OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 15 JULY 1982 [1]

Mr President,
Members of the Court,

The applicant in the present proceedings was, after participating in a competition in 1974, recruited by the Audit Board as a member of its temporary staff and classified in Grade A 7, Step 2. By a decision of 16 December 1976 he was — without any change to his grading — appointed a probationary official with effect from 1 October 1976 for a period of nine months. Subsequently he was established in Grade A 7 by a decision of 14 June 1977 with effect from 1 July 1977.

In 1978 the Court of Auditors, which had recently been created by a Treaty of 22 July 1975 and which had replaced the Audit Board, gave notice of five vacancies in Career Bracket A 7/A 6, which were to be filled by transferring officials from other institutions in accordance with Article 29 (1) (c) of the Staff Regulations. The applicant, who applied for one of the posts, was transferred to the Court of Auditors by a decision of that institution of 18 April 1978, with effect from 1 May 1978, and was assigned to Grade A 7, Step 3. As from 1 May 1979 the applicant was promoted to the first step of Grade A 6 and provision was also made to antedate his seniority in that grade and step to 1 July 1977.

At that time the Court of Auditors was increasing its staff by engaging officials and other employees who were not already employed by the Communities. Their grading was governed from 21 February 1980 by a decision adopted by the Court of Auditors (which, it appears, has been amended twice since then) relating to the criteria for grading and appointing staff. It provided that, in any given category, appointment was possible to a grade other than the starting grade of the basic career bracket, if, subsequent to the acquisition of the qualification required for that career bracket, a specified minimum level of experience had been gained, which in the case of Grade A 6, for instance, amounted to four years. Any experience in excess of that minimum might qualify for additional steps as set out in a table attached to the decision.

The applicant maintains that the practical consequence of that has been that officials and other employees graded in accordance with the decision have obtained considerably more favourable terms than officials transferred to the Court of Auditors from other institutions. On 12 May 1980 he therefore submitted a request to his appointing authority under Article 90 (1) of the Staff Regulations. In that request he pointed out that employees newly recruited to the Court of Auditors but having ten year's experience less than himself had been classified in Grade A 6, Step 1 or Step 2, that is to say, in the same grade and step (A 6, Step 2) as that which he had subsequently attained. He requested the authority to consider whether that anomaly could be rectified.

The request was unsuccessful. A memorandum from the President of the Court of Auditors dated 25 July 1980

1 — Translated from the German.

denied any abnormality in the grading of the applicant. While conceding that the Court had established its own grading criteria for its newly-recruited staff based on their practical experience, it alleged that it had, in promoting the applicant, been bound by Article 46 of the Staff Regulations, with the result that its point of departure had been a previously-established grade and it had therefore been precluded from exercising any discretion.

Early in 1980 the applicant, looking through his personal file, noticed a memorandum which the Member of the Court of Auditors responsible for staff and administration had drafted on the subject of the applicant's request and addressed to the President of the Court. That memorandum, of which the applicant received a copy (which has since been removed from his personal file), demonstrates *inter alia* that the grading criteria established by the Court of Auditors confer preferential treatment upon officials and other servants who have been recruited by it without having previously been employed by the Community, as compared with the grading of officials to whom Article 46 of the Staff Regulations has been applied. This is set forth in detail in the case of Career Bracket A 5/A 4 and — on page 3 of the memorandum of Grade A 6.

The applicant then lodged a complaint under Article 90 (2) of the Staff Regulations with his appointing authority on 15 September 1980. He argued that the above-mentioned memorandum revealed that he had — in spite of his age and seniority — been graded worst of all the officials and other servants in Grade A 6, since according to the memorandum even a thirty-year old probationary official received a salary corresponding to Grade A 6, Step 4. Such a practice, which caused persons employed under a contract, upon being established, to benefit from a better grade than officials who had been promoted under Article 46 of the Staff Regulations, constituted an infringement of Article 5 (3) of the Staff Regulations. His grade should therefore be revised so as to be comparable with that of his colleagues of the same age and experience.

