JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 19 MARCH 1975 [1]

Gijsbertus Van Reenen
v Commission of the European Communities

Case 189/73

Summary

1. *Officials — Recruitment — Competition — Organization — Expediency — Discretionary power of the Administration*
   (Staff Regulations, Article 29)
2. *Officials — Duties corresponding to a higher grade — Acceptance — No right to reclassification*
   (Staff Regulations, Article 7)

1. It is clear from Article 29 that in considering whether it is expedient to hold a competition the appointing authority exercises a discretionary power.
2. Under Article 7 an official cannot be compelled to perform duties corresponding to a grade higher than his own, except on a provisional basis and the fact that he agrees to perform them may be a factor to be borne in mind in connexion with promotion, but does not give him the right to be reclassified.

In Case 189/73

GIJSBERTUS VAN REENEN, an official of the Commission of the European Communities, represented by Marcel Slusny, advocate, of the Brussels Bar, with an address for service in Luxembourg at the office of Mrs Andlauer, Centre Européen, Plateau du Kirchberg,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Joseph Griesmar, with an address for service in Luxembourg at the office of its Legal Adviser, Pierre Lamoureux, 4 boulevard Royal,

defendant,

1 — Language of the Case: French.

Application principally for recognition of the applicant's right to be classified in career bracket A5—A4 and for a ruling that the Commission wrongfully and negligently omitted to take the measures necessary to ensure this classification,

THE COURT (Second Chamber)

composed of: A. J. Mackenzie Stuart, President of Chamber (Rapporteur), H. Kutscher and M. Sørensen, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments put forward by the parties during the written procedure may be summarized as follows:

I — Facts and procedure

Mr Van Reenen took up employment with the Commission in Brussels on 1 March 1961 as an official in Grade B2.

On 28 June 1961 he obtained the diploma of the 'Rijksleergang voor de Hogere Bestuursdienst' (State course in higher administration), which was recognized by the defendant as of university degree standard.

On 5 October 1962 Mr Van Reenen sent the Director-General for Personnel and Administration at the Commission a memorandum the essential part of which ran as follows:

'Several months after taking up employment I obtained the diploma of the Rijksleergang voor de Hogere Bestuursdienst (an academic course). On the strength of this diploma I could be appointed a senior official in the Netherlands Civil Service. Would it not therefore be possible to consider my appointment to Category A with Euratom?'

On 19 February 1963 he wrote another memorandum to the same Director-General:

'The Salary and Allowance Service has received lists from the Directorate for Personnel relating to officials who are established. It emerges from those lists that no promotion or advancement to a

higher category has been provided for in my case.

As I stated in my aforementioned memorandum, I believe I am entitled to claim appointment to Category A on the basis of my education, experience and duties'.

On February 27 1963 Mr Van Reenen was established as an Official in Grade B2 and on 1 November 1963 he was promoted to Grade B1

On 16 October 1964 he was transferred to the Petten Establishment to carry out the duties of Head of the Local Affaires Office.

On 5 April 1966 the applicant wrote another memorandum to the administration concerning his personal classification, asking to be appointed to Category A. He added that, if necessary, he was willing to take part in a competition.

On 24 April 1969, while organizing internal competitions COM/A/215 to COM/A/220 for the drawing up of reserve lists, the Commission took a decision to the effect that all posts in career brackets A7 — A6 and B5 — B4 in respect of which no internal competition on the basis of qualifications had been organized by the date of publication of the above notices of internal competitions on the basis of qualifications and tests, would be included in the reserve list to be drawn up following those competitions.

That decision of 24 April 1969 was brought to the attention of the staff through the Staff Courier No 81 of 11 September 1969. It was thereafter applied as a decision laying down general principles. Since that time, admission to the next higher category has been granted on the basis of success in an open reserve competition.

On 1 July 1969 Mr Van Reenen was assigned to the Petten Establishment as Head of the Office of Internal Administration and Staff Affairs under the Department for Personnel and Administration, the Head of which was at the time an official in Grade A4.

