In Joined Cases 129 and 274/82,

CHARLES LUX, an official of the Court of Auditors of the European Communities, residing at 17 Rue Bertholet, Luxembourg, represented by Edmond Lebrun of the Brussels Bar, with an address for service in Luxembourg at 17 Rue Bertholet,

applicant,

v

COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES, represented by its Secretary, Jean-Aimé Stoll, acting as Agent, assisted by Lucette Defalque of the Brussels Bar, with an address for service in Luxembourg at the seat of the Court of Auditors, 29 Rue Aldringen,

defendant,

APPLICATION for the annulment of the defendant's decision of 20 January 1982 classifying the applicant in Grade A 5, Step 3, and for a declaration that he should be classified in Grade A 4,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and K. Bahlmann, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

Having been successful in an inter-institutional competition, the applicant was promoted by decision of 9 September 1980 to Grade A 5, Step 2. That decision referred to various provisions of the Staff Regulations of Officials of the European Communities, in particular to Article 46. On 27 August 1981 the applicant submitted a complaint against that decision under Article 90 (2) of the Staff Regulations, claiming that he ought to have been classified on the basis of the defendant's decision of 21 February 1980 on the criteria for the classification and appointment of staff, and not on the basis of Article 46 of the Staff Regulations.

In his reply dated 18 December 1981, the President of the Court of Auditors stated that he entirely agreed with the applicant and decided that the decision concerning him should be revised and taken on the basis of the Court of Auditor's decision of 21 February 1980.

Accordingly, the President of the Court of Auditors in his capacity as the appointing authority adopted a decision dated 20 January 1982 revoking the decision of 9 September 1980 and appointing the applicant to Grade A 5, Step 3.

The applicant, however, considered that that new classification did not comply with the decision of 21 February 1980 and was contrary to the principles of equality and objectivity, and on 16 March 1982 he therefore submitted a complaint against that new decision.

The applicant claims that on the basis of Article 2 of the decision of 21 February 1980 he was entitled to be classified in Grade A 4.

II — Written procedure

Immediately after submitting his complaint, the applicant made an application to the Court of Justice on 13 April 1982 as a precautionary measure in case it should be considered that, rather than submitting a complaint, he ought to have brought an action directly against the decision of 20 January 1982. That application is the subject of Case 129/82. The procedure in that case was suspended until judgment had been delivered in Case 9/81, *Williams* v *Court of Auditors*, a case which had some connection with this case. The judgment in *Williams* was delivered on 6 October 1982.

In the meantime the applicant, having received no reply from the defendant to his complaint of 16 March 1982, on 13 October 1982 brought a second action challenging the implied decision rejecting that complaint.

In his second application the applicant requested that the two cases should be joined in the interests of the proper administration of justice and on the ground that they were connected, if not virtually identical.

By order of the Second Chamber of 16 December 1982, the Court decided to join Cases 129 and 274/82 for purposes of the procedure and the judgment.

Meanwhile, on 24 November 1982, the defendant had submitted to the Court an application for interpretation of the judgment given on 6 October 1982 in *Williams.* By letter of 2 December 1982 it requested the Court to stay the proceedings in the two joined cases until the judgment interpreting the *Williams* judgment had been given.

By order of 29 September 1983, the Third Chamber dismissed the application for interpretation of the judgment in *Williams* as inadmissible. That order was communicated to the parties and the written procedure resumed its usual course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

III — Conclusions of the parties

The *applicant* claims that the Court should:

"Declare the application admissible and well founded;

Consequently,

(a) Annul the defendant's decision of 20 January 1982 in so far as it classifies the applicant in Grade A 5, Step 3;

(b) Annul the decision rejecting his complaint against that decision dated 16 March 1982;

(c) Declare that the applicant must be classified in Grade A 4;

Order the defendant to pay the costs."