Here again the applicant was unsuccessful. In a memorandum of 13 November 1980 from the President of the Court of Auditors he was reminded that in 1974 he had accepted a particular grade and that now precluded any amendment thereof; to that extent, therefore, his complaint had to be treated as inadmissible. Any infringement of Article 5 (3) of the Staff Regulations was out of the question. The applicant had had ample opportunity to take part in competitions for filling posts in Career Brackets A 5/A 4 and Grade A 3. Finally, the memorandum alluded to by the applicant was merely a preparatory opinion and could therefore not be binding upon the appointing authority.

Thereupon the applicant brought an action before the Court of Justice on 14 January 1981. He claims that the Court should:

(a) declare that the grading criteria applied by the Court of Auditors are discriminatory inasmuch as they confer higher grades on newly-recruited staff than on staff already employed by the Community;

(b) declare that the Court of Auditors must grant the applicant — with

effect from the date on which the action was brought — a grade which is at least comparable with that of his colleagues of the same age, university education and experience;

(c) annul the decision of 13 November 1980;

(d) order the Court of Auditors — on the ground of a wrongful act or omission on its part — to pay damages estimated at BFR 1 080 000, together with interest calculated at 6% from the date on which the action was brought.

Being convinced that the action was inadmissible on a number of grounds, the Court of Auditors then lodged an application under Article 91 of the Rules of Procedure, but by a decision of 19 May 1981 the Court of Justice reserved its decision on the matter for the final judgment. It further contends that the action should in any event be dismissed as unfounded.

My opinion in this dispute is as follows:

I — Admissibility

The Court of Auditors has doubted the admissibility of the action or of individual heads of claim on several grounds.

(a) First and foremost it considers that the action was brought *out of time.* It alleges that the applicant is concerned primarily with the legality of his grading, on which, however, the relevant decisions were taken at earlier stages, namely when he was engaged by the Audit Board, when he was transferred to the Court of Auditors, and lastly when he was promoted to Grade A 6. It was thus against those decisions that he should have proceeded, and since he failed to do so he is now debarred from returning to the problems associated with them.

(b) In so far as the applicant refers to the Court's grading of newly-recruited employees and officials, such acts cannot be said adversely to affect the applicant.

(c) As regards the applicant's claim that the decision on his complaint should be annulled, it is evident that it did not constitute an act which adversely affected him and was challengeable, but can be considered only as a confirmation of an earlier decision.

(d) Finally, the Court of Auditors argues that the action lacks any valid object, since the applicant has not cited any act adversely affecting him; the object of the action is — at the least — only very vaguely defined.

None the less, I consider that none of these misgivings ultimately entitles us to dismiss the action or individual heads of claim as inadmissible.

1. The applicant has not asserted that the decisions previously taken on his grading were mistaken and therefore in need of amendment (which of course would no longer be possible). What he does maintain is that, after the Court of Auditors had issued in early 1980 a general decision together with the grading criteria for newly-recruited staff and had translated them into practice by way of decisions in individual cases, the need arose, in order to avoid inequalities of treatment, to review the applicant's grading and to make it conform to the new criteria *in the future.* That was the sole purpose of his request of 12 May 1980. In making the request he relied upon new facts and the decision rejecting it must therefore now be open to judicial review.

