OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 11 December 1986 *

Mr President,
Members of the Court,

I — Facts

1. The applicant in these proceedings was engaged by the Court of Auditors as a member of the temporary staff under a contract dated 12 January 1982. He was employed — as is stated in the contract — as an administrator in Grade A 7, Step 1. Including an extension, that contract ran until 31 December 1983.

2. In December 1983, the applicant took part in a form of selection procedure ('screening') held for the purpose of concluding contracts for A 7/A 6 posts. According to a report of the selection board, however, the applicant could not be regarded as suitable for an A 7/A 6 post; the selection board therefore proposed a two-year contract in a B 3/B 2 post.

3. Accordingly a new temporary contract was concluded on 21 December 1983 for the period until 31 December 1985 under which the applicant was to perform the duties of a senior administrative assistant and was classified in Grade B 3, Step 3. However, it is common ground that the applicant was employed in an A 7 post and he maintains, moreover, that he had to perform the same tasks as under the previous contract.

4. In November 1984 the applicant received a certificate from his Head of Division stating that he had been carrying out audits of the own resources of the Community and taken part in audits at the Commission in Brussels and at the national authorities of Member States and further that he was 'under-occupying an A 7 permanent post' (the latter was confirmed in a memorandum of 13 November 1984 addressed to the President of the Court of Auditors by a Member of that body). On 14 January 1985, he addressed a formal request to the President of the Court of Auditors under Article 90 of the Staff Regulations. In that request, he asked, on the basis that he had been assigned to an A 7 permanent post and performed the corresponding duties, for his remuneration to be calculated as for an A 7 official with retroactive effect to 1 January 1984 and sought payment of the corresponding arrears, including interest at the usual rate. He based that claim on the third paragraph of Article 10 of the Conditions of Employment of Other Servants of the European Communities (hereinafter referred to as 'the Conditions of Employment'), which states that:

'assignment of temporary staff to a post carrying a higher grade than that at which they were engaged shall be recorded in an agreement supplementary to their contract of service',

and on the second paragraph of Article 15 of the Conditions of Employment which provides that where a member of the temporary staff is assigned to a post corresponding to a higher grade, as provided for in the third paragraph of Article 10, his grading is to be determined in accordance with Article 46 of the Staff Regulations (that is to say, in accordance with the rules governing promotion).

* Translated from the German.

5. That request did not initially meet with success. In a decision of the President of the Court of Auditors of 7 February 1985 (which refers to the applicant's 'complaint'), that 'complaint' was declared to be inadmissible (because the time-limit for the submission of such a complaint had expired in March 1984). The 'complaint' was also declared to be without foundation on the basis that the applicant had not been assigned to a post corresponding to a higher grade since 1 January 1984 but, notwithstanding the fact that the post which he occupied was designated as A 7 in the budget, had performed duties which were exclusively those of the category specified in his contract of service.

6. The applicant replied on 16 April 1985 by submitting what he himself described as a complaint to the President of the Court of Auditors. On the basis of a document (entitled 'Orientations concernant la gestion du personnel' [guidelines for personnel management], which dealt with classification in grade and step) of which he had become aware only shortly beforehand, namely in January 1985, he claimed that according to that document, the duties assigned to him were those of an 'auditeur/administrateur' in career bracket A 7/A 6. Since his assignment to Grade B 3, a decision under Articles 10 and 15 of the Conditions of Employment must have been adopted and from that point on he should have been classified in accordance with Article 46 of the Staff Regulations. He argued that on the other hand the Court of Auditors was not entitled to rely on the expiry of the time-limit, since it was guilty of a continuing failure to act.

7. The President of the Court of Auditors adopted a further decision on 18 July 1985 which revoked and replaced that of 7 February 1985. In it, as in the decision of 7 February 1985, it was recognized that the applicant had occupied a 'permanent budgetary post in Grade 7' since the conclusion of his contract of service. That decision also stated that a supplementary agreement would be concluded according to which the applicant would be classified in Grade A 7, Step 2, with effect from 14 January 1985. That would apply until 31 July 1985. From 1 August 1985, the applicant would occupy a post in Category B. For the rest, the complaint was rejected on the basis that in regard to the period from 1 January 1984 until the date on which the applicant submitted his application, the prescribed time-limit had expired on 31 March 1984.

8. On 8 October 1985, the applicant brought an action before the Court of Justice, claiming that it should:

(i) Annul the decision of the appointing authority in so far as it states that the request of 14 January 1985 was time-barred;

(ii) Declare that that request safeguarded the applicant's right, already recognized by the Court of Auditors, to the conclusion of a supplementary agreement within the meaning of the Conditions of Employment of Other Servants;

(iii) Therefore, order the Court of Auditors to comply with the provisions applicable to members of the temporary staff;

(iv) Alternatively, in exercise of the Court's unlimited jurisdiction, declare that the Court of Auditors is guilty of maladministration which it must repair by paying damages corresponding to the difference in salary acknowledged by the Court of Auditors, namely the difference between B 3, Step 3, and

Grade A 7, Step 2, for the period between 1 January 1984 and 14 January 1985.