The *defendant* contends that the Court should:

"1. Declare the applicant's applications in Cases 129 and 274/92 admissible but unfounded;

2. Consequently, confirm the classification of the applicant in Grade A 5, Step 3;

3. Order the applicant to pay the costs."

IV — Submissions and arguments of the parties during the written procedure

1. In his two applications the *applicant* puts forward a principal and an alternative submission.

(a) The principal submission relates to the infringement of Article 5 (3) of the Staff Regulations, of Article 2 of the defendant's decision of 21 February 1980 and of the principles of equality and objectivity and the principle of *patere legem quam ipse fecisti.*

The applicant claims in that regard that it follows from the text of Articles 1 and 2 of the abovementioned decision of the Court of Auditors that the appointment of a successful candidate in a competition, other than an appointment to the starting grade of the starting career bracket of his category, that is to say to Grade A 8, must be made to the grade indicated in Article 2 on the basis of the

length of professional experience of the person concerned. The applicant admits that Article 2 contains the word "may", but in his view that merely means that the defendant has an option of appointing a successful candidate in a competition to a grade other than the starting grade; once that option has been exercised, the appointing authority must automatically grade the person concerned in accordance with the criteria defined in Article 2, that is to say on the basis of the length of his professional experience.

That interpretation is confirmed by the principles of equality and objectivity, since there is no reason why, where two successful candidates in a competition have more professional experience than is required, one should be classified in the higher grade and the other in the lower grade of the career bracket.

It is also confirmed by the defendant's decision of 12 June 1980, which amended the decision of 21 February 1980 by stating that in future appointments to Grade A 6 or A 4 were to be made only in exceptional circumstances to be justified in each case. The applicant claims that that new decision laid down for the first time the principle that candidates should be classified in the starting grade of intermediary career brackets and recognized that that was not the position under the decision of 21 February 1980. Moreover, that decision did not set out any reason enabling the appointing authority not to make an appointment to the higher grade of a career bracket where the minimum professional experience required had been obtained.

Lastly, the applicant's interpretation is also in his view confirmed by the context. At the time the Court of Auditors was in the process of setting up its departments and wished to facilitate appointments to the higher grades of the intermediary career brackets, and that is why it adopted the decision of 21 February 1980. It was only when that process was complete that some discretion was once again conferred upon the appointing authority by the decision of 12 June 1980 and 3 December 1981.

The applicant concludes his first submission with the claim that, since on 1 August 1980 he had 11 ¼ years' experience, he ought to have been appointed to Grade A 4 because Article 2 of the decision of 21 February 1980 states that, in order to be appointed to Grade A 4, a person must have at least 10 years' experience.

(b) In the event of the decision of 21 February 1980 being given a different interpretation from that proposed by the applicant, he sets out a second and alternative submission based on the infringement of Article 5 (3) of the Staff Regulations and breach of the principles of equality and distributive justice.

He claims that the principle of equality should be respected even in the application of the decision of 21 February 1980. To that end, identical criteria which were objectively justified and determined in advance ought to have been laid down for all officials.

In that regard he observes that under the decision of 21 February 1980, 160 appointments were made by automatic application of the criterion relating to the length of professional experience; there were only two exceptions, owing to

a shortage of budgetary posts. In relation to the statement made by the President of the Court of Auditors to the effect that the candidates promoted to Grade A 4 all had a minimum of 13 years' experience, the applicant makes the following comments:

That is an *ex post facto* finding based on statistical data and cannot replace an objectively justifiable criterion;

There is no apparent reason why 13 years' experience should be required when the decision in question stipulates a minimum of 10 years' experience;

The disparity between the average experience of officials classified in Grade A 4, namely 17 years, and the experience of the official with the least experience, namely 13 years, is considerable;

One successful candidate who was classified in Grade A 4 possessed 22 years' experience; in those circumstances there can be no objective justification for treating two officials with 22 years' and 13 years' experience in the same way when two officials with 13 years' and 11 ¼ years' experience are treated differently.

He concludes that the distinctions were made arbitrarily.

Lastly, he claims that other officials appointed on the basis of the same competition as that in which he took part were classified in a higher step than he, even though they had less experience or had not had a university education.