In my view scarcely any objection can be raised against that argument. Indeed, it cannot be assumed that, once grading decisions have been taken, they must necessarily be valid for all time unless they are challenged within the period prescribed. On the contrary, it is in principle quite conceivable that when basic circumstances change, amendments — at least for the future — may be required, as was acknowledged in the judgment in Case 28/72.[1] If in such a case the appointing authority leaves an earlier decision unaltered, that actually amounts to a new decision which is open to challenge and not merely to the confirmation of that earlier decision, adopted as it was in the context of a different legal situation. In the present case the applicant could undoubtedly point to the presence of fresh facts. It is unnecessary in the context of an examination of the admissibility of the action to decide whether the appointing authority is indeed obliged to revise his grade; a cogent submission is sufficient for such purposes, and that is certainly not lacking. The applicant reacted immediately to the fresh facts, and even — after the decision of February 1980 had come into force — within the period allowed for lodging complaints, although that does not appear to be mandatory for the submission of a *request*. Furthermore, when he received the refusal of his request before expiry of the four-month period allowed by Article 90 (that is to say, on 25 July 1980), he lodged a complaint within the three-month period, namely on 15 September 1980, and following its rejection on 13 November 1980 (before four months had elapsed), he brought an action before the Court of Justice within the three-month period laid down.

That being so, there can clearly be no question of judicial proceedings, having been commenced out of time.

2. Accordingly, the Court of Auditors' objection that the decisions concerning the grading of newly-recruited staff did not constitute acts adversely affecting the applicant is clearly beside the point. Naturally the applicant does not contest those decisions as being unlawful, but rather he takes their legality for granted and relies upon them in arguing that in the interests of equal treatment an appropriate amendment of his grade was necessary.

3. No objection can be raised in principle against the contention made by the Court of Auditors, in reply to the applicant's claim for annulment of the decision relating to his complaint, that that decision constituted merely an act of *confirmation* — namely of the rejection of his request of May 1980 — and as such was unassailable. Quite apart from previous case-law (such as the judgment in Joined Cases 33 and 75/79 [2]), reference may be made in that regard to the general scheme of Articles 90 and 91 of the Staff Regulations, from which it is clear that any dispute must relate to an *act adversely affecting* the complainant. However, only an express decision or the failure to take a decision which is the subject of a complaint may be regarded as such an act and not therefore the decision on the complaint. Nor is it convincing for the applicant to argue that his complaint of 15 September 1980 referred — as had not been possible in

1 — Judgmend of 12 July 1973 in Case 28/72 *Leandro Tontodonati* v *Commission* [1973] ECR 779.

2 — Judgment of 28 May 1980 in Joined Cases 33 and 75/79 *Richard Kuhner* v *Commission* [1980] ECR 1677.

the request of 12 May 1980 — to the memorandum which had subsequently been drafted by a Member of the Court of Auditors on the problems under discussion, as well as to later grading decisions which had not been published before May 1980. The appointing authority was in any case already familiar with those facts at the time when it dismissed the applicant's request, so that they were not new when it adopted its decision on the complaint.

None the less, I do not consider that the Court of Auditors' statement serves to demonstrate conclusively the inadmissibility of the claim. From the application as a whole and from the other heads of claim it is possible to discern straight away the true grievance of the applicant, namely the refusal to change his grade. I would therefore not consider it to be appropriate simply to declare the claim which is now under discussion to be inadmissible; rather, it should be *re-interpreted* in the aforesaid manner, so as actually to be seeking the annulment of the rejection of the applicant's request of May 1980.

4. Lastly, in the light of the foregoing, it would not be permissible to cast doubt upon the admissibility of the action on the ground that it lacks any valid subject of dispute or is too vaguely defined. In my opinion it would in principle be inappropriate to adopt too formal an approach in this matter, that is to say, in determining the requirements laid down by Article 38 (1) (c) of the Rules of Procedure. Indeed, in referring to previous acts, the application makes abundantly clear that the applicant is concerned to compel the Court of Auditors, now that it has established generous grading criteria for newly-recruited staff, henceforth to treat officials transferred from other Community institutions in a similar manner.

II — Substance

Turning to the merits of the application we must first examine whether the grading practice of the Court of Auditors in early 1980 can be described as discriminatory and whether that discloses a need to award the applicant a grade — effective from the date of the application — which is comparable to the grade of newly-recruited officials and employees. Secondly we must consider whether the applicant should be awarded compensation on the ground of a wrongful act or ommission on the part of an institution.