When, in February 1970, the Head of Personnel and Administration was transferred to another post Mr Van Reenen assumed, besides the duties devolving upon him personally, those previously untertaken by that official in Grade A4. The Commission and the applicant agree that from that time on, at least part of the duties undertaken by the applicant have been of a level higher than those pertaining to Category B. In the applicant's opinion, they relate to career bracket A4-A5.

Despite the rule that admission to the next higher career bracket depends on success on an open reserve competition, the Commission organized competition COM/576/70 which led to the appointment to Grade A7 of an official in Category B whose name did not appear in any reserve list constituted by competition for the future recruitment of administrators. Mr Van Reenen submitted an application for that competition but it was not accepted.

By a letter dated 4 October 1972 registered at the Secretariat-General of the Commission on 10 October 1972 Mr Van Reenen submitted a request to the appointing authority under Article 90 of the Staff Regulations. That letter is in the following terms:

'I hereby request the appointing authority to consider appointing me to Category A so that I may continue to exercise my present duties. This request is based on the following considerations:

1. To my knowledge, the Commission of the European Community decided in 1969 that promotion from Category B to Category A would only be open to officials who had succeeded in an internal competition based on qualifications and in a competition for drawing up a reserve list for the future recruitment of administrators.

   That is why I entered the competition published under No COM/A/264. On 18 August 1972 I made to the

appointing authority under Article 90 of the Staff Regulations a complaint relating to that competition. That complaint was registered at the Secretariat-General of the Commission under No 490.

2. In addition, I participated in the competition on the basis of both qualifications and oral tests which was intended to fill post COM/576/70 (Administrators). In accordance with the provisions of the notice of competition (Doc. 1X/1253/72), candidates who obtained at least 35 points out of 60 in the tests as a whole succeeded. Although I obtained altogether 39 out of 60, according to memorandum 2.11/No 4900/72 of 25. 9. 1972 from the Head of the Personnel and Administration Division of the Joint Research Centre at Ispra, he informed me, by memorandum dated 11 July 1972, that my "application for the aforementioned post could not be accepted".

   In the meantime, I learned that an official in Category B who had *not* participated in an internal competition for the drawing up of a reserve list for the future recruitment of administrators had however been appointed to post COM/576/70 (A7 — A6).

3. The manner in which post COM/576/70 was filled leads me to the conclusion that the aforementioned decision of the Commission of 1969 is no longer applied.

4. As I also pointed out at the end of my complaint of 18 August 1972, I hold a diploma which is recognized as equivalent to a university degree and I have for several years discharged duties always previously performed by an official in career bracket A5 — A4.

   In addition I have now been successful in Internal Competition COM/576/70 (Administrators).

   Taking account of the above considerations, I feel I am justified in requesting the appointing authority to propose my appointment to Category A so that I may continue to perform my present duties'.

By memorandum dated 9 May 1973 Mr Van Reenen lodged a complaint against the implied decision rejecting his request. Form No 2 of this complaint was not registered at the Secretariat-General of the Commission until 25 May 1973, whereas Form No 1, which was transmitted to the appointing authority through his immediate superior, reached its addressee only on 29 June 1973.

In 1973 Vacancy Notice COM/534/73 was posted by the Commission for the purpose of filling a post in career bracket A7 — A6 at Petten. The notice provided that if that post was not filled by transfer within the institution, it would be included, unless the appointing authority decided otherwise, in one of the reserve competitions for administrators.

On 10 September 1973 the Commission replied to the applicant's complaint. That reply was as follows:

'By your letter of 4 October 1972, registered at the Secretariat-General under No 7 134, you made a request to the appointing authority in accordance with Article 90 (1) of the Staff Regulations in which you asked to be appointed to Category A. On 9 May 1973 you lodged a complaint, which was registered on 25 May 1973 under No 621, against the implied decision rejecting your aforementioned request. I regret very much having to inform you that the Commission considers your complaint to be unfounded for the following reasons:

— It is true that in Competition COM/576/70 you obtained the minimum number of points required (35/60) and that you gave evidence of a wide general knowledge.

— In Notice of Competition COM/576/70 (Doc. 1X/1253/72) it was

however stated that candidates were not required solely to obtain a minimum number of points but had also to satisfy other conditions.

