OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 2 May 1985

My Lords,

By an application dated 12 June 1984, Mr De Santis, who was employed by the Court of Auditors in Grade B 3, Step 3, asks the Court to declare that he is entitled to be classed in Grade B 2 and, in the alternative, that he is entitled to four and a half years further seniority in his present grade. He also asks that the Court should set aside a refusal dated 15 March 1984 of a complaint made by him dated 20 December 1983.

Mr De Santis has had a chequered career with the Court of Auditors. Beginning as a member of the temporary staff in June 1978 in Grade A 4, Step 2, he passed respectively to Grade A 4, Step 3 in June 1980 and then down in January 1981 to Grade A 6, Step 3. Having been told in February 1982 that his temporary appointment would not be renewed, but must terminate before the end of 1982, he took a number of competitions for appointments in Grade A 3, Grades A 5/A 4 and A 7/A 6, as he was encouraged to do, but although succeeding in one competition, he was not offered employment. Finally he succeeded in Internal Competition CC/B/6/82.

By letter of 21 December 1982 he was offered, subject to medical examination, a post in the personnel section of the Court of Auditors in Grade B 3, Step 3 with effect from 1 January 1983. He was told that the first nine months of his service would be considered as a probationary period, and that if such period was performed satisfactorily his appointment would be confirmed by his appointment as an established official. By note of 22 December 1982 he notified the President of the Court of Auditors that he was disposed to accept the offer. His formal appointment in this post was dated 21 December 1982.

The report on his probationary period stated that he had carried out satisfactorily the tasks falling to him. His assessment was 'good' under all the headings but one, namely the speed of execution of his work which was said to be unsatisfactory. By decision of 30 September 1983, sent to him under a covering letter of that date, he was established in his post.

In its defence to his application, the Court of Auditors asked the Court to declare that his application was admissible but unfounded. The same was asked in the rejoinder of 21 September 1984.

However, by letter of 21 November 1984, the Registrar of the Court informed the parties that the Court had decided of its own motion to examine the question whether these proceedings were out of time. The defendant explained that it had been content to oppose the claim on its merits even though the applicant's complaint was really directed to the initial grading and

therefore was out of time. The Court of Auditors was, however, willing to leave it to the Court as to whether this case is time-barred.

In view of the Court's question, the first issue is, therefore, whether this application is admissible. If the only decision which Mr De Santis can attack is that of 21 December 1982, which classified him in Grade B 3, Step 3, then clearly he was out of time when he made his complaint on 20 December 1983, by virtue of Article 90 of the Staff Regulations. If, on the other hand, he can raise the point he now seeks to raise as to his grade and step by reference to the decision of 30 September 1983, he is equally clearly in time.

Article 90 (2) of the Staff Regulations provides that a person may submit to the appointing authority a complaint 'against an act adversely affecting him', so far as relevant, within three months of the date of notification of the decision to the person concerned, but in no case later than the date on which the latter received such notification.

The scheme of Chapter I, 'Recruitment', of Title III, 'Career of Officials', is that, other than in Category A and the Language Service, a person is 'appointed' to the starting grade for the post for which he has been recruited unless an exception is made within the limits laid down by Article 31 (2). He is to be 'recruited' at the first step in his grade unless 'taking account of the training and special experience' which he has, the appointing authority allows additional seniority in his grade, which cannot in any event exceed 48 months other than for certain A and LA Grades (Article 32). An official other than one in Grades A 1 and A 2 must serve a probationary period before he can be 'established' which is either 9 months or 6 months according to grade. Not later than one month before the end of his probationary period a report must be made on him. He has the right to comment on that report. A probationer whose work has not proved 'adequate for establishment shall be dismissed', as indeed he may be dismissed during the probationary period if his work is proving 'obviously inadequate' (Article 34).

As far as I can find, the Court has never actually decided whether it is open to an official to question his classification on establishment or whether he is limited to doing so on his initial appointment as a probationary official. It seems to me that dicta in Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981, p. 3991 and Case 227/83 *Moussis* v *Commission* [1984] ECR 3133, paragraph 11, are not addressed to this particular problem. Both cases concerned complaints made several years after the end of the probationary period. In any event the admissibility of *Blomefield* was decided on other grounds, namely the occurrence of a new event, and no probationary period was involved in the decision at issue in *Moussis*, which concerned the advancement of an official who had long since been established. In Case 83/63 *Krawczynski* v *Commission* [1965] ECR 623 an applicant was held entitled to challenge the classification in an act establishing him, but there again no probationary period was involved, so that it is not relevant to the present circumstances. A decision apparently to the opposite effect

is Case 173/80 *Blasig* v *Commission* [1981] ECR 1649, p. 1658, in which the Court held: 'The measure adversely affecting the applicant, which is the subject of the action, is the appointing authority's decision of 18 October 1974 [i.e. the decision of appointment as a probationary official] placing him in Grade B 3'. However, in that case the applicant had complained of his grading within three months of the decision appointing him a probationary official. The question never arose whether he could challenge the grading at the later stage of the decision establishing him. In the result his action was held out of time because it arose from another complaint which he made 5 years later. Thus the Court went on, in the passage which I have just cited, to say: 'Since the Commission rejected a complaint which was lodged against that decision within the requisite period it was not required, unless important new facts arose, to consider a fresh complaint against the same decision'. In my view none of these cases resolves the present issue.

