On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

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

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 18 June 1981.

A. Van Houtte
Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 14 MAY 1981 [1]

Mr President,
Members of the Court,

In the autumn of 1973 the Commission announced in the Official Journal of the European Communities (C 71, p. 4, of 8 September 1973) that it was organizing an open competition on the basis of qualifications and tests to draw up a reserve list of Senior Administrative Assistants in Grades 3 and 2 of Category B (Notice of Competition No COM/B/106).

The duties attached to the posts to be filled were described as being those of an:

"Executive official who, on the basis of general instructions, carries out difficult and complex tasks, in particular the preparation and refinement of programmes for third-generation computers."

Candidates were to be not less than 28 and not more than 40 years of age. The requisite qualifications and experience

1 — Translated from the German.

were described in the notice in the following terms:

— "Candidates must provide proof of secondary education in the form of a school-leaving diploma.

— Knowledge of two computer languages, such as COBOL, PL/1, FORTRAN, ASSEMBLER, APL, ALGOL, METASYMBOL, etc; one of these two must be either COBOL or PL/1.

— Good knowledge of the preparation of programming documents and of programme management.

— Experience of computer treatment of administrative or statistical problems or literature searching.

— Professional experience in the sectors covered by this competition."

Mr Blasig, the applicant in the present proceedings, successfully took part in that competition. He thereupon received a letter dated 6 September 1974 from the Director of the Personnel and Administrative Directorate responsible for the offices of the Commission in Luxembourg. In that letter he was offered a post as a "Senior Administrative Assistant (Programmer)" and was informed that if he accepted the offer he would be appointed as a probationary official in Grade 3, Step 1, of Category B. On 1 October 1974 the applicant took up his duties and was assigned to a post paid from the operating budget in the administrative unit "Analysis and Programming". By a decision of 18 October 1974 he was appointed as a probationary official in the post of Senior Administrative Assistant in Grade B 3, Step 1, with effect from 1 October 1974. By decision of 16 July 1975 he was appointed an established official in his post with effect from 1 July 1975.

Even before then, in a letter of 6 December 1974, the applicant had approached the Commission with a dual request. First, he asked for information as to what criteria had governed assignment to grades and steps under Competition COM/B/106, whether use had been made of the possibilities provided by Article 31 (2) (b) or the second paragraph of Article 32 of the Staff Regulations and what the criteria were for his being placed in Grade B 3, Step 1. Secondly, as a precaution he objected to his being given too low a grade and, referring to his experience, requested that he be placed in Grade B 2, Step 1, or at least B 3, Step 3.

That complaint was rejected by a letter dated 2 June 1975 which cited and enclosed a Commission decision which came into force on 1 July 1973 "on the criteria applicable to grade and step classification upon recruitment". On that occasion there was no application to the Court.

On 20 December 1979 the applicant made a further complaint to his appointing authority. In substance he referred therein to the "description of the duties and competences entailed in the basic posts laid down in Annex I A to the Staff Regulations" contained in a Commission decision of 1 July 1972 and to the said annex to the Staff Regulations, and, mentioning the particulars of the duties attaching to the posts given

in Notice of Competition No COM/B/106, the conditions of admission to the competition and the duties he had in fact performed after taking up employment, he claimed that Notice of Competition No COM/B/106 had in fact advertised a post in Career Bracket B 1 and that he ought therefore to have been placed in Career Bracket B 1 with effect from 1 October 1974.

That complaint was rejected by the appropriate member of the Commission in a letter dated 24 April 1980. It was pointed out on the one hand that the applicant's grading was no longer open to challenge because he had not brought further proceedings after the rejection of his first complaint; further, it was claimed that the grading was in fact justified because he had taken part in a competition organized for Career Bracket B 3/B 2; the alleged performance of more valuable duties did not entitle him to be placed in another career bracket.