2. The *defendant* first of all emphasizes the circumstances in which the applicant's appointment was made. It stresses that appointments were made by the Court of Auditors in two stages:

As regards the appointments made before 1 April 1980, the objective of the Court of Auditors was to fill the posts in higher grades and to appoint the institution's senior staff. Consequently, it was looking for persons of considerable ability, and it was entirely logical for it to recruit them in Grades A 6 and A 4. Furthermore, all the persons appointed to Grade A 4 had at least 13 years' seniority. Furthermore, the applicant had the opportunity of taking part in that initial stage but failed to pass the competition.

The appointments made after 1 April 1980 following inter-institutional competitions were intended to provide younger staff and to give a second chance to candidates who had failed during the first stage. During the second stage, appointments were made to the starting grade unless there were exceptional circumstances; only two officials were appointed to Grade A 4 and they had very considerable experience (19 years).

The Court of Auditors concludes that the applicant, having failed during the first stage, was treated in the same way as everyone else during the second stage and consequently the principle of equal treatment was respected.

(a) In relation to the applicant's first submission, the defendant considers that the applicant has confused career bracket with grade. In making an appointment, the appointing authority has two choices: first, it chooses the career bracket (A 5/4) and, secondly, it chooses the grade (either Grade 5 or Grade 4); it is not obliged, when holding a competition in a high career bracket, to make appointments to the higher grade of that career bracket.

Furthermore, the applicant's interpretation is contrary to Articles 31 and 32 of the Staff Regulations because it would mean that appointments to a grade could no longer be made on the basis of the post to be filled but only on the basis of seniority.

Moreover, appointment to the higher grade within a career bracket is an option and is subject to budgetary constraints and conditional upon the existence of exceptional circumstances; such appointment therefore cannot be made systematically without infringing Articles 31 and 32 of Staff Regulations.

It is also wrong to state that, if the appointing authority has a discretionary power, the criteria enabling its scope to be determined must be stated: they need only be fixed. That was the case in this instance, where during the first stage of appointments, after the higher grades had virtually all been filled, the appointing authority chose to assign the remaining budgetary posts in those grades persons who had the greatest seniority.

(b) In reply to the arguments put forward by the applicant in his second submission, the defendant repeats that the contested appointment took place during the second stage, in which all staff, with certain exceptions, were appointed to the lower grade of the career bracket. It infers from that that the appointing authority did indeed, in exercising its discretionary power, apply objectively justifiable criteria and that it was under no obligation to lay down those criteria in advance.

The defendant further stresses that the applicant cannot challenge the other appointments to which he refers except by bringing an action before the Court, which he has not done.

3. In his reply, the *applicant* examines first the defendant's reference to the circumstances surrounding his appointment, that is to say the two stages of recruitment.

According to the applicant, on the basis of the same decision of 21 February 1980, two conflicting principles were applied; during the first stage, appointments were made to the higher grade within a career bracket, whilst during the second stage appointments were made to the lower grade. According to the applicant, such a practice must be illegal because it cannot be based on two conflicting principles and it is clearly contrary to the principle of equality.

It is in addition incompatible with the decision of 12 June 1980, which provided that the criteria laid down by the decision of 21 February 1980 were to continue to apply to appointments — such as the applicant's — made as a result of the inter-institutional competitions which were then in progress and which altered those criteria so far as future appointments were concerned by stating that appointments to Grades A 4 and A 6 would be made only in exceptional circumstances. It is therefore apparent from the decision of 12 June

1980 that a principle was applied to the applicant which it was decided should not enter into force until after the second stage of appointments.

The applicant further submits that different, conflicting principles were thus applied in grading those appointed by internal competition — during the first stage — and those appointed by inter-institutional competition — during the second stage. It follows from the judgment of the Court of 6 October 1982 in Case 9/81, *Williams*, [1982] ECR 3301, that the "difference in the methods of appointment does not affect classification and cannot constitute grounds for discrimination in classification".

The applicant claims that it follows from the foregoing considerations that the application is well founded; the two submissions put forward in his application are therefore considered only in the alternative.

(a) In relation to the first submission, the applicant denies that he has confused the concepts of career bracket and grade and that he sought to establish a principle to the effect that the appointing authority was bound to appoint a person to the higher grade of a career bracket. On the contrary, he repeats that in his view such an obligation arises simply from a reading of Article 2 of the decision of 21 February 1980.

