JUDGMENT OF THE COURT (SECOND CHAMBER)
9 JULY 1970[1]

Algiso Brembati
v Commission of the European Communities

Joined Cases 59 and 71/69

Summary

1. *Officials — Promotion — Classification in the new grade — Criteria — 'Notional' steps (First sentence of the second paragraph of Article 46 of the Staff Regulations of Officials)*

2. *Officials — Promotion — Classification in the new grade — Criteria — Basic salary (Second sentence of the second paragraph of Article 46 and Article 66 of the Staff Regulations of Officials)*

1. The purpose of the first sentence of the second paragraph of Article 46 is, in cases of promotion, to ensure by taking into account the 'notional steps' that the seniority which may have been acquired by the official concerned is maintained for the purposes of future two-yearly increments. The phrase 'throughout the span of the actual steps' must be interpreted as referring to the intermediate intervals of remuneration between those steps, the last of which represents a limit which cannot be exceeded without distorting the system of scales of remuneration provided for in the Staff Regulations.

2. The purpose of the second sentence of the second paragraph of Article 46 is to ensure that an official who is promoted to a higher grade is classified in such a step of that grade that the basic salary as fixed in the table appearing in Article 66 is at least equal to the basic salary payable in his former grade.

In Joined Cases 59 and 71/69

ALGISO BREMBATI, an official of the Commission of the European Communities, residing in Brussels, represented by Gianfranco Maris, Advocate of the Milan Bar, with an address for service in Luxembourg at the Chambers of Luigi Ronchi, 14 rue Batty-Weber,

applicant,

1 — Language of the Case: Italian.

V

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Sergio Ventura, acting as Agent, with an address for service in Luxembourg at the Chambers of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application to determine the step and the seniority in step of the applicant following his promotion to Grade A4;

THE COURT (Second Chamber)

composed of: P. Pescatore (Rapportuer), President of Chamber, A. Trabucchi and W. Strauß, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

By decision of the Commission of 24 January, 1969, Mr Algiso Brembati, an official of the Commission of the European Communities, was promoted, with effect from 1 October 1968, without any change in his post, from Grade A5, Step 8, to Grade A4, Step 4, with seniority in that step as from 1 November 1966.
In a letter of 30 January 1969, the Director-General for Personnel and Administration of the Commission informed Mr Brembati that as the basic salary in his new grade was 100 BF less than that in Grade A5, he would be paid the same basic salary for the month of October 1968 as he had received in his former grade.
On 7 February 1969, Mr Brembati submitted a request to the Director General for Personnel and Administration of the Commission:

(a) to be classified in Grade A4 and to be paid the basic salary corresponding to that grade rather than to Grade A5, and with effect from 1 October 1968 rather than from 1 November 1968;

(b) to be awarded a step in Grade A4 corresponding to an actual, rather than a notional, basic salary which is not

lower than that which he 'would have received' in his former grade;

(c) for the administration to take into account the twenty-four notional steps acquired in his former grade.

On 15 March 1969 the Commission paid Mr Brembati, together with his salary for March 1969, the sum of BF 7100 by way of arrears due following his promotion.
By letter of 17 March 1969, Mr Brembati informed the Director-General for Personnel and Administration that in his opinion, even accepting the doubtful method of calculation employed by the Commission, the sum paid in respect of four months' arrears (from November 1968 to February 1969) should have amounted to BF 7 200 and asked whether the reduction of BF 100 in his salary following his promotion was the result of a deduction.
On 1 April 1969, Mr Brembati received a reply to the effect that there had been a material error in this matter.
This error was made good by a payment made during October 1969.
On 14 April 1969 the Director-General for Personnel and Administration of the Commission confirmed to Mr Brembati that after reconsideration of his case it was apparent that the classification which had been notified to him was in accordance with Article 46 of the Staff Regulations.
On 11 June 1969, Mr Brembati submitted an application to the President of the Commission in which he requested:

(a) to be awarded Step 5 in Grade A4 with effect from 1 October 1968;

(b) to be awarded a notional seniority in that step which would take into account the seniority acquired in Step 8 of Grade A5.

