

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
7 February 1991 *

In Case T-58/89,

Calvin Williams, an official of the Court of Auditors of the European Communities, residing in Luxembourg, represented initially by Victor Biel, of the Luxembourg Bar, and subsequently by Jean-Paul Noesen, also of the Luxembourg Bar, with an address for service at the latter's Chambers, 38 avenue Victor Hugo,

applicant,

v

Court of Auditors of the European Communities, represented by Michael Becker and Marc Ekelmans, members of its Legal Department, and, at the hearing, by Michael Becker and Jean-Marie Stenier, members of its Legal Department, all acting as Agents, with an address for service in Luxembourg at the Court of Auditors, 12 rue Alcide De Gasperi, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Court of Auditors refusing to reconsider the applicant's classification,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fourth Chamber)

composed of: R. Schintgen, President of the Chamber, D. A. O. Edward and R. García-Valdecasas, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 3 October 1990,

gives the following

* Language of the case: French.

Judgment

Facts

- 1 Mr Williams was engaged in October 1974 by the Audit Board, a body responsible for financial supervision under the auspices of the Council of the European Communities, as a member of the temporary staff in grade A 7. Subsequently, by Council decision of 16 December 1976, he was appointed an official of the Audit Board with effect from 1 October 1976 in grade A 7. With effect from 1 May 1978 he was transferred at grade A 7 to the newly created Court of Auditors of the European Communities. Later he was promoted to grade A 6 with effect from 1 May 1979.

- 2 Between 1979 and 1983 the applicant took part, unsuccessfully, in 29 internal or interinstitutional competitions organized by the Court of Auditors for posts in grades A 5, A 4 and A 3.

- 3 On 1 October 1982, the Court of Auditors decided to organize an internal competition (competition No CC/A/17/82) to fill a post of principal administrator responsible for carrying out advisory duties relating to internal administration and budgetary matters. According to the notice of competition, the appointment was to be made in principle in the basic grade in the career bracket, namely A 5. When it had completed its deliberations, the selection board drew up a list of suitable candidates, on which Mr Schwiering was placed first and the applicant second. By decision of 24 March 1983, the Court of Auditors appointed Mr Schwiering to the principal administrator's post, classifying him in A 5. On 18 November 1983, Mr Williams lodged an application with the Court of Justice in which he challenged the decision appointing Mr Schwiering, essentially on the ground that the latter did not meet the requirements laid down by the notice of competition. By judgment of 16 October 1984 (Case 257/83 *Williams v Court of Auditors* [1984] ECR 3547) the Court of Justice upheld Mr Williams' application and annulled the decisions of the Court of Auditors of 24 March 1983 appointing Mr Schwiering and of 5 September 1983 rejecting Mr Williams' complaint.

- 4 In implementation of that judgment, having regard to the list of suitable candidates drawn up following competition No CC/A/17/82 and pursuant to Decision No 81-5 of the Court of Auditors dated 3 December 1981 on the criteria applicable to the classification in grade and step of personnel (hereinafter referred to as 'Decision No 81-5'), the President of the Court of Auditors, in his capacity as Appointing Authority, appointed Mr Williams principal administrator on 18 October 1984 in grade A 5, step 3, with effect from 16 October 1984. Mr Williams did not contest his classification.
- 5 On 3 January 1985, the applicant submitted a request to the President of the Court of Auditors pursuant to Article 25 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations') to the effect that the date at which his appointment in grade A 5 became effective should be the date on which the selection board for competition No CC/A/17/82 definitively adopted the list of suitable candidates, that is to say 17 December 1982. The Appointing Authority did not reply to that request, and the applicant did not lodge a complaint against the implied decision turning down his request.
- 6 The applicant was required to take leave pursuant to Article 59(2) of the Staff Regulations from 12 June 1987 to 12 June 1988.
- 7 On 2 September 1988, the applicant submitted to the Appointing Authority of the Court of Auditors what was styled 'une plainte au sens de l'article 90, paragraphe 2, du statut' in which he asked to be appointed to grade A 4 pursuant to Article 3 of Decision No 81-5. He argued that, in the light of the different criteria applied to the classification given to other officials of the Court of Auditors, in particular Mr Ruppert and Mr Beurotte when they were promoted, his classification, as laid down in the decision of 18 October 1984 by which he was appointed, was incorrect.
- 8 Mr Ruppert was recruited and appointed as an official by decision of 1 August 1980 and Mr Beurotte by decision of 1 July 1982. The former was promoted to grade A 3 by decision of 23 October 1986. An action brought against that decision on 24 June 1987 by another official of the Court of Auditors was dismissed by the Court of Justice on 4 July 1989 (Case 198/87 *Kerzmann v Court of Auditors* [1989] ECR 2083). The notice that this action had been brought was published in the *Official Journal of the European Communities* on 28 July 1987 (Official Journal C 200, p. 7). As for Mr Beurotte, he was promoted to grade A 5 on 15 December 1987.