Those conditions included in particular a knowledge of Italian Law and a good knowledge of Italian. You were admitted to the competition because the Selection Board wished to convince itself of your knowledge of Italian language and law. Since you do not possess the necessary knowledge of the Italian language and since you stated expressly, as is apparent from the report of the Selection Board, that you have no knowledge of Italian law, it was impossible for the Selection Board to include you on the list of suitable candidates as provided for in the first paragraph of Article 30 of the Staff Regulations.

Consequently, I must, to my great regret, confirm that the result of competition COM/576/70 has been negative in your case, contrary to your own opinion and that, accordingly, you are not entitled to promotion to Category A.'

On 14 December 1973 Mr Van Reenen instituted these proceedings.

In an application on a procedural issue, registered on 16 January 1974, the Commission raised a plea of inadmissibility.

On 15 March 1974 the applicant lodged his submissions on the application on a procedural issue.

In a letter of 28 March 1974 the Commission replied to a request by the Court to give its views on points raised in the submissions of the applicant in the main action.

By order of 29 April 1974, the Court (Second Chamber) decided to reserve for the final judgment its decision on the objection put forward by the defendant.

The written procedure followed the normal course. Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (Second Chamber) decided that there was no need for any preparatory inquiry.

II — Conclusions of the parties

In his application the *applicant* claims that the Court should:

1. Declare null and void the express rejection by the Commission, in its letter of 10 September 1973, of the claim made by the applicant in his request of 4 October 1972 to be classified in Category A, at a grade corresponding to his duties;

2. Declare and rule that by virtue of the principle of correspondence between duties und grades the applicant has the right to be classified in career bracket A5 — A4, which corresponds to the level of his duties,

3. Declare and rule that, by neglecting to take the measures necessary to ensure such classification with effect from 1 February 1970, the defendant was guilty of a wrongful omission which has caused the applicant material and non-material damage;

4. Order the defendant to pay BF 1 as compensation for the non-material damage;

5. Declare and rule that in respect of material damage the defendant must pay the difference between salary and benefits paid in respect of Grade B1 and those to which he would have been entitled had he been duly classified in Grade A5, the step being determined in accordance with Article 46 of the Staff Regulations;

6. Order that under this head the defendant should pay provisional compensation of BF 200 000, the case to be brought before the Court once more when the Commission's services have calculated the exact amount of damages owing to the applicant;

7. Order the defendant to bear the costs.

In its application on a procedural issue, the *Commission* claims that the Court should:

— dismiss the application as inadmissible;

— order the applicant to bear the costs.

In its defence, the Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to bear the costs.

In its rejoinder the Commission contends that the Court should:

1. Dismiss as unfounded the action brought before it against the express decision of 10 December 1973 rejecting the applicant's complaint;

2. Declare that a ruling cannot be given on the applicant's demands which are unrelated to the submissions in the originating application, in that these demands relate to the merits of an implied decision of rejection, the annulment of which has not been sought;

3. Alternatively, dismiss these demands as unfounded;

4. Order the applicant to bear the costs.

III — Submissions and arguments of the parties

A — Admissibility

1. Lateness of the complaint

The *Commission* maintains that in view of the dates at the head of the applicant's request and complaint, the period for the lodging of a complaint through official channels came to an end on 6 May 1973. Since the complaint was lodged only on 9 May 1973, it is out of time and the application is therefore inadmissible in accordance with Article 91 of the Staff Regulations.

Even if the period is deemed to commence on the date of receipt of the documents by the Commission, this normally being the date of registration at the Secretariat-General of the Commission, the complaint is still out of time.

The Commission does not deny that for this purpose account could be taken of the date when the complaint was submitted to the applicant's immediate superior.

But the Commission maintains that there is no evidence in this case that the applicant's complaint was conveyed to his immediate superior on 9 May 1973.

The *applicant* claims and offers evidence of the fact that he delivered a copy of his complaint on 9 May 1973 to the postal service at Petten; he denies responsibility for the fact that this complaint was not registered until 25 May 1973.