In a letter of 29 September 1969, the Director-General for Personnel and Administration informed Mr Brembati that the Commission had decided that 'promotions made within the career bracket for the financial year 1968 will take effect on 1 July 1968' and that he had therefore been classified in Grade A4, Step 4, with seniority in that grade from 1 July 1968 and in that step from 1 August 1966.
On the same day Mr Brembati was informed that, as a result of the change in the date on which his promotion took effect, his new basic salary was 100 BF lower than that received in Grade A5 and that for the month of July 1968 he had been paid the basic salary received in his former grade.

II — Procedure

As within two months he had received no reply from the Commission to his request through official channels of 11 June 1969, Mr Brembati brought an application on 15 October 1969 for the annulment of the implied decision of rejection resulting from this failure to reply.
This application was registered under No 59/69.
The Commission lodged its statement of defence in Case 59/69 on 20 November 1969.
On 2 December 1969 Mr Brembati brought a further application against the decision which had been notified to him by the letter dated 29 September 1969 from the Director-General for Personnel and Administration of the Commission.
This application was registered under No 71/69.
By order of 15 December 1969 the Second Chamber of the Court decided to join Cases 59/69 and 71/69 for the purposes of procedure and judgment.
On 29 December 1969 the Commission lodged its statement of defence in Case 71/69.
The applicant lodged a reply in Joined Cases 59 and 71/69 on 5 February 1970 and the Commission lodged a rejoinder of 6 March 1970.
Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Second Chamber of the Court decided that it was not necessary to hold any preparatory inquiry.
The parties oral argument at the hearing on 27 May 1970.
The Advocate-General delivered his opinion at the hearing on 18 June 1970.

III — Conclusions of the parties

After amending his first conclusions the *applicant* claims that the Court should:
— declare the application to be admissible;
— principally: declare that, in the calculation of the notional salary to which he is entitled in Grade A4, the Commission must take into account the twenty-four months' notional seniority in step acquired in Grade A5/8;
— in the alternative: declare that the applicant must be classified in Step 5 of Grade A4 with effect from 1 July 1968, without any seniority in step;
— order the Commission to pay the costs.

The *Commission* contends that the Court should:
— dismiss Application 59/69 as unfounded;
— declare that Application 71/69 is inadmissible or, alternatively, dismiss it as unfounded;
— order the applicant to pay the costs according to the terms of Article 70 of the Rules of Procedure.

IV — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *Admissibility of Application 71/69*

The *Commission* considers that the subject-matter of Application 71/69 is the same as that of Application 59/69 and that the decision to which it refers is not independent of the first decision; the only amendment made had concerned the date on which the applicant's promotion took effect. It was thus a partly confirmatory measure which, in so far as it makes no changes in the objective legal position defined by the measure confirmed, cannot be regarded as any different from it. Such a measure may not be validly contested on the basis of submissions which only refer to factors already contained in the earlier decision, which have not changed. The applicant gives evidence of no interest in support of his second application, different from that referred to in the first. Application 71/69 must therefore be declared inadmissible for lack of any interest.

On the other hand, the *applicant* maintains that the Commission dealt in both decisions with the promotion, the step and the date on which such promotion took effect. The second decision is unquestionably and radically new, from the point of view both of the procedure and of the substance. It covers the entire breadth and scope of the earlier decision, even as regards that part which is substantially the same. It puts forward a new and different assessment of the problem as a whole. It has thus annulled the earlier decision, which no longer exists. Case 59/69 now only concerns the costs which the Court cannot refuse to award to the applicant. Case 71/69 also concerns the substance of the action and the applicant has an undoubted interest in seeing his argument accepted. The Court has rightly recognized a connexion between them and has decided on the joinder of the two cases.

B — *Substance*

1 — Submission based on the first sentence of the second paragraph of Article 46 of the Staff Regulations

The *applicant* alleges that the Commission has infringed the first sentence of the second paragraph of Article 46 of the Staff Regulations, according to which '... each grade shall be divided into notional steps corresponding to months of service and notional salaries rising by one twenty-fourth of the two-yearly increment for that grade throughout the span of the actual steps'.

This provision means that 'throughout their span' each of the actual steps in each grade, including the eighth, are divided into twenty-four notional steps.