- 9 In 1988 the applicant was elected to the Staff Committee of the Court of Auditors, of which he has been a member since 30 March 1988.
- 10 On 13 September 1988, the Appointing Authority rejected the applicant's request, while reserving the right to take the disciplinary measures which, in its view, were warranted by the accusations made by the applicant against the members and staff of the Court of Auditors in his memorandum of 2 September 1988. Disciplinary proceedings were in fact taken against the applicant.

Procedure

- 11 Those were the circumstances in which, by application lodged at the Registry of the Court of Justice on 30 November 1988, Mr Williams brought this action for annulment of the decision of 13 September 1988 rejecting his complaint. The case was registered as Case 349/88.
- 12 The written procedure took place in its entirety before the Court of Justice. It followed its usual course.
- 13 By virtue of Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of Justice (First Chamber) referred the case by order of 15 November 1989 to the Court of First Instance, where it was registered as Case T-58/89.
- 14 In its defence the Court of Auditors, before setting out its pleas as to the substance, raised an objection that the application was inadmissible.
- 15 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and to confine discussion at that stage to the question of admissibility pursuant to Article 92(2) of the Rules of Procedure of the Court of Justice, which are applicable to the Court of First Instance *mutatis mutandis* by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988.

- 16 The hearing took place on 3 October 1990. The parties presented oral argument and answered the questions put by the Court.
- 17 The applicant claims that the Court should:
- (i) order the Court of Auditors to produce the personal files of Mr Jean-Jack Beurotte and Mr Edouard Ruppert;
 - (ii) declare that the application is admissible;
 - (iii) annul the decision rejecting his complaint;
 - (iv) refer the case back to the Appointing Authority of the Court of Auditors for the purpose of carrying out the judgment to be given by the Court;
 - (v) order the defendant to pay all of the costs.
- 18 The defendant claims that the Court should:
- (i) dismiss the application as inadmissible or, failing that, as unfounded;
 - (ii) order the applicant to pay the costs.
- 19 At the hearing the Court asked the representatives of the Court of Auditors to produce the minutes of the meetings of the Staff Committee and of the various committees of which the applicant was a member which were held as from April 1988, during the period when he was required to take leave. The Court of Auditors complied with this request on 10 October 1990. The Court of First Instance found from an examination of the minutes produced that during the period in question the applicant only attended one meeting of the Staff Committee, that held on 30 March 1988.

Admissibility

20 The defendant puts forward two pleas in law in support of its objection of inadmissibility. It maintains, first, that the administrative procedure was not exhausted and, secondly, that the 'plainte au sens de l'article 90, paragraphe 2, du statut' lodged on 2 September 1988 was out of time.

