contended that the appointing authority should have applied Article 32 of the Staff Regulations, not Article 46. They also argued that they were discriminated against in comparison with successful external candidates in the competitions in which they had participated.
- 12 The Commission did not respond to the three complaints within the period laid down in the Staff Regulations.

### **Procedure**

- 13 In those circumstances the applicants brought the present actions, which were lodged at the Registry of the Court of First Instance on 1 December 1992.
- 14 By order dated 20 January 1993 the Court (Fifth Chamber) joined Cases T-103/92, T-104/92 and T-105/92 for the purposes of the written procedure, oral procedure and judgment.

- 15 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure without holding a preparatory inquiry.
- 16 The parties presented oral argument and gave their replies to questions put by the Court at the hearing on 7 July 1993.

### **Forms of order sought**

- 17 The first and third applicants claim that the Court should:

- (1) declare their applications to be admissible and well founded;
- (2) consequently, annul the Commission's decisions of 27 February and 29 January 1992 appointing them to posts as administrative assistants after their successful participation in Competition EUR/B/21, in so far as the appointments classify them in the first step of Grade B 5, without any additional seniority;
- (3) order the Commission to pay, by way of compensation, interest at the rate of 10% per annum from the date on which the contested decisions entered into force, namely 1 March 1992 and 1 January 1992 respectively, until their classifications in step are rectified;
- (4) order the Commission to pay the entire costs.

- 18 The second applicant claims that the Court should:

- (1) declare his application to be admissible and well founded;

- (2) consequently, annul the Commission's decision of 22 January 1992 appointing him to the post of translator after his successful participation in Open Competition COM/LA/706 in so far as the appointment classifies him in the first step of Grade LA 7 without any additional seniority;
- (3) order the Commission to pay, by way of compensation, interest at the rate of 10% per annum from the date the contested decision entered into force, namely 1 December 1991, until his classification in step is rectified;
- (4) order the Commission to pay the entire costs.

The Commission claims that the Court should:

- (1) dismiss the applications as unfounded;
- (2) make an appropriate order as to costs.

## **Pleas in law and arguments of the parties**

### *The actions for annulment*

#### — Arguments of the parties

- <sup>19</sup> The actions for annulment are based on three submissions. First, the Commission is alleged to have acted in breach of Article 32 of the Staff Regulations by classifying the applicants pursuant to Article 46 of the Staff Regulations. Secondly, it acted in breach of the principle of non-discrimination. Thirdly, and in the alternative, it is submitted that the criteria for classification in step used by the Commission on a change in category are unlawful. As these three submissions are closely linked, they will be examined together.

20 The applicants contend that officials moving to a higher category on the basis of an open competition must be classified pursuant to Article 32 of the Staff Regulations on recruitment, and not Article 46 on promotion.

21 They accept that their situation does not fully correspond to recruitment in its strict sense, but maintain that it corresponds even less to promotion. They submit that the Court of Justice has filled the gap in the Staff Regulations by holding that, in such cases, Article 32 should be applied by analogy, while providing for exceptions to that rule.

22 They submit that in Case 266/83 *Samara v Commission* [1985] ECR 189, at paragraph 15, and Case 138/84 *Spachis v Commission* [1985] ECR 1939, at paragraphs 10 and 11, the Court of Justice laid down the rule that Article 32 should be applied.

23 In their view, the Court of Justice confirmed this in Case 273/83 *Michel v Commission* [1985] ECR 347, at paragraph 14 et seq., and Case 47/87 *Lucas v Commission* [1988] ECR 3019, at paragraph 11 et seq., while providing for Article 46 to be applied if Article 32 would prejudice the normal development of the official's career.

24 In their second submission the applicants contend that the principle of non-discrimination has been breached. They assert in essence that the Staff Regulations must be interpreted in the light of general principles of law, such as the principle of non-discrimination. In their view, classifying an official in step on the basis of Article 46 of the Staff Regulations, when he moves from one category to another on the basis of an open competition, results in discrimination between that official and successful external candidates who enjoy the necessarily more favourable Article 32 rules. They add that this argument was accepted by the Court of Justice in *Samara v Commission*, at paragraph 15.