Thereupon the applicant brought the matter before the Court of Justice claiming that the Court should:

— Order the defendant to place the applicant in Grade B 1 in accordance with Articles 7 and 31 of the Staff Regulations of Officials of the European Communities, with retroactive effect from 1 October 1974; and

— Order the defendant to pay the applicant the difference between the salary actually paid and that which he would have received if he had been correctly graded, together with interest at 8 %.

The Commission contends that those claims are inadmissible and in any event unfounded and should be rejected.

My opinion on the issues is as follows.

I — Admissibility

The Commission considers the entire action inadmissible. The claim for alteration of the applicant's grading involves criticism of a 1974 decision against which a complaint was lodged at the time but was not followed by court proceedings. That decision is no longer open to challenge for the subsequent decision of the appointing authority rejecting the applicant's complaint of 20 December 1979 represents no more than a confirmatory measure without any substance of its own. But in so far as the applicant relies on the fact that he did not become aware of the incorrect grading until 1979 when he received a "Guide to Staff Reports" containing the description of duties laid down in 1972, the crucial factor in the Commission's opinion is that that did not amount to the occurrence of new facts. Besides, the question when the applicant actually *became aware* of that matter is not decisive because the description of duties was published in the Staff Courier of 4 September 1973 and the Guide to Staff Reports was made available to the applicant in 1975 in connection with the first report on him. The inadmissibility of the application in relation to grading automatically renders the claim for arrears of salary inadmissible. Since that claim likewise has its origin in the allegedly incorrect grading the same considerations must apply with regard to the time-limits to be observed. If, however, it were to be treated as an action for damages, then according to

Article 43 of the Statute of the Court of Justice of the EEC it was already out of time when the complaint was lodged on 20 December 1979.

Against that the applicant states in the first place that his complaint in 1974 was not designed to secure a place in Grade B 1 but simply, as is clear from the Commission decision, to obtain a higher step within Career Bracket B 3/B 2 having regard to his previous experience. He became aware that he was entitled to be graded in B 1 only when in October 1979 he received the Guide to Staff Reports containing the description of duties. The Commission cannot object that the description of duties had been published in 1973 or that the applicant had received at least a supplement of the Guide to Staff Reports in 1975. In fact no such supplement was sent to the applicant and so he did not receive knowledge of the description of duties in 1975. As regards the publication thereof in 1973 it is significant that the applicant was not then in the employment of the Community. Nor may it be assumed that he was bound to ascertain the position himself; it is rather the duty of the employer to make available to his employee in good time all resolutions and decisions appertaining to his legal status.

With regard to this argument it must be stated at the outset that the view expressed by the applicant in the written procedure to the effect that unlawful decisions may be challenged at any time is obviously mistaken. That is quite clearly not in accord with the Staff Regulations. Because of the principle of legal certainty, which is important both to the administration and to others, review of the lawfulness of measures adversely affecting officials has been made conditional upon its being sought within certain time-limits first by means of a complaint to the appointing authority and then by means of an application to the Court.

The essential point is that the applicant is in fact concerned with the modification of a decision which was taken in 1974 in respect of his grading in a salary scale when he entered the service. In view of the time-limits applicable under the Staff Regulations (lodging of a complaint within three months of notification of the contested decision (Article 90)) that object can in principle no longer be obtaining by means of proceedings brought in 1979. The view which immediately springs to mind is that any notice issued thereafter was simply a confirmatory measure which according to decisions of the Court (see for example the judgment on Joined Cases 33 and 75/79 *Richard Kuhner* v *Commission* [1980] ECR 1677) does not give rise to a right of action. That may be more readily said in so far as it was stressed in the decision on the complaint that the contested grading had already ceased to be open to challenge and only incidentally was it stated that the grading in 1974 was correct.

A different judgment would be possible only if after the original decision on grading there had arisen *new facts* leading to a change in the position in fact and law. In such a case there would be ground for the administration to review an earlier decision and if fresh

administrative proceedings were then brought a decision thereon could not be regarded as purely confirmatory; it would rather be a new measure giving rise to a further time-limit for complaint and action. Authority for that is the judgment in Joined Cases 109/63 and 13/64 *Charles Muller* v *Commission* [1964] ECR 663 at p. 674, where it is stated that if important new facts arise the administration must reconsider a decision which would otherwise no longer be open to challenge, or the judgment in Case 59/65 *Heinrich Schreckenberg* v *Commission of the EAEC* [1966] ECR 543, where a similar view was taken.