The first plea in law: failure to exhaust administrative remedies

21 The defendant argues that it was not until he submitted his memorandum of 2 September 1988 that the applicant contested the Appointing Authority's decision of 18 October 1984 appointing the applicant to a post of principal administrator and classifying him in grade A 5, inasmuch as that decision fixed his classification in grade

22 The defendant considers that, despite the fact that the applicant describes his memorandum of 2 September 1988 as a 'plainte au sens de l'article 90, paragraphe 2, du statut', it was in reality a request made pursuant to Article 90(1) of the Staff Regulations. This is because of the real scope of the memorandum, in which the applicant sought reclassification in grade because an allegedly new fact had arisen which, in his view, was such as to justify a reconsideration of the classification laid down in the decision of 18 October 1984.

23 The defendant argues that the fact that an act adversely affecting the applicant (namely the decision of 18 October 1984 classifying him in grade A 5) already existed does not in itself constitute a sufficient ground for regarding the memorandum of 2 September 1988 as a complaint rather than a request.

24 The defendant observes that under Article 90(1) of the Staff Regulations any official is entitled to request the Appointing Authority to take a decision relating to him. It points out that, as the Court of Justice has consistently held, that right does not allow an official to circumvent the time-limits laid down in Articles 90 and 91 for the lodging of a complaint and an appeal by indirectly calling in question by means of a request a previous decision which has not been challenged within the period prescribed; only the existence of new substantial facts may justify the

submission of a request for a review of such a decision (judgment in Case 231/84 *Valentini v Commission* [1985] ECR 3027, paragraph 14).

- 25 It adds that in the judgment in *Pressler-Hoefl* (Case 302/85 *Pressler-Hoefl v Court of Auditors* [1987] ECR 513) the Court of Justice held that ‘a request under Article 90(1) of the Staff Regulations submitted after the expiry of the time-limit for bringing an action against the act adversely affecting the person concerned is admissible only if new facts have arisen which justify a reconsideration of the situation’.
- 26 The defendant maintains that it was in fact a request — alleging that new facts had arisen — that the applicant submitted on 2 September 1988 with a view to the Appointing Authority’s reclassifying him in grade A 4. However, it argues that according to Article 91(2) of the Staff Regulations an appeal lies to the Court of Justice only if a complaint within the meaning of Article 90(2) has first been made to the Appointing Authority. The defendant observes that the applicant did not submit a complaint against the express rejection of his request and claims that the application to the Court is therefore inadmissible.
- 27 The applicant considers first that the application cannot be declared inadmissible on the basis of a mere question of form when a formal request made under Article 90(1) of the Staff Regulations, followed by a separate complaint under Article 90(2), would not have served any purpose. He argues in the second place that the wording used was clear and that the defendant should not try to distort his words.
- 28 In order to resolve the question of the categorization of the applicant’s memorandum of 2 September 1988, it is first necessary to examine the wording of the document, which the applicant himself describes as a ‘*plainte au sens de l’article 90, paragraphe 2, du statut*’. Whilst it is true that the memorandum contains neither the word ‘*réclamation*’ (complaint) nor the word ‘*demande*’ (request), it does refer expressly to Article 90(2) of the Staff Regulations. The Court considers that this factor is sufficient in order for the memorandum to be classed as a complaint rather than a request. The fact that the applicant used the word ‘*plainte*’ rather than ‘*réclamation*’ is of no significance and hence entails no consequences.

- 29 As far as the purpose of the complaint is concerned, the applicant is challenging the classification laid down in the decision of 18 October 1984 and asking to be classified in grade A 4 pursuant to Article 3 of Decision No 81-5. The Court considers that the defendant is wrong in arguing that a complaint cannot have such a purpose. The case-law cited by the defendant in that regard covers not only complaints submitted by officials against decisions classifying them, but also cases in which the Court of Justice has regarded as complaints memoranda seeking reclassification which the applicants described as requests (judgments in Case 191/84 *Barcella v Commission* [1986] ECR 1541 and in *Pressler-Hoeft*, cited above).
- 30 It follows that the applicant complied with the pre-litigation procedure laid down in Articles 90 and 91 of the Staff Regulations.
- 31 In view of the foregoing, the first plea in law raised by the defendant in support of its objection of inadmissibility must be dismissed.