He claims that the relevant date is the date when he submitted the complaint to his immediate superior.

2. Mere confirmatory measure

According to the *Commission,* the applicant's requests in 1962 and 1963 were followed by implied decisions of rejection which were not contested within the periods prescribed and the express decision of rejection of 10 September 1973 was merely a decision of a confirmatory nature. The rejection of the complaint in May 1973 could not reopen the period for the making of an application to the Court.

The *applicant* denies that his memoranda of 1962 and 1963 should be deemed to be requests within the meaning of Article 90 of the Staff Regulations, since they were not addressed to the appointing authority.

Moreover, the applicant claims that a new fact had occurred. For the purpose of making possible the applicant's promotion to Category A a vacancy notice was drawn up containing a description which corresponded to the nature of the post occupied by the applicant, but in the end the competition did not take place because the Commission decided in 1969 that

promotion from Category B to Category A was only possible following an internal competition intended for the drawing up of a reserve list for future recruitment. Despite this rule, a later competition was organized for the filling of a post in career bracket A7 — A6 at Ispra (COM/576/70), which signifies, in the applicant's opinion, that the Commission no longer recognized the rule which it had formulated in 1969.

3. Admissibility of the claim for damages

According to the *Commission,* the extra-judicial complaint did not seek to obtain compensation. For this reason, the claim for damages in the proceedings before the Court is inadmissible on the ground of failure to observe Article 91 (2).

Secondly, the Commission maintains that the inadmissibility of an application for annulment entails that of the claim for damages if the latter is closely linked to the application for annulment.

The mere allegation of a wrongful omission is, on the one hand, irrelevant and, on the other hand, too brief to be considered admissible. Since there is no statement of grounds supporting this submission, the latter appears too lacking in substance to be regarded as satisfying the requirements of Article 38 (1) (c) of the Rules of Procedure.

In the *applicant's* opinion, if in the complaint, a document which is normally drawn up by the official concerned without any legal assistance, the contested measure is adequately specified and if the arguments are sufficiently detailed, the complaint must be accepted as including, by implication, every subsidiary claim logically flowing from it, and in particular a claim for damages.

The question whether the application for annulment and the claim for damages are separable is a substantive matter.

As regards the alleged lack of information, the facts which constitute the alleged wrongful omissions are adequately illustrated in the first claim above. As regards any failure to elucidate the allegations of law, the applicant relies on the principle that in all cases *jura novit curia*

B — The substance

1. Lack of statement of reasons

According to the *applicant,* his memorandum of 4 October 1972 was essentially an application for his classification in career bracket A5 — A4, corresponding to the duties which he performed. In its reply, the Commission merely argued as if the applicant had lodged a complaint against the results of COM/576/70.

The refusal to give effect to the applicant's complaint made it impossible for him to be promoted to Category A and affected him adversely. The Staff Regulations do not recognize a reply to an application through official channels which is both implied and express. The Administration's reply of 10 September 1973 must therefore be annulled on the ground that there is no statement of reasons.

The *Commission* claims that even if it is admitted that an incomplete or partial solution was given to the problem raised in the request of 4 October 1972 it nevertheless was accompanied by an implied decision of rejection. Article 25 can only relate to express decisions.

The Staff Regulations, which recognize both express and implied decisions of rejection, do not in any event preclude, in the case of a request made up of several heads or of several grounds, an express decision with regard to part of the request, rejecting certain heads or certain grounds, the remainder being rejected by implication through the very fact of the silence maintained thereupon over a period of four months.

2. Violation of the principle of correspondence between duties and grade

The *applicant* states that he performs duties which appertain to Category A. Since his classification does not conform to his duties, it is contrary to the principle of correspondence between duties and grade. The applicant's right to reclassification accords with the principles relating to classification enshrined in the Staff Regulations. The *ratio legis* of those principles has been indicated by the Court in its judgment in *Prelle* v *Commission* (Case 77/70, Rec. 1971, p. 561). In the applicant's opinion, where reclassification is due, there is no question of promotion. Reclassification is a right, promotion a favour.