There can obviously be no question of that in the present case. The applicant does not indeed claim in support of the action which he began in 1979 that fresh facts have arisen within the meaning of the decisions cited. He says only that he then for the first time discovered the legal criterion governing the decision on grading, which presupposes that it is a criterion which applied already in 1974 and had to be observed when the contested decision was taken. That circumstance cannot lead to the conclusion that when the administration reached a decision on the applicant's complaint it adopted a fresh measure which could again be challenged; indeed it was purely a confirmatory measure which did not start a fresh limitation period running because the factor put forward by the applicant involved nothing new for the administration.

At most an application made out of time might conceivably be allowed in the event of the subsequent discovery of a factor affecting the validity of a decision; on that the second paragraph of Article 42 of the Statute of the Court of Justice of the EEC provides:

"No right shall be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure.*"

But even that provision does not make the applicant's claim admissible. On principle it must be doubted whether complete or partial ignorance of the law (as in the applicant's case) is at all ground for allowing an application out of time. Reference may be made to corresponding provisions of national law (such as Article 60 of the German Verwaltungsgerichtsordnung [Rule of Procedure of the Administrative Courts]) according to which it depends on whether a time-limit is innocently disregarded and with regard to which it has been stressed that ignorance of the law may in principle not be pleaded (see the commentary on the Verwaltungsgerichtsordnung by Eyermann-Fröhler, note 11 on Article 60). The view may therefore be advanced (at least in the case of officials in certain grades which must surely include higher-ranking officials in the B Category) that they must see to it that they have in good time the necessary legal knowledge for the review of their grading and if they fail to do so they cannot in support of a subsequent claim rely on the appointing authority's duty to have regard to the interests of officials in order to claim that they were not informed in sufficient detail of their legal position.

Further in the present case the applicant's ignorance, lasting even until *1979*, of the criteria relevant to his grading can by no means be regarded as

excusable to such an extent as to found a right to make an application out of time. In this regard it is not necessary to discuss the question whether in 1975 the applicant received a supplement to the Guide to Staff Reports together with a description of posts or whether, as he maintains, that was not so. It is more important, first, that the applicant received a copy of the Staff Regulations when he took up his employment. He was thus, through Article 5 thereof, referred to the existence of a description of posts; that would have been easy to obtain since it had been published in the autumn of 1973 in the Staff Courier available to every official. Further, as his first complaint shows, it is obvious that as soon as he took up employment the applicant had inquired into the niceties of the rights of the staff and had specifically concerned himself with the criteria for grading. Thus in principle it was open to him to consider all aspects of that question instead of confining himself to the grading within the career bracket; in any event he should not have postponed his consideration of the matter until 1979.

If therefore the applicant might no longer be allowed in 1979 to challenge the decision taken in 1974 in respect of his grading that means that not only the first claim is inadmissible but also the second. That is obvious because his claim for arrears of salary depends on a finding that the decision in respect of his grading was unlawful and such a finding is no longer possible. Nor can that result be avoided by attempting to classify the claim for arrears as a claim for compensation. In that respect it is significant that the claim contains no particular submissions alleging a wrongful act or omission and that the compensation sought is payment in arrear of the difference between the applicant's salary and the salary carried by Grade B 1. The facts clearly recall those in Case 59/65 *Schreckenberg* v *Commission of the EAEC* which I have already cited. It was argued there that in fact the applicant was not seeking compensation but simply a sum equal to the difference between the salary paid and that which he would have received in Grade A 3; it was expressly held that in that way, namely by means of a claim for compensation, he might not circumvent the inadmissibility of an application concerning the same illegality and having the same financial end in view. Further, in this case it is necessary to have regard to Article 43 of the Statute of the Court of Justice of the EEC which provides that proceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. Since the event giving rise to the damage, namely the allegedly incorrect grading of the applicant, is said to have taken place in 1974 and a complaint against it, in so far as grading in B 1 is concerned, was not made until December 1979, an objection that the action is barred by lapse of time would certainly succeed; the second claim would therefore in any event have to be rejected on that ground.