The initial decision of 21 December 1982 appointed him as a probationary official as an assistant in Grade B 3, Step 3 with seniority of step at 1 January 1983 when the appointment took effect. The decision of 30 September 1983 is simply to the effect that Mr De Santis, 'probationary official in grade B 3 ... is established in his post', the decision taking effect on 1 October 1983.

If the regulations are read literally, the only decision as to grade and step is taken on appointment as a probationary official so that any challenge as to grade and step must be made within 3 months of initial appointment.

On the face of the regulations the only 'appointment' or 'recruitment' and the only obligation to fix grade and step arise at the beginning of an official's career as a probationer. The only affirmative decision required at the end of the probationary period is to 'dismiss' an unsatisfactory official. There is no express requirement that a positive decision be taken to establish him: it appears to follow automatically if he is not dismissed. In this case, as I understand is the practice, an affirmative decision was, however, taken to establish him.

For my part I do not consider that the Court is compelled to take that literal reading. There is an alternative possibility. If in fact a decision is taken to establish an official, it can be said that that decision incorporates expressly (as here) or impliedly a decision as to his grade on establishment; it also incorporates a decision expressly or (as here) impliedly as to his step. It is thus open to the Court to find as a matter of interpretation of the regulations that there is a decision on establishment as to grade and step which can be challenged within three months.

If both these interpretations are possible, as I consider they are, then that one should be chosen which produces a fairer result to officials in general since it cannot, in my view, be said that either interpretation creates such problems for the administration that it should be avoided at all costs.

It seems to me that to treat the establishment decision as including a decision as to grade or step produces the more just and fair result, which is no doubt why, commendably, the Court of Auditors did not take the point that the applicant was out of time in their pleadings. During his probationary period the official is in a vulnerable position. His continued employment depends on a favourable probationary report; he is likely to be deterred from challenging his assessment out of a perfectly natural anxiety that this may adversely affect his establishment. He cannot in any sense be blamed for fearing that the assessment of the performance of his duties, of his attitudes and of his sense of dedication, may suffer if he lodges a complaint. The pressure on the probationer not to 'rock the boat' by lodging a complaint is particularly acute in the case of a person such as the applicant in the present case, whose employment has been so insecure for a long period and who has family commitments. It is in my view unrealistic not to have regard to this consideration. It would be totally wrong to approach the issue on the basis that someone who finds or who feels on appointment or during his probationary period that he should have a better grading is behaving in an unworthy manner if he waits until establishment before asking that his grading be reconsidered.

I do not consider that such an approach creates any undue problems for the administration. The principal objective of a time limitation provision is to prevent stale complaints being raised and acts done being affected after a long period of time. To regard time as running from the end, rather than from the beginning, of the 6 or 9 month probationary period, does not seem to me to run contrary to that objective. Nor does such a request mean that the official could have two bites at the cherry. If he challenges the initial decision and fails, he would not be entitled to raise the identical challenge to grade and step on establishment.

I would accordingly, and despite the literal wording, hold that a decision on establishment, including a decision as to grade and step not previously challenged, can be the subject matter of a complaint within three months of that decision. On this basis the application was in time.

On the substance of the application Mr De Santis takes three main points. As to his grade he contends that he should have been appointed Grade B 2 in the light of his qualifications and his experience, not only before he joined the Communities' service, but also during his time as a temporary official. The Court of Auditors rely in the first place on a collegiate decision of that Court which was applied in this case. That Decision, No 81/5 of 3 December 1981, recites that 'it is appropriate to lay down

equal criteria for the classification of successful candidates in competitions' and that the guiding principle for the policy of classification 'is to classify in the starting grade of the career brackets in the various categories and services with the aim in particular of securing for the Court the services of young employees and ensuring for them over the years advancement in their careers'.