9. Since the Court of Auditors continues to take the view that the applicant could no longer pursue his claim that with effect from the date of conclusion of his contract he should be assigned to a post corresponding to a higher grade, it has applied to the Court of Justice under Article 91 of the Rules of Procedure for a preliminary decision on the admissibility of the application, claiming that it should be dismissed as inadmissible.

10. The oral procedure concerning that aspect of the dispute took place on 27 November 1986.

II — Analysis

11. My views on this case are as follows:

12. (i) It is clear from the pleadings that the applicant, who is of the opinion that an agreement supplementary to his contract of service of 21 December 1983 should, in accordance with the second paragraph of Article 10 of the Conditions of Employment, have been concluded with effect from 1 January 1984, is seeking a retroactive change in the legal position. In fact, on the basis of the duties performed by him, he wants the contract to be altered from the very beginning.

13. Since under Article 46 of the Conditions of Employment, Title VII of the Staff Regulations, concerning appeals, is to apply by analogy (including the time-limits laid down in Articles 90 and 91), it is not surprising that the Court of Auditors expressed the view that a modification or supplementary agreement to the contract concluded with the applicant with retroactive effect to the time at which it came into effect cannot be sought more than a year after the event. At very most, it could be sought during the three month period laid down in Article 90, whether it was a complaint that was to be made within the period or whether a request had first to be submitted. In this case, the applicant considers that the latter was appropriate since the basic conditions of service are not contested; the applicant in fact sought a supplementary agreement. Support for the defendant's view can be found in the settled case-law of the Court according to which, when an act adversely affecting an official has not been contested within the prescribed time-limit, it is not possible, by subsequently submitting a request which essentially seeks to correct the act adversely affecting the official, to cause time to run anew (see, for example, the judgments in Cases 127/84,[1] 191/84,[2] 231/84[3] and 153/85[4]).

14. It is not possible to counter that by saying, as the applicant has done, that in reality, the claim is for the payment of arrears, which the Court may award in the exercise of its unlimited jurisdiction and for that reason, the time-limits do not apply. It may also not be argued that the Staff Regulations contain no time-limit for claims for payment of salary and that, since Article 85 thereof provides for a permanent right to recover sums unduly paid, officials and members of the temporary staff have a corresponding right in regard to claims for payment of arrears. From that point of view the system of rules which may be deduced from the Staff Regulations is perfectly clear and, in the interests of legal stability and legal certainty, can only be endorsed. It is possible to set aside or alter *ab initio* the legal effect of an act of an authority which

1 — Judgment of 15 May 1985 in Case 127/84 *Esly* v *Commission* [1985] ECR 1437.

2 — Judgment of 7 May 1986 in Case 191/84 *Barcella & Others* v *Commission* [1986] ECR 1541.

3 — Judgment of 26 September 1985 in Case 231/84 *Valentini* v *Commission* [1985] ECR 3027.

4 — Judgment of 10 July 1986 in Case 153/85 *De Fraye* v *Economic and Social Committee* [1986] ECR 2427.

adversely affects an official only if it is contested in good time but not at any point in the future chosen by the official (there is no need to consider here whether in a case in which a relationship involves debt arising over a long period, it is possible to seek to change the *future* effects of that relationship at any time since in this case, the Court of Auditors has actually made such an alteration).

15. (ii) It is also clear from the case-law that where *new facts arise*, it is certainly possible, even after the expiry of the said time-limits, for an act adversely affecting an official to be reconsidered provided that the request under Article 90 of the Staff Regulations was submitted within the appropriate period of time after the discovery of the relevant new facts (see the judgments in Cases 191/84, 231/84 and 153/85). Such situations arose precisely in connection with criticism of the grading of officials. The Court decided that it was justifiable to reconsider them, notwithstanding the expiry of the relevant time-limit, where, at a later date, a decision containing criteria for classification in grade and step was published or a description of the duties attached to particular grades was circulated. I rely in support of that proposition on the judgments in Cases 28/64,[5] 9/81,[6] 190/82[7] and 231/84.