The principle of the right to reclassification has been recognized by the Court in *Mulders* v *Commission* (Case 8/69 Rec. 1969, p. 561)

Advancement from one grade to another is no different from advancement from one category to another. This argument is accepted by implication in *Muller* v *Commission* (Joined Cases 109/63 and 13/64, [1964] ECR 663).

Alternatively, if the Court were to consider that promotion for one category to another could be effected only on the basis of a competition, the Commission would have to follow the procedure which it itself instituted by publishing Vacancy Notice COM/534/73.

The *Commission* maintains that even if it is accepted that in deputizing for his superior, the applicant has for a number of years been performing duties appertaining to a level higher than his own grade, this fact cannot, of itself, give him the right to reclassification in the higher grade, unless he first succeeds in a competition leading to promotion to the higher category. If grade and duties do not correspond the only recourse open to a servant adversely affected by this fact is to request the annulment of the unilateral decision imposing the higher of lower duties upon him, so as to free himself of them; he cannot request the revaluation of the post:

— *Boursin* v *Commission* (Case 102/63, [1964] ECR 691)

— *Prelle* v *Commission* (cited above)

— *Tontodonati* v *Commission* (Case 28/72, [1973] ECR 779)

Apart from exceptional cases relating to the integration of officials in the system of grades, which was carried out in 1962, there has been no instance of an official's benefiting from an appointment involving reclassification in the next higher grade which has not itself been the result of promotion by selection or of success in a competition, as laid down by Article 45 (2) of the Staff Regulations in respect of appointment to a higher category.

3. The claim for damages

The *applicant* maintains that the present position, which has existed since 1 February 1970, is the result of a wrongful omission on the part of the Commission, which has caused the applicant non-material damage; this could be compensated by the rectification of his administrative position. He has also suffered material damage equivalent to the difference between the amount of salary and benefits paid to him in respect of Grade B1 and the amount which he would have been entitled to receive if he had been duly classified in Grade A5.

The omissions of the Commission consist in:

1. The refusal over many years to reclassify the applicant without recourse to a competition.
2. The pursuit of a policy of making promotion from one category to another, even in cases of reclassification, subject to an open competition, which is in itself an infringement of the Staff Regulations,

since article 45 (2) does not lay down such a requirement.

3. The failure, although no longer pursuing that policy, to rectify the applicant's administrative position, even by organizing an individual competition, whereas it had adopted and posted Vacancy Notice COM/534/73.

In the *Commission's* opinion, since it is not contravening the Staff Regulations by causing the applicant to remain in Grade B1 as long as he does not satisfy the condition under Article 45 (2), there has been no illegality and there can have been no wrongful omission.

As a subsidary point it may be stated that illegality does not necessarily entail the right to compensation. Illegality consisting in an explicable error of judgment does not in fact constitute a wrongful act. Any error which the Administration may have committed in reliance upon Article 45 (2) of the Staff Regulations would at the very least be explicable.

In this connexion the defendant emphasizes that the rule adopted in 1969 and since maintained in force renders the requirements of Article 45 (2) of the Staff Regulations more specific, thereby reflecting a concern to achieve equal opportunities and equal pay for officials. Although Article 45 (2) of the Staff Regulations does not specify the requirements in question, it does not however preclude them. The Court has itself accepted the legality of open reserve competitions instituted by the decision of 1969, in particular in the judgment in *Campogrande and Others* v *Commission* (Joined Cases 112, 144 and 145/73, of 9 October 1974).

When deciding whether or not to organize competitions, the appointing authority exercises a discretionary power; this means that the choice made in pursuance of that power cannot be described as wrongful (Judgment in *Morina* v *Parliament,* [1965] ECR 1017).

Having regard to the information given in Vacancy Notice COM/534/73, publication of this notice cannot be regarded as the preliminary step in a procedure which had necessarily to lead to the organization of an individual competition: failure to organize such a competition cannot therefore be described as a wrongful interruption, in circumstances contrary to the Staff Regulations, in the procedure desired by the applicant.

Oral Procedure

During the oral procedure on 12 December 1974, new factors summarized below were brought to the attention of the Court.