The second plea in law: the claim that the memorandum of 2 September 1988 was out of time

- 32 The defendant takes the view that, even if the memorandum of 2 September 1988 can be regarded as a complaint within the meaning of Article 90(2) of the Staff Regulations, it should have been submitted within three months of the date on which the applicant received notice of the act adversely affecting him, that is to say, in this case, the decision of 18 October 1984 classifying him in grade A 5.
- 33 The defendant reiterates that, whilst it is true that an official may submit a request pursuant to Article 90(1) of the Staff Regulations after that three-month period has expired, such a request is admissible only if a new fact has arisen which justifies a reconsideration of the situation. It is only if the applicant succeeds in proving that such a new fact has arisen that the rule laid down in the Staff Regulations can be waived in the particular case.

- 34 The defendant maintains that the applicant is wrong to categorize as new facts the Appointing Authority's decision of 23 October 1986 promoting Mr Ruppert to grade A 3 and its decision of 15 December 1987 promoting Mr Beurotte to grade A 5. Since those decisions were taken on the basis of Article 45 of the Staff Regulations, they cannot be regarded as resulting from the application of Decision No 81-5, which is concerned with the classification in grade and step of successful candidates in competitions, and therefore cannot provide a basis for claiming that Decision No 81-5 is now being applied differently.
- 35 In addition, the defendant contests the applicant's claim that it was not until summer 1988 that he received notice of the promotion decisions taken in October 1986 and December 1987. More specifically as regards the promotion decision of 23 October 1986, the defendant states that it was displayed in the premises of the Court of Auditors for a period of one month during which the applicant had been carrying out his duties normally. It points out that an action was brought against that decision in the Court of Justice by another official of the Court of Auditors essentially on the basis of the same arguments as those raised by the applicant. As the notice relating to the institution of those proceedings was published in the Official Journal on 28 July 1987, the defendant considers that the applicant was bound to have had notice of the decision in question by 28 July 1987 at the latest. As far as the promotion decision of 15 December 1987 is concerned, the defendant points out that the applicant had been a member of the Staff Committee since April 1988 and that would have enabled him to obtain information about promotion decisions taken in December 1987.
- 36 The defendant concludes that the application is inadmissible on the ground that it is out of time, either because the applicant has not proved that new facts arose which justify a re-opening of the time-limits or, at the very least, because he did not lodge a complaint within three months of his receiving notification of the allegedly new facts.
- 37 The applicant maintains that the promotion of Mr Ruppert to grade A 3 and the promotion of Mr Beurotte to grade A 5 by means of a very 'liberal' application by the Appointing Authority of Decision No 81-5 or through the adoption of new criteria constitute new facts which justify a reconsideration of his situation.

- 38 As to the date on which he had notice of these new facts, the applicant argues that on 28 July 1987 he was on compulsory leave and hence had no access to the Official Journal; moreover, even if he had read the notice published in the Official Journal relating to the action brought by a colleague, that would not mean that he had had notice of the circumstances in which Mr Ruppert's promotion had been decided upon. He claims that it was not until 2 September 1988 that he learnt that when he was promoted in December 1987 Mr Beurotte did not have the experience required in order to be promoted and did not have a recognized first degree. The complaint of 2 September 1988 was lodged within three months of his resuming work following his compulsory one year's leave between 12 June 1987 and 12 June 1988.
- 39 It must be observed, as the Court of Justice has repeatedly stated, that whilst Article 90(1) of the Staff Regulations provides that any official may request the Appointing Authority to take a decision relating to him, that right does not allow an official to circumvent the time-limits laid down in Articles 90 and 91 of the Staff Regulations for the lodging of a complaint and an appeal by indirectly calling in question by means of a request a previous decision which has not been challenged within the period prescribed. Only the existence of new substantial facts may justify the submission of a request for a review of such a decision (judgments in Case 161/87 *Muysers and Tulp v Court of Auditors* [1988] ECR 3037 and in Case 232/85 *Becker v Commission* [1986] ECR 3401).
- 40 In the present case, the applicant claims that the way in which the Appointing Authority applied Decision No 81-5 on the occasion of the promotions of Mr Ruppert and Mr Beurotte constitutes a new substantial fact which justifies a reconsideration of his classification.
- 41 In order to assess whether that claim is well-founded, it is necessary first to examine the aim and scope of Decision No 81-5. That decision sets out the 'criteria applicable to appointment to a grade and to classification in step for staff of the Court of Auditors'. It is based on Articles 29, 30 and 32 of the Staff Regulations, which are concerned with recruitment. Its aim is to lay down uniform criteria for the classification of successful candidates in competitions, and it states that the same criteria should be applied when classifying members of the temporary staff. It is based on the view that policy with regard to the classification of successful candidates in competitions held by the Court of Auditors constitutes an important part of its personnel policy. Accordingly, it is clear from its wording