It is, however, also recited that 'derogations from the principle of classification in the starting grade in career brackets may be allowed in exceptional cases where the candidate may be appointed to the higher grade in his career bracket'. Thus, by Article 1 as a general rule the appointing authority 'shall appoint successful candidates in competitions to the starting grade in the starting career bracket for his category or service'. Derogations are provided for by Articles 2 and 3 on the basis of experience. The relevant exception here is Article 3 which provides that the authority may 'in exceptional circumstances justified by reference to the post to be filled make an appointment in the higher grade of the starting career brackets and intermediary career brackets' for certain grades, subject to specified periods of relevant experience. However, 'no appointment may be made to Grades B 2, C 2 or D 2 since those grades are reserved for promotions within the career bracket'.

It is clear that if the appointing authority adopts internal rules it must normally abide by those rules, subject to a power to derogate from them, and that if there are circumstances justifying such a derogation the reasons for such derogation must be given. The first question is always, however, whether the rules adopted are *intra vires*. It seems to me that the Court of Auditors was entitled to adopt a policy reserving certain grades for internal promotion, for the reasons stated in their decision. Such a policy should, however, in my view leave open the possibility that in the exceptional case a person might be appointed to e.g. Grade B 2 pursuant to the discretion conferred by Article 31 (2) of the Staff Regulations. It seems to me that the object of that paragraph is to enable particular candidates to be treated exceptionally on their personal merits and that an absolute rule that a candidate will never be appointed to a particular grade or grades goes too far.

The defendant's refusal to appoint Mr De Santis to Grade B 2 is, however, based on an alternative ground. It is said that it was open to the authority to consider whether (a) the candidate's experience and qualifications and (b) the nature of the post to be filled justified such an advancement of grade. This seems to me clearly to be right. Then it is said that the defendant here was not satisfied and was entitled not to be satisfied that neither the candidate nor the post justified such an advancement.

This appraisal is essentially for the appointing authority and, in the absence of any misdirection as to the law or other vitiating factor, is not a matter for the Court. In the present case, Mr De Santis can point to substantial periods of employment, apparently in positions of authority (in particular with Avis Ltd, the

details of which are set out in my Opinion in Case 108/84 *De Santis* v *Court of Auditors* to which I refer), to his reports and to the fact that for long periods he held temporary posts in Category A. On the other hand it is clear that he was unsuccesful in many competitions for appointments as an official in Category A, and that his grade was reduced in his temporary appointments. Moreover, the post to which he was eventually appointed was not of such a nature that it can be said that it must have required his being put into Grade B 2. In my opinion it has not been shown that the defendant acted unlawfully in deciding that Mr De Santis should be put into Grade B 3. The authority acted within the margin of discretion available to it and I do not accept the suggestion made that there was any form of conspiracy to keep him down. Accordingly I reject the applicant's contention that his grading as B 3 violated rules of good administration, proper care for the authority's officials or his legitimate expectations.

Then it is said that even though he was given the maximum seniority under Article 32 for his training and special experience, he should, in addition, have been allowed extra seniority to take account of his 54 months with the Court of Auditors between June 1978 and January 1983. Reliance is placed on Article 44 of the regulations which provide that an official who has been two years at one step in his grade shall automatically advance to the next step in his grade. Hence he should move up two steps with 6 months' seniority at that step.

In my view Article 44 is not applicable in the present case since Mr De Santis first became an official on appointment to Grade B 3. He can only rely on Article 44 for the future and not as to the past employment with the authority. In fixing his step the only relevant Article was 32, which was applied in his favour. I do not see any way in which the distinction he seeks to draw between training and external experience on the one hand, and service as a temporary official in other grades on the other hand, can assist him. In the result, in my view, the application fails.

The Court of Auditors asks that the applicant pay the defendant's costs under Article 69 (3) of the Rules of Procedure. It is perhaps right to point out in this Opinion, since it is given in English, a difference which exists between the English and the French versions of the Court's Rules of Procedure. By Article 70 institutions are to bear their own costs, without prejudice to the second sub-paragraph of Article 69 (3) of the Rules in respect of proceedings commenced by an official or other servant of an institution against the institution. In the English version it is provided in Article 69 (3) that the 'Court may order even a successful party to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur'. The unsuccessful party's costs are dealt with in Article 69 (2) so that it appears at first glance that it is only the successful party who can be ordered to pay costs unreasonably incurred in a staff action. It is clearly absurd that the official who fails cannot, but the one who succeeds can, be ordered to pay the costs of

the other side. The French text makes the position clear: 'La Cour peut condamner une partie, même gagnante' to pay the costs which that party has unreasonably or vexatiously caused the opposite party to incur. There is thus plainly jurisdiction to make an order for costs against an official who unreasonably causes an institution to incur costs and who fails in his action.

Although Mr De Santis has failed, this is not in my view a case where he should be ordered to pay the costs pursuant to Article 69 (3).

Accordingly, although the application should be dismissed, each side should, in my view, bear its own costs.