The *applicant* invoked, in pursuance of Article 184 of the EEC Treaty, the inapplicability of the decision taken by the Commission on 24 April 1969 on the grounds of failure to observe Articles 110, 45 and 29 of the Staff Regulations in that the decision was not brought to the attention of the staff, was taken without prior consultation with the Staff Committee, was not submitted to the Staff Regulations Committee and was not published *in extenso.*

He stated that a decision to organize only open competitions was contrary to Articles 29 and 45 (2).

The Commission replied that this argument amounted to a fresh issue and was therefore inadmissible in pursuance of Article 42 of the Rules of Procedure. The Court must consider only the submissions and arguments in the application.

A general decision of the Commission dated 10 March 1971 provided that any decision relating to appointment to a higher career bracket or category entailed the classification of the person concerned in the starting grade of the said career bracket. The principle behind that decision is set out in Article 31 of the Staff Regulations. The Commission maintains that if the applicant, who had

been classified in Grade B1, step 5, on 1 November 1971, had become entitled as from 1971 to reclassification in Category A following success in a competition, he would have been classified in Grade A7, the starting grade. However, in Grade A7, steps 1 to 6, the salary is lower than that of step 4 in Grade B1 held by the applicant. A compensatory allowance would have had to be paid to enable him to maintain his former salary. Even if there was a wrongful omission on the part of the Commission by virtue of its failure to organize a competition to make possible the applicant's promotion to Category A, that omission could not have caused him material damage.

The Advocate-General delivered his opinion on 25 February 1975.

Law

1 By application lodged on 14 December 1973 the applicant brought before the Court an action for the annulment of the Commission's decision of 10 September 1973 rejecting his request of 4 October 1972 that he be reclassified in Grade A5.

2 He is further claiming that the defendant should be ordered to make good the damage which he suffered as a result of the Commission's negligent omission to take the measures necessary to effect such reclassification with effect from 1 February 1970.

3 In support of these two heads of claim the applicant maintains that under certain circumstances an official in a lower category may be entitled to direct appointment to the next higher category without a competition.

4 Article 45 (2) of the Staff Regulations expressly states that 'An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition'.

5 It is clear from Article 29 that in considering whether it is expedient to hold a competition the appointing authority exercises a discretionary power.

6 Although, under Article 7 (1), an official cannot be compelled to perform duties corresponding to a grade higher than his own, except on a provisional basis, the fact that he agress to perform them may be a factor to be borne in mind in connexion with promotion, but does not give him the right to be reclassified.

7 By refraining from organizing a competition requiring qualifications corresponding to those of the applicant, thereby rendering it impossible for the latter to be appointed to Category A, the defendant was not acting *ultra vires*.

8 Since the action clearly lacks any foundation, there is no need for the Court to give a ruling on the objection of inadmissibility entered by the Commission.

9 The action brought by the applicant must therefore be dismissed.

Costs

10 The applicant's action has failed.

11 In pursuance of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

12 However, in pursuance of Article 70 of the Rules of Procedure, in actions brought by officials of the Communities, institutions shall bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders the parties to bear their own costs.**

Mackenzie Stuart Kutscher Sørensen

Delivered in open court in Luxembourg on 19 March 1975.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 25 FEBRUARY 1975 [1]

Mr President,
Members of the Court,

The Facts

Mr Van Reenen was recruited by the Commission of Euratom on 1 March 1961 in Grade B2 and attained Grade B1 on 1 November 1963.

In October of the following year, at the Petten Establishment, he was called upon to perform the duties of Head of the Local Affairs Office. With effect from 1 July 1969 he became Head of the Office of Internal Administration and Staff Matters, under the Department for Personnel and Administration.

The Head of that department — at that time Mr Van Westen — was an official in Grade A4.

Several months later, in February 1970, Mr Van Westen was promoted to Head of the Administration, Finance and General Technical Services Division. As regards his previous duties he was not replaced by a Category A official.

As a result, a proportion of those previous duties were, as from that time, undertaken by Mr Van Reenen, although with his consent.

Notwithstanding this fact Mr Van Reenen was not officially given a temporary posting as replacement for his

1 — Translated from the French.