1. In support of his argument the applicant has explained at length how his present grade was arrived at. Even at the beginning of his career no generosity was shown in the award of his grade, since his former employer, the Audit Board, did not apply the Commission's decision of 6 June 1973 on the allowing of additional seniority. In his case, moreover, the Audit Board departed from its previous practice by failing to promote him to Grade A 6 at the time when be became established, since in 1977 it was decided to suspend promotions pending the creation of the Court of Auditors. He alleges that it must therefore be assumed that as long ago as 1974 to 1978 his grading was too low and inconsistent with his duties under the Audit Board.

At the same time it is evident that grades have always been generously awarded to

new employees of the Court of Auditors. That was clearly demonstrated by the decision of February 1980 concerning the establishment of grading criteria. New staff members thereby benefited from preferential treatment; that continued after their estblishment, which took place following highly dubious competitions. The end result was not only that higher classifications were discernible within the applicant's own grade (A 6) but also that new employees having comparable experience and qualifications obtained higher grades.

(a) In the light of that submission it is first necessary to eliminate all the matters which cannot, in my view, be dealt with in the present proceedings.

(aa) That undoubtedly applies to the contentions concerning the *organization of the applicant's career under the former Audit Board.* Indeed, it is now no longer possible to consider whether everything was properly conducted at the time, because the relevant acts and the subsequent behaviour of the Audit Board were not challenged within the prescribed periods. We must therefore assume the legality of those measures, which means that the Court of Auditors cannot be required to take account of any supposed shortcomings on the part of the Audit Board in handling the applicant's career, quite apart from the fact that any demand to that effect should have been asserted, at the latest, at the moment when the applicant was transferred to the Court of Auditors.

(bb) The same applies to the implied and overt *criticism by the applicant of the manner in which the Court of Auditors conducted its competitions,* which allegedly made it comparatively easy for persons employed under contract to obtain favourable posts as officials. Quite apart from the apparent irrelevance of those observations to the claims made by the applicant, they must be disregarded if only because the competitions which have been criticized were not challenged in good time and consequently must now be regarded as having been lawfully conducted.

(cc) Turning finally to the point that the applicant compares his grade with that of officials and employees in *higher grades* and to the consequent inference that, given his qualifications and experience, assignment to Career Bracket A 5/A 4 or even to Grade A 3 would have been appropriate, I consider that it should be held that he is debarred from seeking a decision of that nature in the present proceedings.

In order to fill the posts referred to by the applicant, a series of competitions was organized, in some of which the applicant participated. Like other interested parties, the applicant thus had the opportunity of obtaining posts in higher grades, which leads us to assume — since no complaints or applications were lodged — that in all respects the competitions are properly conducted. That being so, however, it cannot be accepted that he has an interest worthy of legal protection permitting him, by relying upon the principle of equal treatment and by circumventing the procedures laid down in the Staff Regulations, to attain a higher grade.

(b) The only outstanding question is therefore whether the applicant can, by pointing to the Court of Auditors'

decision on grading criteria and its resultant practice, demand to be appropriately *re-graded within Grade A 6.*

Here he relies upon the basic provision contained in Article 5 (3) of the Staff Regulations, which provides as follows:

"Identical conditions of recruitment and service career shall apply to all officials belonging to the same category or the same service."

In his view that provision implies an obligation to apply the same criteria to all officials not only at the time of their engagement but also during the subsequent development of their careers, so as to avoid the situation which allegedly arose at the Court of Auditors whereby the preferential grading of newly-recruited officials and employees caused the careers of officials transferred from other Community institutions to be retarded. He argues at length that he holds a degree in economics, with special qualifications in finance and accountancy, and that on taking up his post in 1974 he had already acquired twelve years' practical experience. Thus, within Career Bracket A 7/A 6 he had a better education and greater experience in accountancy than other officials in higher grades and possessed, in so far as his education was concerned, higher qualifications than fifty-three of the sixty-five officials who were entrusted with auditing duties.