II — Substance

It is only for the sake of completeness that I deal with the question whether the application is well founded, a question which the Commission answered in the negative.

The appointment of the applicant which led to the now-contested grading

followed, as provided in the Staff Regulations (Article 29), a competition, the particulars of which are laid down in Annex III to the Staff Regulations. That fact, which is obviously of crucial significance in a claim such as the present, is quite clear in so far as there is mention therein of appointment of Senior Administrative Assistants in Career Bracket B 3/B 2.

1. However, the applicant is of the view — and this is one of the main arguments in support of his claim — that in fact the career bracket allocated to the post advertised is not correct. In his opinion it is clear from a number of factors that grading in B 1 was actually intended. The most important is the description of the nature of the duties and in particular the fact that there is reference to the preparation and refinement of programmes as was done for Career Bracket B 1 in the description of posts financed out of the operating budget which the Commission laid down in 1972. In addition the minimum age laid down in the notice is significant as indicating lengthy experience as a programmer. Further support for the applicant's view is seen in the qualifications and knowledge required under paragraphs 3 and 4 of Section III of the competition notice.

In my view, however, the applicant must fail even on that issue.

From the start it may be said that the attempt to rectify a grading by means of amending the competition notice must be regarded as extremely dubious. If it is held that contrary to the express wording of the competition notice a B 1 post was advertised, then it must be said that that was not immediately apparent, with the result that many potential candidates for such a post may have failed to apply. In other words the competition would have been distorted; it is by no means certain that if the proper procedure had been followed with a clear notice for a B 1 post, which would doubtless have attracted a different group of candidates, the applicant would have been chosen. If the applicant's premise were accepted it would be much more logical to declare the whole competition void rather than to allow the applicant a higher grading when he did not take part in a competition which was clearly for a B 1 post.

More important however than that consideration is the fact that the notice which followed a careful procedure after consultation with the Joint Committee cannot in fact be challenged in so far as it provided expressly for the post to be graded in Career Bracket B 3/B 2.

If account is taken of the 1972 description of posts referred to by the applicant, which together with the title of the competition notice is the most important criterion, then it is significant that according to that description Career Bracket B 2/B 3, in so far as it is now relevant, involves carrying out "in the light of general directives, difficult and complex tasks". That corresponds almost word for word with the first part of the description of duties in the competition notice, in which it was stated — and contrary to the applicant's view this applies to technical as well as administrative staff — that the post was

for an executive official who "on the basis of general instructions, carried out difficult and complex tasks". Whilst in addition the second part thereof mentioned "the preparation and refinement of programmes for third-generation computers", that was, as the Commission has rightly stressed, only an apparent reference to the description of posts for B 1 officials in which there is mention of "preparation of programmes for electronic computers". The notice as a whole leads to that conclusion. Indeed it must be concluded that the clause cited does not really refer to a B 1 post characterized according to the Commission's description of posts by the carrying out of *especially* difficult and complex tasks on the basis of general instructions. Having regard to the express reference to Grades 3 and 2 of Category B in the first paragraph of the competition notice and in view of the fact that in the description of duties there is mention only of difficult and complex tasks, the clause referring to programmes for third-generation computers must be construed as a reference to the preparation of programmes in a lesser sense, that is to say basically *helping* with such work. Moreover — though the point may remain open now — the same conclusion may also be indicated by the fact that in the description of duties in the competition notice in addition to the preparation of programmes there is mention of the *refinement* of programmes, whereas there is no mention of that in the description of duties for Career Bracket B 1.