- 25 The applicants also claim that the Commission acted purely arbitrarily in setting at two years the period corresponding to that defined by the words 'shortly after entry into service' of the official, which are those used in the case-law, to justify applying Article 32 of the Staff Regulations instead of Article 46.
- 26 The Commission agrees with the applicants that there is a gap in the Staff Regulations, but takes the view that the Court of Justice has filled this gap by applying the rules on promotion and not the rules on recruitment. It concedes, however, that the Court of Justice has envisaged exceptions to this.
- 27 In support of its argument the Commission relies on the same judgments of the Court of Justice as the applicants but, in its view, what the applicants regard as the exception (applying Article 46) is in fact the rule and, conversely, what they regard as the rule (applying Article 32) is in fact the exception.
- 28 The Commission argues that the requirement to apply Article 46 was laid down in *Michel v Commission*, where it was held that the classification in step of an official moving from one category to another must, as a general rule, be based on the principles laid down in the provisions of the Staff Regulations which are applicable in the case of promotion. This was confirmed in *Lucas v Commission*, where it was held that the classification in step of an official moving from one category to another must be based on the principles laid down in Article 46 and not those laid down in the second paragraph of Article 32. In that judgment the Court of Justice did, however, set out the exceptions to this rule which it had already established in *Samara v Commission* and *Spachis v Commission*, holding that it is justifiable to depart from the application of Article 46 when the change of category or service occurs shortly after the official's entry into service of the Communities and when application of that article on appointment to the new post would not allow account to be taken of the training and the specific professional experience acquired by the person before he was recruited.

- 29 The Commission points out that the rationale for this case-law must be that professional experience acquired by an official before his entry into the service of the Communities can only be taken into account once.
- 30 It argues that when the applicants were recruited they obtained the maximum additional seniority under Article 32 and that they cannot claim this a second time. When they moved to the higher category, they would have seen their seniority reflected in their new classification through operation of the mechanism laid down by Article 46 of the Staff Regulations, as in the case of promotion. At the hearing the Commission added that experience acquired by the applicants before they were recruited was also taken into account when they were admitted to the open competitions.
- 31 The Commission points out that this analysis is entirely consistent with the judgments in *Samara v Commission* and *Spachis v Commission*, because Article 32 applies to an official moving to the higher category shortly after his initial appointment, when applying Article 46 would not allow his experience to be taken into account.
- 32 It adds that its interpretation fixing at two years the criterion 'shortly' laid down by the Court of Justice's case-law was reasonable, so as to ensure all officials were treated equally.
- 33 The Commission states in reply to the second submission that there can be no question of discrimination in comparison with external candidates. The Court of Justice held in *Michel v Commission*, at paragraphs 24 and 25:

"The application of those decisions does not constitute discrimination against the applicant by comparison with the external candidates who took part in the same competition. If, in a competition organized to constitute a reserve for the starting

grade of a category, there have participated not only external candidates but also officials seeking to be transferred to that category in accordance with Article 45(2), the appointing authority in fact takes account of the experience of the candidates in the two groups for the purpose of their classification in step. External candidates may have the experience which they acquired before entering the service taken into account pursuant to, and within the limits of, the second paragraph of Article 32. In the case of officials transferred from a lower category, the appointing authority will as a general rule already have taken account of any such experience when they were recruited to that category and their experience as officials in the service of the Communities will have been taken into account by their advancement to higher steps and by promotions within that category. Quite properly, Article 46 has the effect of maintaining the seniority thus acquired when officials are transferred to a new category.

The fact that account is taken of relevant experience by means of two separate systems, each of which applies to one of two different groups of candidates, does not constitute discrimination, provided that the two groups are objectively different and the two systems are adapted to the particular circumstances of each group, and notwithstanding the fact that, in a specific instance, the other system proves more advantageous to the candidate in question. The disadvantage of which the applicant complains is, moreover, offset by the advantages — in the form of dispensation from the age-limit and probationary period — accorded to him but not to external candidates and similarly founded on the objective difference between the circumstances of the two groups’.

#### — Findings of the Court

34 As has been held by the Court of Justice (see *Samara v Commission* and *Lucas v Commission*), no provision in the Staff Regulations governs the classification in step of an official appointed to a post in a higher category following an open competition.