The intention of the Staff Regulations is to protect the 'normal' development of the career of an official who, on recruitment at the first step of his grade, receives an increment every two years. This direct progression would be interrupted if the last step in the grade were not also divided into twenty-four notional steps as, of course, promotion cannot always take place on the very day on which the official reaches the last step of his grade.

However, contrary to the letter and the spirit of the first sentence of the second paragraph of Article 46, the Commission refused to credit the applicant, who had been classified in Grade A5, Step 8, for more than twenty-four months, with the maximum twenty-four notional steps acquired in that step.

For its part, the *Commission* considers that no more notional steps exist beyond the last actual step of each grade, from which an official appointed to a higher grade might benefit in his new grade.

The notional steps correspond to months of service representing a series of potential increases in salary which are justified to the extent to which an official may rise automatically, through the mere passage of time, to a new step involving a higher salary in the same grade. Once an official has reached the final step in a grade, it is no longer possible to rise automatically to a higher salary and there is no further reason for the notional steps to exist.

The *applicant* maintains that by awarding him Grade A4, Step 4, which corresponds to a basic salary of BF 40 800 when he was classified in Grade A5, Step 8, with a basic salary of BF 40 900, the Commission infringed the second sentence of the second paragraph of Article 46 of the Staff Regulations of Officials which provides that: 'An official appointed to a higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade'.

It follows from Article 46 that the salary which the promoted official 'would have received' is made up of the salary which he was receiving at the time of his promotion, as increased by the twenty-four notional months of service acquired in the step which he held.

The Commission awarded the applicant a basic salary which was not only lower than that which he 'would have received' but was lower than that which he was receiving.

2 — Submission based on the second sentence of the second paragraph of Article 46 of the Staff Regulations

The applicant sets out as follows the solutions which would have conformed with the Staff Regulations:

If he is entitled to have taken into account the twenty-four notional months of service acquired, at the time of his promotion, in the step he had then reached:	If he is not entitled to have the twenty-four notional months of service taken into account:
BF 40 900 basic salary in Grade A5/8	BF 40 900 basic salary in Grade A5/8
BF 1 700 24/24 notional steps	0
BF 42 600 notional salary which he 'would have received'	BF 40 900 notional salary which he 'would have received'
BF 1 700 two-yearly increment pursuant to the second sentence of the second paragraph of Article 46	BF 1 700 two-yearly increment
BF 44 300	BF 42 600
There is thus reason to award the applicant Step 5 in Grade A4, with a basic salary of BF 42 700 and a notional salary of BF 44 362 corresponding to the twenty-first notional step in Step 5.	This sum corresponds to Step 4 of Grade A4. In order to comply with the second sentence of the second paragraph of Article 46 it is necessary to award the applicant the basic salary in the step next above (BF 42 700), that is, Step 5, without any seniority in step.

In the opinion of the applicant the aim of the second sentence of the second paragraph of Article 46 is to alter, in the cases to which it relates, the classification fixed on the basis of the first paragraph alone, to which it makes an express exception.

Contrary to the wording of the text the interpretation put forward by the Commission only awards an official the salary which he was already receiving before this promotion, although under the regulations he must continue to receive the basic salary 'which he would have received' in his former grade.

The *Commission* replies that the application of the first paragraph of Article 46 of the Staff Regulations, which provides that 'An official appointed to a higher grade shall, in his new grade, have the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for that grade' involved the classification of the applicant in Step 4 of his new grade. In fact, as it was impossible to award the 'notional step ... reached in (his) former grade', it was necessary to take into account the salary received by the applicant in Step 8 — the last step in Grade A5 — plus the amount of the two-yearly increment for that grade, that is, 40 900 + 1 700 = BF 42 600. In the table of notional steps in Grade A4, the notional salary next above is BF 42 620.83. The applicant was thus classified in Step 4 of Grade A4 with a notional seniority of 23 months in that step.

As the basic salary payable in Grade A4, Step 4, was BF 100 lower than that received in his former grade the applicant was informed that, in accordance with the second sentence of the second paragraph of Article 46, he would continue to receive the salary paid before his promotion until such time — one month later — as he was entitled to a higher salary in his new grade.