In reply the Court of Auditors contends first and foremost that, in assigning the applicant to a grade, it was bound by the rule contained in Article 46 of the Staff Regulations. Hence the applicant's situation is not comparable to that of officials and employees who were recruited on the basis of competitions organized by the Court of Auditors, to whom alone the decision of February 1980 applied. In the written procedure the Court of Auditors merely adduced the additional argument that the applicant was wrong in maintaining that he had a better education and greater experience than newly-recruited officials in Grade A 6.

As regards this crucial point of contention, it must clearly be acknowledged that the provision contained in Article 5 (3) of the Staff Regulations, which embodies the principle of *equal treatment,* is of particular importance to employment law. That principle is normally implemented automatically by applying the provisions of the Staff Regulations concerning the detailed organization of careers, *inter alia* by applying Article 46 which governs promotions, in cases where there has been consistency from the start in organizing the careers. Matters may be different, however, where a newly-created body engages some staff from other Community institutions, in which their careers were governed by a definite code of practice, while recruiting other staff from outside and applying to them a separate set of grading rules unknown *in that particular form* to the other institutions. Should such a situation disclose that an inflexible adherence to the rules of the Staff Regulations concerning the progress of a career, coupled with the application of generous grading criteria to newcomers to the service, is obstructing the attainment of the aim of Article 5 (3), then it is my opinion that provisions such as those of Article 46 must be subordinated to the overriding principle of equal treatment, which must be re-asserted immediately by means of appropriate corrective measures. Consequently, after establishing a new grading practice for newly-recruited officials and employees, the

Court of Auditors cannot respond to officials whose careers began in less favourable circumstances by relying upon the rigid rules of the Staff Regulations applicable to them, which ostensibly demonstrate that the two situations are not comparable. Rather, in the interests of equal treatment, which is concerned solely with the duties performed and not with the passing of a competition at the Court of Auditors itself, it is bound to amend their grades in the light of the newly-established criteria.

Moreover, the applicant deserves a higher classification within Grade A 6, if the criteria contained in the decision of February 1980 are applied to him. Unless I am mistaken, the decision sees as a decisive factor any *practical experience* which is acquired after obtaining the degree which is required for recruitment to the Court of Auditors and for the performance of certain routine duties. The applicant's present classification within Grade A 6 may perhaps be explicable in terms of the experience he acquired over roughly six years of employment with the Communities. If account were taken of his experience prior to recruitment — the applicant mentions twelve reckonable years —, he would have to be granted a higher step, especially as it is inconceivable (and was not even contended) that that experience was such as to be disregarded by the Court of Auditors in adopting its grading decision. That view is corroborated by the above-mentioned memorandum drafted by the competent Member of the Court of Auditors, which examines the problem of discrimination which was raised by the applicant. The memorandum clearly expounds how newly-recruited officials and employees were generally receiving better grades than was possible under Article 46 of the Staff Regulations for officials transferred from other institutions. In particular, within Grade A 6 the result was a striking discrepancy between the grading of the applicant and that of other officials having manifestly the same duties, who moreover had only probationary status at that time. I would merely point out that according to the memorandum a probationary official who was ten years his junior was in the same step as the applicant and that another probationary official, likewise ten years younger, was classified two steps higher than the applicant, which — there being no question here of superior university qualifications — could not possibly be explained in terms of greater experience. Furthermore, I would recall that the representative of the Court of Auditors readily conceded at the hearing that the applicant would, under the decision of February 1980, have been classified two steps higher and would accordingly now be in Grade A 6, Step 5.