35 The Court of Justice has held that the Staff Regulations are to be interpreted as meaning that the classification in step of an official moving from one category to another on the basis of an open competition must be based on the principles laid down in Article 46 and not on those laid down in the second paragraph of Article 32, particularly in view of the purpose of the latter provision. Article 32 is intended

in particular to leave open the possibility for the appointing authority to take into account, albeit within rather strict limits, training and professional experience acquired by a candidate before he takes up his duties as a Community official. On the other hand, the purpose of Article 46 is to ensure the greatest possible continuity regarding an official's seniority and salary as his career develops, even when he moves from one category or service to another — which, in accordance with Article 45(2), can occur only on the basis of a competition.

36 It is apparent from the case-law that 'the Court [of Justice] has departed from the application of Article 46 in cases where that article would not, on the appointment of an official to a new post shortly after his entry into the service of the Communities, have allowed account to be taken of the training and the specific professional experience acquired by that person before he was recruited' (see, most recently, *Lucas v Commission*, paragraph 14).

37 It is appropriate to consider the precise scope of that exception and then to ascertain if the Commission's interpretation of it guarantees equal treatment of, on the one hand, successful candidates in an open competition who have already been Community officials for more than two years on publication in the *Official Journal of the European Communities* of the notice of competition enabling advancement to the higher category and, on the other hand, other successful candidates.

38 To ascertain the scope of the exception, one must consider in what cases applying Article 46 would not, on the appointment of an official to a post in a higher category, '[allow] account to be taken of the training and the specific professional experience acquired ... before he was recruited'.

39 The parties agree that under Article 46 of the Staff Regulations the classification in step of officials moving to the next category is determined in accordance with the following formula:

$$24 \times \frac{[F_s + N_i + (F_i \times m/24) - N_s]}{N_i}$$

where:

$F_s$  = salary in the former grade

$N_s$  = salary in the starting step in the new grade

$F_i$  = increment in the former grade

$N_i$  = increment in the new grade

$m$  = number of months seniority in the former grade

40 A comparison of the results given by that formula with the maximum possible additional seniority under Article 32 of the Staff Regulations gives three categories of official: the first comprises officials whose previous experience cannot be reflected if Article 46 is applied on their advancement to the higher category, whether that experience was acquired before their entry into the service of the Communities and gave rise to additional seniority under Article 32 when they took up their duties, or was gained after they took up their duties and gave rise to an increase in step or grade under Article 44 or 45 whilst the official was in service. The second category comprises officials whose experience can be reflected if Article 46 is applied on their advancement to the higher category, albeit to a lesser extent than if Article 32 were applied again. The third category comprises those officials for whom applying Article 46 is necessarily more favourable than applying Article 32 again.

41 The judgment in *Lucas v Commission*, which, in paragraph 14, envisages the application of Article 32 'in cases where [the application of Article 46] would not, on the appointment of an official to a new post shortly after his entry into the service of the Communities, have allowed account to be taken of the training and the specific professional experience acquired by that person before he was recruited' must

be interpreted as imposing not two cumulative conditions for the application of Article 32 but a single condition, namely that the application of Article 46 'would not [allow] account to be taken of the training and the specific professional experience acquired by that person before he was recruited', and as giving an illustration of the kind of circumstances in which that condition is satisfied, namely 'on the appointment of an official to a new post shortly after his entry into the service of the Communities'.

42 In the instant cases the parties agree that applying Article 46 does not allow account to be taken of the training and of the specific professional experience acquired by the three applicants before they were recruited, as is apparent from their replies to a question of the Court. This is because their advancement to the next category took place shortly after their entry into the service of the Communities.

43 It follows that an official must be classified on the basis of Article 46 if applying that provision allows some account to be taken of the training and the specific professional experience acquired by the person before he was recruited, even if to a lesser extent than under Article 32 (see *Michel v Commission*, paragraph 24), but the classification must be on the basis of Article 32 if applying Article 46 does not allow any account to be taken of such training and experience.

44 The rationale for Articles 32 and 46 of the Staff Regulations, as established by the body of case-law cited above, also supports that approach. As regards officials for whom application of Article 46 allows account to be taken of experience acquired before they took up their duties, given the high level in step or in grade that they have reached in their category, advancement to a higher category is part of the normal development of their careers. On the other hand, for the other officials, advancement to the higher category is not part of their continuing career development, but must instead be treated as the beginning of a new career, which justifies applying Article 32.