that it applies only to the classification in grade and step of successful candidates in internal, interinstitutional and open competitions, since it draws no distinction between the different types of competition, and is not intended to be applied to promotions.

- 42 In that connection, it is important to remember the distinction between promotions and competitions and between the provisions relating to promotions and those relating to competitions. The first subparagraph of Article 45(1) of the Staff Regulations provides as follows:

‘Promotion shall be by decision of the Appointing Authority. It shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.’

- 43 As the Court of Justice has repeatedly held, the provisions concerning promotions are intended to govern the advancement, in their respective categories and branches, of employees of the Community who, at the time of their promotion, already have the status of officials (judgment in Case 17/83 *Angelidis v Commission* [1984] ECR 2907), and to ensure the greatest possible continuity regarding an official’s seniority and salary as his career develops (judgments in Case 273/83 *Michel v Commission* [1985] ECR 347 and in Case 47/87 *Lucas v Commission* [1988] ECR 3019).

- 44 It is appropriate to emphasize the differences between the promotion and the competition procedures. Various factors play a role in the promotion of an official: the general quality of the work which he has performed in carrying out his duties (judgments in Case 280/81 *Hoffmann v Commission* [1983] ECR 889 and in Case 9/82 *Øhrgaard and Delvaux v Commission* [1983] ECR 2379), and competence, age and seniority in the grade or service (judgment in Case 298/81 *Colussi v European Parliament* [1983] ECR 1131). This is reflected in the importance of the periodic report, which is an indispensable criterion of assessment each time the official’s career is considered by the administration (judgment in Case 7/86 *Vincent v Parliament* [1987] ECR 2473).

- 45 As far as competitions are concerned, the notice of competition lays down the criteria and the requirements which candidates must meet. The provisions of the Staff Regulations relating to classification in step on appointment are designed, *inter alia*, to allow the Appointing Authority to take account of the training and specific experience acquired by the candidate before he entered the service of the Communities.
- 46 It follows that competitions and promotions are different procedures which are governed by different provisions of the Staff Regulations and are subject to their own particular criteria.
- 47 In this case, Decision No 81-5, which relates only to the classification of successful candidates in an internal, inter-institutional or an open competition, did not have to be applied to the decisions promoting Mr Ruppert and Mr Beurotte. As a result, those decisions cannot be regarded as new, substantial facts as regards the implementation of Decision No 81-5 entitling the applicant to request that the application of that decision on the occasion of his promotion to grade A 5 following an internal competition should be reconsidered.
- 48 It follows from the foregoing that the applicant has not established new, substantial facts which would justify re-opening the time-limits laid down in Articles 90 and 91 of the Staff Regulations for appealing against the act adversely affecting him, namely the decision of 18 October 1984 appointing him to grade A 5. Consequently, the application must be dismissed as inadmissible.

Costs

- 49 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 institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby

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

Schintgen

Edward

García-Valdecasas

Delivered in open court in Luxembourg on 7 February 1991.

H. Jung

Registrar

R. Schintgen

President