The applicant also denies that his interpretation is contrary to Articles 31 and 32 of the Staff Regulations, claiming that his appointment to Grade A 4 rather than to Grade A 5 would not have constituted a misuse of the post of principal administrator or of the rule that an official's grade should correspond to his post, since the post in question covers both Grade A 5 and Grade A 4.

In addition, in relation to the question whether the appointing authority's discretionary power was limited by the posts available in the budget, the applicant claims first that on 1 August 1980 at least three A 4 posts were available in the budget and points out that on 22 December 1981 he himself actually occupied a post classified in the budget as Grade A 4.

He concludes that there is therefore no purpose in entering into a legal debate in order to show that a shortage of available budgetary posts could not prevent an official from being classified in accordance with the Staff Regulations or general decisions adopted in implementation thereof.

(b) The applicant supplements his second submission by the further claim that there was an infringement of the defendant's decision of 12 June 1980. In his view, that decision provides that the principle that appointments should be made to the higher grade in any career bracket should still apply to appointments made during the second stage and should only be abandoned thereafter. Consequently, the applicant ought to have been classified in the higher grade in the career bracket, that is to say in Grade A 4; therefore by adopting a different course of action the defendant failed to comply with the aforesaid decision.

Replying next to the defendant's arguments, the applicant claims that even if in the second stage all persons had been appointed to the lower grade of the career bracket there would none the less be discrimination, since a single decision, namely the Court of Auditors' decision of 21 February 1980, would have been applied in two different ways. Moreover,

the applicant denies that in the second stage all staff were appointed to the lower grade and claims that on the contrary, but for him, they were all appointed to the higher grade. He concludes from that that, even by comparison with the persons appointed in the second stage alone, he was discriminated against. By way of evidence, he refers to other cases and produces an annotated table.

4. In its rejoinder the *defendant* observes by way of preliminary that it cannot agree with the approach which underlies the applicant's action and which amounts to an endeavour to compel the appointing authority to appoint officials by reference solely to their experience and not by reference to the nature of the post to be filled, as is none the less required by the Staff Regulations and the judgments of the Court. For that reason it does not believe that it is worthwhile replying to each of the applicant's arguments individually, but considers it necessary first to set out the rules applicable in order to demonstrate that the applicant's argument is fundamentally inconsistent with the wording and spirit of the law applicable in this case.

According to the defendant, it follows from the Staff Regulations, especially Articles 31 and 32, and from the way in which they have consistently been interpreted by the Court, that in principle a successful candidate in a competition should be appointed to the starting grade of the career bracket, which is to be determined by reference to the nature of the post to be filled. Only in exceptional cases can the appointing authority make an appointment to the higher grade of a career bracket.

The internal decisions adopted by the Court of Auditors, which clearly fall within the framework thus laid down by the Staff Regulations, should consequently be read in the light of Articles 31 and 32 of those regulations. Thus, according to the defendant, Article 2 of the decision of 21 February 1980 sets out for the appointing authority a table of minimum experience to be required of candidates when notices of competitions are drawn up. The contention that that table is intended to determine the grade is incompatible with the spirit of the aforesaid internal decision and with the Staff Regulations. The table is merely intended to be indicative and is not intended to be followed automatically, and the distinction drawn between the two stages of appointment — based on the exceptional circumstances, namely the setting up of a new institution — cannot provide support for the view that appointments were bound to be made on the basis of seniority. Equally, the distinction does not constitute a breach of the principle of equality, since the situation of the applicant, who was appointed during the second stage, is not comparable to the situation of other staff who were appointed during the first stage.

(a) In relation to the applicant's arguments concerning his first submission, the defendant considers that it is illogical on the part of the applicant to cite in support of his application the decision of 21 February 1980 when he puts forward an interpretation of that decision which is clearly *contra legem.*

The applicant's argument is also untenable because, Grade A 8 having fallen into disuse, the appointing authority would have no choice but to appoint staff on the basis of their seniority.