The other factors referred to by the applicant are in my view equally incapable of casting doubt on the correct classification of Competition No COM/B/106. That certainly applies to the minimum age mentioned in the notice. Even if it is assumed, which does not appear necessary, that that requirement implies a certain degree of experience in data processing, that does not mean to say that programmers with sufficient experience for Career Bracket B 1 were being sought. On the contrary, the opposite is to be inferred, for according to the "Decision on the Criteria Applicable to Grade and Step Classification upon Recruitment," which was sent to the applicant with the answer to his first complaint and is appended to the defence, a condition for grading in B 1 is *fourteen years'* experience which can scarcely apply to applicants in the sector in question who have only the minimum age of 28. The same may be said of the qualifications required by the notice advertising the competition for the posts to be filled. Even if it were assumed, and that need not be discussed now, that they were in no way distinguishable from the qualifications required for Career Bracket B 1, that would not suffice for the assumption that in truth a B 1 post ought to have been advertised. The requirement of similar qualifications for posts of differing rank is not altogether unusual. In relation to the present case it would simply mean that the qualifications are needed not for carrying out *especially* difficult tasks (B 1) but only for the performance of difficult tasks within the scope of Career

Bracket B 3/B 2 where they are also justified even if the duties are only those of an assistant.

2. If therefore the main argument of the applicant to the effect that the notice was in fact intended to advertise a B 1 post is unconvincing, there still remains to be considered whether the other matters put forward by him justify his claim for regrading in B 1.

That is certainly not true of the fact that in the letter of 6 September 1974 in which the applicant was offered employment the expression "programmer" was used, which is the word used in the Commission's description of posts for Career Bracket B 1. There is no doubt that such a summary of duties in an administrative communication cannot have decisive significance, not least because the said expression appeared neither in the competition notice nor in the decision to appoint the applicant and, moreover, the same letter from the administration specifically referred to a post as a Senior Administrative Assistant in Step 1 of Grade B 3.

Further, it is not clear how the two other competitions (COM/B/135 and COM/B/137) referred to by the applicant can be of any assistance in the present case. Competition No COM/B/137 is identical to the one involved in this case. Competition No COM/B/135, however, was concerned not with the recruitment of Assistant Programmers in Career Bracket B 2/B 3 but with the filling of posts in Career Bracket B 4/B 5. Therefore there was no mention in that competition notice of carrying out difficult and complex tasks and assisting programmers but only of carrying out work under supervision and *taking part* in the preparation and refinement of programmes.

Finally, the applicant's claim cannot be founded on the work he says he actually did after taking up his employment or on the reports on him pursuant to Article 43 of the Staff Regulations in which the word "programmer" is used in connection with his duties and it is explained that his duties include analysis and the coordinating of analysis and programming. The assessments by the applicant's superior in the reports drawn up pursuant to Article 43 of the Staff Regulations cannot of course in themselves justify a grading different from that made in the decision of the appointing authority. But as regards the work which the applicant claims that he actually does, the Commission emphatically denies that it comes within Career Bracket B 1. According to the case-law (see the judgment in Case 189/73 *Gijsbertus van Reenen* v *Commission* [1975] ECR 445) any such circumstance could at most be ground for promotion and not for regrading. This cannot be otherwise or the provisions on the conduct of competitions would be easily circumvented and the powers reserved to the appointing authority whittled away.

Accordingly, it is not necessary to discuss the submissions concerning the Com-

mission's efforts to amend the description of the posts financed out of the operating budget in order to bring it into line with the definition of duties applying to corresponding posts financed out of the research budget for obviously they are irrelevant to the present case since they are concerned essentially with providing B 4/B 5 posts for the field of data processing which is financed out of the operating budget. Instead it may be observed in conclusion that the action cannot be regarded as well founded either in relation to the grading on appointment or as regards the claim for payment in arrear of the difference in the amount between the applicant's salary in his present grade and the salary carried by Grade B 1.

III — I therefore propose that in the first place the action should be dismissed as inadmissible or in the alternative as unfounded and that an order for costs be made pursuant to Article 70 of the Rules of Procedure.