16. The applicant therefore wishes essentially to argue that such a situation exists in his case. He relies in support of that argument on the certificate drawn up by his superior in November 1984, the memorandum from a Member of the Court of Auditors of 13 November 1984 (in which it is confirmed that the applicant was assigned to an A 7 permanent post), and on a document sent to him by the Staff Committee in January 1985 entitled 'Orientations concernant la gestion du personnel' (the definition contained in the third paragraph of section II of part B of that document implied that the applicant was performing duties corresponding to an A 7 post). Furthermore, he refers to the fact that the decision of 7 February 1985, in which his request was rejected, was revoked and replaced by the decision of 18 July 1985, which recognized that his claim was well founded.

17. There can also be no doubt that if the abovementioned circumstances together, or any one of them, constitute new facts within the meaning of the Court's case-law, the action before the Court was brought within the prescribed time-limit.

18. It must also be accepted that in that case, it would then be possible to seek not merely a modification of the legal position for the future, but also a review of the initial classification. That, in my opinion, is clear from the judgment in Case 231/84.

19. The decisive question is therefore whether there actually are new facts in the applicant's case which made it possible to raise in January 1985 the problem of his correct classification.

20. (a) In my opinion, that question should be answered in the negative in so far as the *decision of 18 July 1985 on the applicant's complaint* is concerned. It can undoubtedly be deduced therefrom that the Court of Auditors recognized that from the beginning, the applicant performed the duties of an official in Grade A 7 since there is no mention anywhere of a modification of those duties at any given moment. For that reason, I find it wholly incomprehensible that the representative of the Court of Auditors contested that prop-

5 — Judgment of 7 April 1965 in Case 28/64 *Müller* v *Council of the EEC and Council of the EAEC* [1965] ECR 237.

6 — Judgment of 6 October 1982 in Case 9/81 *Calvin E. Williams* v *Court of Auditors* [1982] ECR 3301.

7 — Judgment of 1 December 1983 in Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981.

osition at the hearing. Apparently, however, that decision was not the factor which caused the applicant to submit his request. The decision was in fact a reaction to the applicant's request and for that reason, it can hardly be regarded as a new fact justifying that request.

21. (b) On the basis of the oral argument presented by the Court of Auditors, it must be doubted whether the document entitled 'Orientations concernant la gestion du personnel' may be regarded as a 'new fact'. It certainly appears that the applicant believed that the decision of 18 July 1985 was adopted pursuant to that document (see his claim that he was performing the duties of an 'auditeur' in Grade A 7 because he 'participe à l'enquête et à la rédaction du rapport de contrôle . . . ') and it is also interesting to note that the Court of Auditors admitted at the hearing that that document could have given rise to misunderstandings on the part of the staff concerning gradings. However, the decisive factor is that emphatic assurances have been given that the document, in which the ideas of the President of the Court of Auditors were set out, was never adopted by the Court of Auditors. It thus never had any legal effect and the practice of the Court of Auditors was not based on it. It is therefore difficult to equate it to the decisions concerning general criteria for classification which have been involved in other cases and have been regarded therein as relevant new facts.

22. (c) However, I do consider that the applicant's assessment of the two *documents dated November 1984* is reasonable.

23. It must certainly be assumed that the applicant, who states that he has performed the same duties as under his first contract of service, must have had the *impression* from the beginning that he had been appointed to too low a grade. In his application, he speaks of having the feeling that his classification was incorrect. It is also true that in the said document, it is not expressly stated that the applicant is performing the *duties* of an official in Grade A 7. It should however be noted that it does not appear to be reasonable to bring formal proceedings merely on the basis of a subjective impression which may in fact be unfounded. It is possible that because the distinctions between duties are unclear, his classification under the *first* contract of service was incorrect.

24. It would be more appropriate to wait until clear evidence of the justification of the claim came to hand. However, the two abovementioned documents may certainly be regarded as such evidence since the applicant's duties were described in one of them ('measures of control of own resources to be carried out by him', participation in numerous inspection visits to the Commission); moreover, the expressly mentioned circumstance that the applicant was occupying an A 7 post is certainly a strong indication that he was carrying out corresponding duties (as was later clearly recognized in the decision of 18 July 1985).

25. However, if the 1984 documents are to be regarded as new facts, it is clear that, by his request of 14 January 1985, the applicant reacted to them within the time-limit for the submission of complaints. It is also certain that following the rejection of his request, he submitted a formal complaint within the prescribed time-limit and that when his complaint met with a partly negative decision, he brought his action before the Court of Justice in good time.

26. (iii) That means that the objection of inadmissibility raised by the Court of Auditors is unjustified and the application must be regarded as admissible.

III — Conclusions

27. I therefore propose that the Court of Auditors' application under Article 91 of the Rules of Procedure be dismissed and that the Court declare that Mr Pressler-Hoeft's application is admissible. Since that does not terminate the proceedings, which must continue in regard to the substance of the case, the decision as to costs should be reserved.