At all events, the second sentence of the second paragraph of Article 46 cannot be interpreted as capable of changing the classification fixed on the basis of the first paragraph. It merely constitutes a safeguard clause of a purely financial nature. It refers only to 'salary' and not to 'classification'. Moreover, the effect of the interpretation put forward by the applicant would be to ensure that every official appointed to a higher grade is classified 'not lower than the initial step in that grade', which would render superfluous the final paragraph of Article 46 which expressly provides that this shall be the case.

3 — Submissions based on the first paragraph of Article 62 of the Staff Regulations

The *applicant* maintains that under the terms of the first paragraph of Article 62 of the Staff Regulations: 'In accordance with Annex VII and save as otherwise expressly provided, an official who is duly appointed shall be entitled to the remuneration carried by his grade and step'.

In contravention of this provision the Commission awarded him in respect, first, of October and later of July 1968, the salary carried by Grade A5, Step 8, although he was promoted to Grade A4.

The *Commission* maintains that the first paragraph of Article 62 must be interpreted in the light of Article 46.

The 'remuneration carried by his grade and step' to which an official is entitled is that which corresponds to the new grade and step to which he has been appointed under the first paragraph of Article 46. Where, as in this instance, this remuneration is lower than that received in his former grade, the second sentence of the second paragraph of Article 46 allows the payment of the salary previously received, although it is higher than that resulting from the joint application of the provisions of the first paragraph of Article 62 and the first paragraph of Article 46.

4 — Submission based on the principle of equality of treatment

The *applicant* observes that another official of the Community, who was promoted in the same circumstances as he, was immediately awarded Step 5 of Grade A4 as well as notional seniority in that step.

The *Commission* replies that the case referred to by the applicant is similar but not identical to his own. In that instance it

was necessary to take into account a compensatory allowance paid to the official concerned by the High Authority of the ECSC, which led the Commission to award him the salary corresponding to the third notional step following Step 5 of Grade A4.

Grounds of judgment

1 By an application dated 15 October 1969 the applicant instituted proceedings for the annulment of the implied decision of rejection resulting from the failure of the Commission to give any reply to his request through official channels submitted on 11 June 1969 concerning his classification following promotion from Grade A 5 to Grade A 4. (Application 59/69).

2 As a subsequent decision of the Commission of 29 September 1969 altered the applicant's position in certain respects, he lodged an application against that decision on 2 December 1969. (Application 71/69).

I — Admissibility

3 The Commission contends that Application 71/69 is inadmissible in that it lacks legal interest as its subject-matter is no different from that of Application 59/69.

4 Although the decison of 29 September 1969, which forms the subject-matter of Application 71/69, did not satisfy the applicant's claims, it did, however, alter his seniority of grade and step in some respects.

5 Therefore, in order to safeguard the chances of success of his original application, the applicant had a legal interest in lodging another application against this new decision.

6 As the Court has ordered the joinder of these two proceedings it is unnecessary to consider to what extent, if at all, the new application rendered the first application pointless.

7 For this reason the two applications must be declared jointly admissible.

II — Substance

1 — *Submission based on the first sentence of the second paragraph of Article 46 of the Staff Regulations*

8 The applicant alleges that the Commission has infringed the first sentence of the second paragraph of Article 46 of the Staff Regulations by failing to take into account, for his classification in the scales of remuneration for Grade A4, the 'notional steps' which he had reached through having been classified for more than twenty-four months in Step 8 of Grade A5

9 Under the terms of the first paragraph of Article 46 of the Staff Regulations an official appointed to a higher grade shall, in his new grade, have the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for that grade.

10 For the application of this provision, the first sentence of the second paragraph of the same article states that 'Each grade shall be divided into notional steps corresponding to months of service and notional salaries rising by one twenty-fourth of the two-yearly increment for that grade throughout the span of the actual steps'.

11 The purpose of this provision is in case of promotion to ensure that the seniority which may have been acquired by the official concerned is maintained for the purposes of future two-yearly increments.

12 Thus, the monthly progression envisaged by the provision in question cannot continue beyond the eighth step which forms the salary ceiling in Grade A5.

13 This is the meaning of the expressions 'notional step' and 'notional salary' which refer to possible rather than to imaginary steps in the scale of remuneration, as would be those which continued beyond the maximum level of remuneration laid down in the table in Article 66 of the Staff Regulations.