The defendant stresses that appointments are indeed dependent upon the avail-

ability of budgetary posts and submits that the appointing authority is not, on the other hand, bound to use all the posts available; in its view, appointments should be made only on the basis of the duties to be carried out.

Lastly, the defendant insists that the appointing authority is entitled to adopt a recruitment policy establishing a hierarchical structure and a pyramid of appropriate ages within that structure.

(b) In relation to the second submission, the defendant repeats that during the second stage, in the absence of exceptional circumstances, all staff were appointed to the lower grade of a single career bracket and that the applicant ought to have challenged the appointments to which he refers as evidence of the discrimination of which he claims to have been a victim. Moreover, it stresses that the various cases relied upon have nothing in common with the applicant's case.

The defendant concludes that the applicant's aim is to force the appointing authority to apply provisions auto-10029matically without any discretion or choice. According to the defendant, that view has no basis in law, cannot be applied in practice and is not feasible from the point of view of personnel management.

In conclusion, the defendant contends that, in refusing to recognize that the appointing authority is entitled to adopt a recruitment and personnel policy and to grade officials on appointment by reference to the posts to be filled, as it is required to do, the applicant bases his arguments on a mistaken view of the powers of the appointing authority and of the rules governing those powers.

V — Oral procedure

The parties presented oral argument at the sitting on 30 May 1984.

The applicant drew attention in particular to the fact that the Court of Auditors' decision of 12 June 1980 provided that for inter-institutional competitions the rules applicable were the same as those applied in relation to internal competitions.

The defendant stated in particular that the decision of 12 June 1980 also provided that the date by which all appointments resulting from inter-institutional competitions should be made was to be fixed by the appointing authority. The date fixed by the appointing authority was 1 August 1980. After that date, the criteria for appointment were amended to the effect that a successful candidate in a competition was to be appointed directly to Grade A 4 only in exceptional circumstances.

In the reply which it gave by letter of 6 June 1984 to the questions put by the Court at the sitting, the defendant stated that the selection board for inter-institutional competition No CC/A/3/80, as a result of which the applicant was appointed on 9 September 1980 had been set up on 24 April 1980; the closing date for applications was 5 May 1980, the oral tests were held on 9 June 1980, the selection board's report on the outcome of those tests was received by the appointing authority on 12 June 1980 and an offer of appointment was made to the applicant on 3 August 1980.

The Advocate General delivered his Opinion at the sitting on 25 October 1984.

Decision

1 In two applications lodged at the Court Registry on 13 April and 13 October 1982, Charles Lux, an official of the Court of Auditors of the European Communities, brought two actions seeking the annulment of the decision adopted by the President of the Court of Auditors on 20 January 1982 appointing him to the post of principal administrator with classification in Grade A 5, Step 3, as a result of inter-institutional competition No CC/A/3/80 of 21 April 1980. The applicant further claims that the Court should declare that he should be classified in Grade A 4.

Background to the dispute

2 At the beginning of 1980 the Court of Auditors, an institution set up in 1977, needed to increase its staff and, in particular, to fill posts in higher grades. For that purpose it adopted, on 21 February 1980, Document No M 8/80 Rev. 1, entitled "Decision on the criteria for the classification and appointment of staff." Article 1 of that decision provides:

"In general, the appointing authority shall appoint a successful candidate in a competition to the starting grade of the basic career bracket of his category or service,"

and Article 2 provides:

"By way of derogation from Article 1, the appointing authority may appoint a candidate to a grade other than the starting grade of the starting career bracket of his category or service if he gives evidence of professional experience of at least . . . 10 years for Grade A 4 . . ."

3 In addition the Court of Auditors decided in Document No MC 6/80 Rev. 1, adopted in restricted session on 12 June 1980, that "the criteria for classification in grade and step, laid down by the Court and set out in Document No M 8/80 Rev. 1, shall remain in force until the appointments resulting from the inter-institutional competitions at present being held have been made. As soon as those procedures are completed [on a date to be fixed

by the appointing authority], the criteria set out in Document No M 8/80 Rev. 1 shall be amended or supplemented by the following provisions, which shall however take *immediate effect* for temporary staff .... As regards both temporary and permanent staff, appointments direct to A 4 and to A 6 will be made in exceptional circumstances, to be justified in each individual case by reference to the duties to be carried out ...."