45 The Court notes that in refusing to apply to the applicants the criteria laid down in Article 32 of the Staff Regulations the Commission relies on a standard administrative practice, based on its interpretation of the words 'shortly after' used by the Court in the case-law cited above. Under this practice, the expression 'shortly after' has been specifically defined as 'the period not exceeding two years in duration from the date of entry into service' until publication in the Official Journal of the notice of competition that enabled advancement to the higher category (paragraph 12 of the defence).

46 That practice not only makes selecting the provision to be applied when classifying officials in step dependent on an arbitrary factor, namely the interval between the date of an official's entry into service and the date of publication of a notice of competition enabling advancement to the higher category, but also is contrary to Articles 32 and 46 of the Staff Regulations as interpreted by the Court of Justice, most recently in *Lucas v Commission*, as it precludes application of Article 32 in cases where application of Article 46 does not allow additional seniority, granted on recruitment on the basis of Article 32, to be conferred on an official in any circumstances for the purpose of taking into account the training and the specific professional experience acquired before he was recruited.

47 Moreover, the Commission's restrictive interpretation is contrary to the principle of equal treatment. It results in successful candidates in the same open competition being classified in step on the basis of different criteria: first, there are those officials who, like the applicants, had been officials for more than two years by the time that notice of the open competition in which they took part was published in the Official Journal, whose previous experience cannot be reflected at all when Article 46 is applied on their advancement to a higher category, but who are nevertheless classified on the basis of Article 46, and, secondly, there are those officials who had been officials for less than two years on the publication date and who are classified on the basis of Article 32. Although that distinguishing criterion is objective, it is not necessary for achieving its purpose advanced by the Commission, namely preventing experience acquired by an official before his entry into the service of the Communities from being taken into account twice. Applying Article 46 to the first category of officials means that for the remainder of their career experience

acquired before they were recruited cannot be taken into account. They are therefore in this respect in an identical situation to an official in the second category. Accordingly, they had to be treated in the same way as the latter and distinguishing between them not only is unnecessary to prevent their experience from being taken into account twice on classification in step, but also prevents account being taken of that experience for the remainder of their career.

48 Furthermore, this unequal treatment cannot be justified by referring to the advantages in the form of dispensation from the age limit and probationary period enjoyed by successful candidates in an open competition who are already officials. First, those advantages are not commensurate with the disadvantages arising from the unequal treatment to which they are subject; secondly, they have an objective justification in that they further consolidate the relationship between the officials and the Communities; and, thirdly, they are in any event not capable of justifying the difference in treatment between officials who took up their duties less than two years before and those (such as the applicants) who took up their duties more than two years before publication in the Official Journal of the notice of competition that enabled advancement to the higher category.

49 Accordingly, as held by the Court of Justice in *Samara v Commission*, at paragraph 15, the principle of equal treatment can only be complied with by classifying all successful internal and external candidates in an open competition on the basis of the criteria laid down in Article 32, subject to preservation under Article 46 of rights acquired by officials in that capacity prior to their advancement to a new category.

50 Indeed, that system corresponds to the system that the European Parliament, the Council and the Court of Auditors of the European Communities apply to their officials.

51 The contested decisions must therefore be annulled in so far as they classify the applicants in step on the basis of Article 46 and not Article 32 of the Staff Regulations.

52 The Commission must reconsider the applicants' positions and apply the criteria laid down in Article 32 of the Staff Regulations.

*The actions for compensation*

53 The applicants claim interest at 10% per annum on the sums to be paid when their financial positions are regularized.

54 The Commission disputes in any event the rate of interest claimed by the applicants and considers that a rate of 8% per annum would be consistent with the case-law (Case 21/86 *Samara v Commission* [1987] ECR 795).

55 The Court holds that the actions for compensation are premature as the Court cannot take the place of the Commission and apply to the three applicants the criteria laid down by Article 32 of the Staff Regulations.

**Costs**

56 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the applicants have applied for costs in their pleadings, the Commission must be ordered to pay the entire costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls the Commission decisions of 27 February, 22 January and 29 January 1992 in so far as they classify the applicants in the first step of their grade under Article 46 of the Staff Regulations;**
2. **Dismisses the remainder of the applications;**
3. **Orders the Commission to pay the entire costs.**

Barrington

Lenaerts

Kalogeropoulos

Delivered in open court in Luxembourg on 28 September 1993,

H. Jung

A. Kalogeropoulos

Registrar

President