That being so, since the Court of Auditors failed to adopt the idea contained in the memorandum of June 1980, which was to seek an adjustment by giving priority to the promotion of certain officials, it is my opinion that one cannot fail to recognize the justice of the applicant's claim that discrepancies in grading should be eliminated by applying to him the grading criteria laid down by the decision of February 1980. It is of course not the task of the Court of Justice to determine the exact grade of the applicant; that is a matter for the Court of Auditors, which must carefully

evaluate the applicant's experience and — if relevant — his qualifications. The Court of Justice can restrict itself — indeed, the applicant's claims on this point go no further — to declaring that the applicant was right in seeking an amendment of his grade in early 1980 and that the Court of Auditors' refusal to effect that amendment by granting the applicant a grade comparable to that of new recruits cannot be upheld.

2. We must now turn to the applicant's claim for *damages for a wrongful act or omission on the part of an institution,* which, he maintains, his discriminatory grading discloses.

Here he is obviously going beyond the claim hitherto discussed. In order to justify the sum claimed by him (BFR 1 080 000) he points out in his application that ever since taking up employment with the Court of Auditors he has been compelled to accept a loss of salary. Had he been immediately assigned to Career Bracket A 4/A 5 — like colleagues with comparable duties — he would have received approximately BFR 30 000 per month more over a period of three years, which amounts to the sum now being claimed by him. In his reply he sets forth the same calculation based on the assumption that he should have been assigned to Grade A 6, Step 8, and submits that at least such a grading would have been appropriate, in view of the fact that the Court of Auditors had already graded newly-recruited employees in a most generous manner even before it had adopted the decision of February 1980.

On this point, however, I can hardly concur with the applicant, since I fail to see how any amendment to his grade could actually be justified for the period prior to the lodging of his application in February 1980.

The applicant seeks in effect a retroactive payment of the salary withheld in respect of a period of three years preceding the date on which the action was brought, since he takes the view that he should have been classified in a higher grade since the beginning of 1978, that is to say, even before his transfer to the Court of Auditors, which of course took place in May 1978. In that regard one may well ask how the Court of Auditors is supposed to make an adjustment for an allegedly inadequate grade which at that time was in no way its responsibility.

Turning our attention to the moment in time at which the applicant was transferred to the Court of Auditors, we find that in actual fact the argument underlying his claim is that the grade conferred at that time was incorrect. However, not only has no evidence been adduced to indicate that the transfer was conducted in an irregular manner, but it may further be said that, since he failed to contest his grade at that time, the applicant must now be debarred from seeking a similar result by way of an action for damages.

Lastly, as regards the question of whether the establishment of a new grading system afforded grounds for amending the applicant's grade *retroactively,* it can be stated only that no compelling argument has been advanced in support of such a view and in particular that the Court of Auditors can certainly not be charged with a *wrongful omission on the part of an institution* by reason of such a failure to act.

In this context it must further be observed, on the subject of the proper grade for the applicant as demanded by the precept of equal treatment, that it cannot be assumed that he should be classified in *Grade A 5,* as I have already

tried to demonstrate by the remarks which I made in the first part of my examination of the validity of the claim. Neither was it demonstrated to us, however, that there was any need to classify the applicant in *Step 8* of Grade A 6. *That* question cannot be decided in judicial proceedings but is more properly to be resolved by the Court of Auditors in the light of all the relevant factors.

Consequently, it must be concluded that the claim concerning the liability of the institution cannot be considered justified.

In so far as the applicant may be said to have suffered from discriminatory grading, an appropriate adjustment will be made by revising his grade, as the Court of Auditors, in my view, is bound to do. With regard to the claim for damages, it can at most be accepted that such an amendment must take effect, not from the date on which the action was brought, but from the submission of the applicant's request, and that the retroactive payment of salary which that entails should include interest calculated from the dates on which the individual payments fell due.

III — I therefore propose that the Court should grant the application and declare that the Court of Auditors is obliged to revise the applicant's grade with effect from May 1980, taking account of the criteria contained in the decision of February 1980, and to make a retroactive payment of the amounts resulting from that amendment, together with interest calculated at 6 % from the dates on which the individual payments fell due. In the event of such a decision, the Court of Auditors, being unsuccessful in the main part of its submissions, should be ordered to pay the costs.