4 Having regard to the two decisions of 21 February 1980 and 12 June 1980 and considering that it was necessary to lay down identical criteria for the classification of persons appointed on the basis of competitions, the Court of Auditors adopted on 3 December 1981 Decision No 81-5 on the criteria applicable to the grade and step classification of the staff of the Court. Article 3 of that decision provides that "the appointing authority may, in exceptional circumstances justified on the basis of the post to be filled, make appointments to the higher grade of starting or intermediary career brackets, provided that the candidate gives evidence of professional experience of at least ... 10 years for Grade A 4 ...".

5 The Court of Auditors explains that those decisions reflect successive stages in its recruitment policy. It observes that on its creation it had to contend with the problem of building up its staff and that it chose first to recruit senior staff by attracting persons of considerable ability, whom it wished to appoint to the higher grades of the career brackets. That first stage, which involved solely internal competitions within the Court of Auditors, was completed on 1 April 1980. By contrast, the objectives in the second stage of appointments was, according to the Court of Auditors, essentially to seek younger staff to be appointed to the starting grades of career brackets and, at the same time, to give a second chance to candidates who had been unsuccessful during the first stage of appointments. The second stage involved holding competitions within the institutions of the European Communities. The Court of Auditors observes that among those inter-institutional competitions was competition No CC/A/3/80, in respect of which the notice of competition was published on 21 April 1980 and the selection board's report was received by the appointing authority on 12 June 1980.

6 It appears that the applicant, after being successful in Competition No CC/A/3/80, was appointed on 9 September 1980 to a post of principal administrator and was classified in Grade A 5, Step 2. That appointment was based *inter alia* on Article 46 of the Staff Regulations of Officials of the European Communities.

7 In reply to a complaint submitted by the applicant on 27 August 1981, the President of the Court of Auditors, on 18 December 1981, stated that the applicant's appointment ought not to have been based on Article 46 of the Staff Regulations and decided that the individual decision of 9 September 1980 should be revised and taken "on the basis of the decision of the Court of Auditors of 21 February 1980".

8 Accordingly the President of the Court of Auditors, acting in his capacity as the appointing authority, adopted the individual decision of 20 January 1982; by that decision which expressly referred to the decision of 21 February 1980 and revoked the decision of 9 September 1980, the applicant was appointed to Grade A 5, Step 3.

9 On 16 March 1982 the applicant submitted a complaint, pursuant to Article 90 (2) of the Staff Regulations, against the decision of 20 January 1982, claiming that his new classification was not in conformity with the decision of 21 February 1980, that the decision was thus contrary to the principles of equality and objectivity and that he should be appointed to Grade A 4. The applicant also submitted the first of the two applications to the Court of Justice on 13 April 1982, as a precautionary measure, in case it should be considered that, instead of submitting a complaint, he ought to have brought an action directly against the decision of 20 January 1982.

10 The applicant received no reply from the Court of Auditors to his complaint of 16 March 1982, and, on 13 October 1982, made a second application to the Court of Justice challenging the implied decision rejecting that complaint.

Substance

11 The applicant bases his claim to a higher classification upon Article 5 (3) of the Staff Regulations of Officials, which provides that "identical conditions of recruitment and service career shall apply to all officials belonging to the same category or the same service". He states that the defendant, in accordance with its decision of 21 February 1980 concerning internal competitions, as confirmed by the decision of 12 June 1980 as regards the inter-institutional competitions then in progress, made appointments to a grade higher than the starting grade.

12 The Court of Auditors observes that the contested appointment was made in the second stage of recruitment, in which all staff, subject to certain exceptions, were appointed to the starting grade of the career bracket.

13 In that regard it should be pointed out that the internal decision of the Court of Auditors dated 12 June 1980 clearly states that the criteria for grade and step classification laid down by the Court of Auditors in the internal decision of 21 February 1980 are to remain in force until the appointments resulting from the inter-institutional competitions currently being held have been made.

