OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 31 May 1988 *

Mr President,
Members of the Court,

1. The actions brought by Mrs Feyaerts and Mr de Szy-Tarisse relate essentially to the Commission's alleged failure to comply with the judgment of 11 July 1985 [1] by which the Court annulled various decisions appointing former special contract staff of the European Association for Cooperation (the 'EAC'), including the applicants, in so far as those decisions determined their grade and step.

2. By decision of 3 February 1986 the Commission reclassified the applicants with effect from the date of their appointment as probationary officials (1 July 1982) in Grade A 5, Step 7, in the case of Mr de Szy-Tarisse and Grade C 3, Step 7, in the case of Mrs Feyaerts. The additional remuneration ensuing from that decision was paid to the parties with their salaries for April 1986.

3. In their first submission the applicants challenge the date fixed by the Commission for their reclassification. They consider that in order to comply properly with the Court's judgment the Commission should have taken the date on which they were engaged as members of the temporary staff.

4. In its judgment the Court stated that

'the decisions appointing the applicants as probationary officials . . . must be annulled in so far as they classify the applicants in *grades* or *steps inferior to those which they held in the service of the EAC*'. [2]

5. It is common ground that the Commission did not classify the applicants in grades or steps below those which they held in the service of the EAC. However, must it be considered that the Commission failed to comply with the terms of the Court's judgment in so far as it reclassified the applicants with effect from the date of their appointment as probationary officials?

6. The judgment of 11 July 1985 gives no indication as to the date from which the reclassification should take effect. The Court stated that

'when the Commission appointed the EAC's special contract staff it was recruiting staff from outside the institutions. The fact that the relevant provisions of the Staff Regulations were applied involved no irregularity'. [3]

It must be pointed out in that connection that the Commission applied Article 8 of

* Translated from the French.

1 — Judgment of 11 July 1985 in Joined Cases 66 to 68 and 136 to 140/83 *Hattet and Others* v *Commission* [1985] ECR 2459.

2 — *Hattet*, cited above, paragraph 25, my emphasis.

3 — *Hattet*, cited above, paragraph 23.

Decision 61/IX/81 to the applicants in so far as when classifying them it gave them seniority corresponding to the time which they had served as members of the temporary staff.

7. Lastly, I agree with the Commission's point that the applicants did not bring actions in time against their engagement as members of the temporary staff. Whereas the applicants maintain that it was not necessary to challenge each of the individual acts since it was sufficient to 'challenge the final act', the applicants' engagement as members of the temporary staff and their appointment as officials constitute two separate acts, as the Court pointed out in its judgment of 11 July 1985.[4] Consequently, the validity of the applicants' engagement as members of the temporary staff can no longer be challenged.

8. I therefore propose that the Court should dismiss the applicants' claim that their classification should take effect as from their engagement as members of the temporary staff.

9. The applicants ask the Court to order the Commission to pay default interest both on the additional remuneration paid as a result of the reclassification carried out pursuant to the judgment of 11 July 1985 and on any additional remuneration which may result from a fresh reclassification made as a result of the Court's judgment in this case. In view of the recommendation which I have just made, only the first of those points needs to be considered.

4 — *Hattet*, cited above, paragraph 22.

10. The Court stated in its judgment in *Delhez* v *Commission* that:

'an obligation to pay default interest can arise only where the amount of the principal sum owed is certain or can at least be ascertained on the basis of established objective factors'.[5]

However, the principal sum owed cannot be regarded as being ascertainable before the adoption of the decision of 6 February 1986. Since by its judgment of 11 July 1985 the Court instructed the Commission to reclassify the applicants, only that reclassification could establish the objective factors from which the relevant sum owed could be determined.

11. There remains the hypothetical situation referred to in the judgment in *Delhez*, in which the Court stated that

'A . . . question which could arise is whether an obligation to pay default interest should be recognized where there was an unjustified delay in actually determining the amount of the remuneration owed'.[6]

12. In the present case, the Commission adopted the reclassification decision approximately six months after the Court's judgment annulled the initial decision classifying the applicants. Admittedly, that time-lag does not indicate a great deal of diligence; however, having regard to the need for the administration to find a solution satisfying the requirements of the Court's judgment, and in view moreover of

5 — Judgment of 30 September 1986 in Case 264/83 *Delhez and Others* v *Commission* [1986] ECR 2749, paragraph 20.

6 — Paragraph 23.

the complex situation involved, it cannot be regarded as excessive.

13. Thirdly, the applicants claim that according to Articles 5, 31 and 32 of the Staff Regulations their grades and steps should be higher than the grades and steps which they had at the time when they were dismissed by the EAC.

14. Before considering that complaint the applicable principles must first be called to mind. It appears from a line of cases decided by the Court,[7] to which moreover reference is made in the judgment of 11 July 1985, that the appointing authority has a wide discretion in assessing the previous experience of a person appointed as an official both as regards the nature and the length of that experience and as regards the extent to which it meets the requirements of the post to be filled.

15. Mr de Szy-Tarisse maintains that he should be classified in Grade A 4, Step 4. He points out that several former special contract staff of the EAC having the same or less experience than he were reclassified in Grade A 4. The files of the persons concerned were produced to the Court by the Commission, according to which Mr de Szy-Tarisse had 15 years' experience, including eight with the EAC, which is significantly less than that of his colleagues. Mr de Szy-Tarisse contested that claim, on the ground that he had some 19 years' relevant experience. However, at the hearing, the Commission stated, without being challenged, that in fact he was including in his claimed experience a period corresponding to Grade B, which could not be taken into account for a Grade A post. As a result, the claimed arbitrariness as regards his classification has not been made out and it does not appear that the limits of the appointing authority's discretion, as mentioned above, have been exceeded.

16. For her part, Mrs Feyaerts considers that the Commission should have granted her a C 2 grading in view of the time for which she had carried out her duties and her excellent reports. The Commission disputes, in any event, that Article 3 of Decision 61/IX/81, which provides that no appointment may be made in career bracket C 3/C 2 — a provision which the Court held to be lawful in its judgment in the *De Santis* case[8] — could be applied to her.

17. However, the applicant contests that view on the ground that in so far as she was classified in Grade C 3, contrary to the wording of that provision, the administration could have classified her in Grade C 2.

18. It must be pointed out that, according to the case-law of the Court, Article 3 of Decision 61/IX/81, which provides for the possibility of appointing an official to the upper grade in the starting or intermediate career bracket by way of derogation, must be construed as

'an exception to the general classification rules, and as a decision which in any event lies within the discretionary power of the administration'.[9]

7 — Judgment of 1 December 1983 in Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981; judgment of 12 July 1984 in Case 17/83 *Angelidis* v *Commission* [1984] ECR 2907.

8 — Judgment of 6 June 1985 in Case 146/84 *De Santis* v *Court of Auditors* [1985] ECR 1723.

9 — Judgment of 21 January 1987 in Case 219/84 *Powell* v *Commission* [1987] ECR 339, paragraph 8.

19. Consequently, the Commission was entitled, without exceeding its discretionary power, to consider that neither Mrs Feyaerts' qualifications nor the requirements of the service were such as to justify her being classified in Grade C 2.

20. There remain the claims for compensation for material and non-material damage. Since they depend on the claim for reclassification, which I propose should be dismissed, they do not need to be considered.

21. I therefore propose that the Court should

(i) dismiss the applicants' claims;

(ii) order the parties to bear their own costs.