14 It appears therefore that the phrase 'throughout the span of the actual steps' must be interpreted as referring to the intermediate intervals of remuneration between those steps, the last of which represents a limit which cannot be exceeded without distorting the system of scales of remuneration provided for in the Staff Regulations.

15 The result of this is, in this instance, that the monthly progression envisaged by the first sentence of the second paragraph of Article 46 cannot therefore exceed the eighth of Grade A5.

16 For this reason the submission based on the first sentence of the second paragraph of Article 46 must be rejected.

2 — *Submissions based on the second sentence of the second paragraph of Article 46 and on the first paragraph of Article 62 of the Staff Regulations*

17 The Commission classified the applicant in Step 4 of Grade A4 with a notional seniority of twenty-three months by applying, for this purpose, the rule appearing in the final section of the first paragraph of Article 46 of the Staff Regulations.

18 By virtue of this provision the Commission chose as the basis of calculation the salary received in the former grade plus the amount of the two-yearly increment for that grade, and took into consideration the 'notional salary' next above.

19 As the salary calculated in this way was BF 100 lower than that received in his former grade, for one month the Commission continued to pay the remuneration received before promotion, until the official concerned could attain the salary carried by the higher step, that is, Step 5 of Grade A4.

20 The applicant considers that to determine his salary in this way is contrary to the rule contained in the second sentence of the second paragraph of Article 46, which entitles him to be paid immediately not less than the basic salary attaching to Step 5 of Grade A4.

21 For the reasons set out above, the provisions contained in the first paragraph and the first sentence of the second paragraph of Article 46 concerning the determination of seniority on the basis of notional steps for the purposes of a future rise to a higher step of remuneration in the new grade were not applicable to the applicant.

22 For this reason the applicant's salary ought to have been fixed by applying the rule contained in the second sentence of the second paragraph of Article 46 of the the Staff Regulations according to which: 'An official appointed to a higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade'.

23 The application of this provision depends on a comparison to be made between the 'basic salary' to which an official is entitled in his new grade and the 'basic salary' which he would have received had he not been promoted.

24 The concept of 'basic salary' laid down in Article 62 of the Staff Regulations is set out in detail in Article 66, according to which basic salaries are determined for each grade and step by a table of figures forming an integral part of that same provision.

25 In this instance, therefore, the comparison envisaged by the second sentence of the second paragraph of Article 46 must be made between, first, the basic salary carried by Step 8 of Grade A5 and, secondly, the basic salary carried by the corresponding steps in Grade A4.

26 As the basic salary carried by the fourth step of Grade A4, as fixed by the table which was in force when the contested decisions were taken, was lower than the basic salary which the applicant would have received in his former grade, the Commission should have awarded him the step next above.

27 Therefore, the submissions based on the second sentence of the second paragraph of Article 46 and the first paragraph of Article 62 are justified to the extent to which they refer to the applicant's classification at the time of his promotion in the fifth step of Grade A4, without any seniority in step.

III — Costs

28 Under the terms of Article 70 of the Rules of Procedure, in proceedings by officials of the Communities institutions shall bear their own costs.

29 The applicant has failed in his principal head of claim.

30 Although his alternative conclusions have been accepted it must be found that, apart from a minimal difference, they have only confirmed the practical result of the decisions in question.

31 In these circumstances, it is reasonable for the applicant to be ordered to pay the costs incurred by him.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of Officials, especially Articles 45, 46, 62 and 66;
Having regard to the Protocols on the Statute of the Court of Justice annexed to the Treaties establishing the ECSC, the EEC and the EAEC;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 43, 69 and 70,

THE COURT (Second Chamber)

hereby:

1. **Annuls the contested decisions to the extent to which they refused to classify the applicant on his promotion in the fifth step of Grade A4 without any seniority in step;**

2. **Orders the parties to bear their own costs.**

Pescatore Trabucchi Strauß

Delivered in open court in Luxembourg on 9 July 1970.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 18 JUNE 1970[1]

Mr President,
Members of the Court,

The applications brought by Mr Brembati, an official of the Commission of the European Communities, against the decisions determining his step and seniority in step will lead the Court to decide on the meaning and scope of the rather complex provisions of Article 46 of the Staff

1 — Translated from the French.