14 It appears from the documents put before the Court that the appointment resulting from inter-institutional competition No CC/A/3/80 had not yet been made at the time of the decision of 12 June 1980, since it was not until that date that the report of the selection board was received by the appointing authority. That competition must consequently be regarded as "being held" within the meaning of that decision. Moreover, the liberal recruitment policy resulting from the decision of the Court of Auditors dated 21 February 1980 and amended in part by the decision of 12 June 1980 was not finally ended until the adoption of the decision of 3 December 1981.

15 Under those circumstances, the Court of Auditors has no grounds for stating that the appointing authority decided, pursuant to the decision of 12 June 1980, that all the appointments had been made by 1 August 1980 and that

therefore the applicant, who was appointed on 9 September 1980, had to be appointed to the starting grade, in the absence of exceptional circumstances. On the contrary, according to the clear provisions of the decision of 12 June 1980, the recruitment procedures could not be found to have been completed until after the appointments resulting from the inter-institutional competitions had been made.

16 It follows that the criteria for grade and step classification laid down in the decision of the Court of Auditors of 21 February 1980 were still in force at the time of the appointment of the applicant, a successful candidate in competition No CC/A/3/80.

17 As regards the application of Article 2 of the decision of 21 February 1980 to the applicant's appointment, the Court of Auditors contends that it would result in a successful candidate's being graded solely on the basis of his professional experience and not on the basis of the post to be filled. In its view, appointment to a higher grade is merely an option which the appointing authority may or may not exercise and cannot be automatic without infringing Articles 31 and 32 of the Staff Regulations.

18 It should be pointed out in that regard that Article 31 (2) (b) of the Staff Regulations authorizes the appointing authority to make exceptions within certain limits to the general rule that candidates should be appointed to the starting grade. Such an exception, justified by special needs, was laid down by the decision of 21 February 1980.

19 Where an exception to the general rule governing appointments is introduced in the form of a general decision adopted within an institution, the principle that there should be no discrimination between officials in any one category at the time of their recruitment, laid down by Article 5 (3) of the Staff Regulations, would be deprived of any legal significance if in such a case the appointing authority still had the same discretion as is conferred upon it by Article 31 of the Staff Regulations.

20 The Court has held on numerous occasions that Article 5 (3) of the Staff Regulations is of fundamental importance in the law relating to the employment of Community officials. Thus, as the Court held in its judgment of 20 January 1974 in Case 148/73 *(Louwage* v *Commission,* [1974] ECR 81), although an internal directive does not have the character of a rule of law which the administration is bound to observe, it nevertheless lays down a rule of conduct indicating the practice to be followed, from which the administration may not depart without giving the reasons which have led it to do so, since otherwise the principle of equality of treatment would be infringed.

21 In this case, the criteria laid down in the decision of 21 February 1980 for appointment to a grade higher than the starting grade are drafted in such a way that, if they are fulfilled, the appointing authority may make the appointment but cannot lay down additional pre-conditions. That being so, the Court of Auditors was not entitled in the applicant's case to depart from the administrative practice laid down by Article 2 of the decision of 21 February 1980 without giving the reasons for doing so.

22 It should also be pointed out that the Court of Auditors did not give any reasons which could justify its refusal to apply Article 2 of the decision of 21 February 1980 to the applicant. As far as professional experience is concerned, the applicant's claim that he has at least 10 years' professional experience has not been refuted by the Court of Auditors. As to the question whether the budget permitted such an appointment, the Court of Auditors admits that, at the time at which the applicant sat the competition which led to his appointment, it still had two vacant budgetary posts in Grade A 4.

23 Consequently, the defendant's decision of 20 January 1982 must be annulled and the case must be remitted to the Court of Auditors for it to revise the applicant's grading in accordance with the criteria laid down in this judgment.

Costs

24 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Court of Auditors has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Annuls the decision of the President of the Court of Auditors dated 20 January 1982;**

2. **Remits the case to the Court of Auditors for a fresh decision;**

3. **Orders the Court of Auditors to pay the whole of the costs.**

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 13 December 1984.

P. Heim
Registrar

O. Due
President of the Second Chamber