OPINION OF ADVOCATE GENERAL LÉGER

delivered on 28 March 2000 [1]

1. This appeal relates to one of the series of Community staff actions brought in response to the judgment of the Court of First Instance of 5 October 1995 in the case of *Alexopoulou* v *Commission*. [2]

Mr Gevaert (otherwise referred to as 'the appellant' or 'the applicant'), an official of the Commission, is asking the Court to set aside the order of the Court of First Instance of 19 August 1998 [3] in so far as it declared inadmissible the action he had brought against the Commission's decision rejecting his request for reconsideration of his classification in grade.

I — Legal background and facts

2. Article 31 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') governs the classification of staff on recruitment.

Article 31(1) provides that candidates selected by the institutions are to be appointed to the starting grade of their category or service. Article 31(2) allows the appointing authority to make exceptions to that provision for up to a certain proportion of the posts to be filled.

3. Articles 90 and 91 of the Staff Regulations concern the remedies available to staff.

Article 90(1) provides that '[a]ny person to whom these Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him'.

Article 90(2) states that '[a]ny person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a decision or where it has failed to

1 — Original language: French.

2 — Case T-17/95 [1995] ECR-SC I-A-227 and II-683 ('the judgment in *Alexopoulou* v *Commission*').

3 — Case T-160/97 *Gevaert* v *Commission* [1998] ECR-SC I-A-465 and II-1363 ('the contested order').

adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months'.

Finally, Article 91(2) provides that '[a]n appeal [to the Court of First Instance]... shall lie only if the appointing authority has previously had a complaint submitted to it pursuant to Article 90(2) within the period prescribed therein...'.

4. On 1 September 1983, the Commission adopted a decision on the criteria applicable to the grading and classification in step on recruitment [4] ('the decision of 1 September 1983'). According to Article 2, first subparagraph, of that decision:

'The appointing authority shall appoint the probationary official to the starting grade of the career bracket to which he has been recruited'.

5. In 1995 an action was brought before the Court of First Instance by a Commission official who had been classified in the basic grade of her career bracket pursuant to the abovementioned decision. Mrs Alexopoulou considered that she held exceptional qualifications and had sought annulment of the Commission's decision refusing to appoint her to a grade higher than the starting grade.

In the judgment in *Alexopoulou* v *Commission*, the Court pointed out that the decision to classify an official in a particular grade, based on Article 31(2) of the Staff Regulations, came within the scope of a 'wide discretionary power' of the administration. [5] However, it considered that the appointing authority was required in special circumstances, such as where a candidate had exceptional qualifications, specifically to assess the possible application of that provision. [6]

The Court stated that '[s]uch an obligation arises in particular where the specific needs of the department require the recruitment of a specially qualified official and therefore justify recourse to Article 31(2) of the Staff Regulations... or where the person recruited possesses exceptional qualifications and requests the application of those provisions'. [7]

The Court also rejected the Commission's argument that, by adopting the decision of 1 September 1983, it had waived the dis-

4 — Annex 14 to the observations filed by Mr Gevaert on the objection of inadmissibility in Case T-160/97.

5 — Paragraph 19.
6 — Paragraph 21.
7 — *Idem*.

cretionary power conferred upon it by Article 31(2) of the Staff Regulations. It considered that the decision was incompatible with the Staff Regulations in so far as it did not allow the appointing authority to appoint an official to a grade higher than the starting grade. [8]

Consequently, the Court found that the decision appointing Mrs Alexopoulou was vitiated by an error of law. The Commission had refused to classify the applicant at a higher grade solely because the decision of 1 September 1983 precluded such a possibility, without having specifically assessed Mrs Alexopoulou's qualifications pursuant to Article 31(2) of the Staff Regulations.

6. With a view to complying with the judgment in *Alexopoulou* v *Commission*, the Commission amended its decision of 1 September 1983 by a second decision adopted on 7 February 1996 [9] (hereinafter 'the decision of 7 February 1996') and published in *Administrative Notices* of 27 March 1996. Article 2 of the original decision now reads as follows:

'The appointing authority shall appoint a probationary official in the starting grade of the career bracket to which he is recruited.

By way of exception to this principle, the appointing authority may decide to appoint a probationary official to the higher grade of the career bracket where the specific needs of the service require the recruitment of a person with particular qualifications or where the person recruited has exceptional qualifications.

This provision will have effect from 5 October 1995 (date of the Court judgment)'.

7. The judgment in *Alexopoulou* v *Commission* was seen by many Commission officials as marking a significant change of direction in the case-law. In the months following its delivery, some 950 officials [10] filed requests for reconsideration of their classification in grade on the basis of Article 31(2) of the Staff Regulations. More than 80 actions were then brought before the Court of First Instance. [11]

When dealing with those cases, the Court of First Instance essentially distinguished two categories of action: [12]

(a) actions brought by officials who had submitted requests for reclassification

8 — Paragraph 24.

9 — Annex 12 to the application filed by Mr Gevaert in Case T-160/97.

10 — This figure is derived from the information which the Commission communicated to the Court of Justice in Case C-155/98 P *Alexopoulou* v *Commission* [1999] ECR I-4069: see footnote 9 of my Opinion of 25 March 1999 in that case.

11 — See point 9 of my Opinion in Case C-155/98 P *Alexopoulou* v *Commission*.

12 — See the *1998 Annual Report of the Court of Justice of the European Communities*, pp. 111 and 117.

more than three months after the final decision classifying them in grade (first category), and

(b) actions brought by officials who had contested the decision concerning their classification in grade *within the three-month period* prescribed in Article 90(2) of the Staff Regulations (second category).

As regards the first category of case, the Court of First Instance held in a series of orders [13] that the applicants were out of time for the purposes of contesting the decisions fixing their classification in grade. It observed that these applicants had not furnished any evidence of the existence of material new facts which would permit the re-opening of the periods prescribed by Articles 90 and 91 of the Staff Regulations for the filing of complaints and appeals.

As regards the second category of case, the Court of First Instance, in another series of decisions, [14] dismissed a number of actions as unfounded. It considered, essentially, that the applicants had made no submission from which it might be concluded that, by rejecting their requests for re-examination of classification in grade, the appointing authority had exercised the discretion conferred on it by Article 31(2) of the Staff Regulations in a manifestly erroneous manner.

8. Mr Gevaert's action before the Court of First Instance belonged to the first category of cases.

II — Facts and procedure

9. It is apparent from the contested order [15] that the applicant was appointed on 18 January 1995 as a probationary official at the Commission with a classification in grade B 5. He was established in his post on 1 June 1995.

10. On 24 June 1996, i.e. shortly after publication of the decision of 7 February

13 — See, in particular, orders of the Court of First Instance of 11 July 1997 in Case T-16/97 *Chauvin* v *Commission* [1997] ECR-SC I-A-237 and II-681; of 21 September 1998 in Case T-237/97 *Progoulis* v *Commission* [1998] ECR-SC I-A-521 and II-1569 (the appeal lodged by Mr Progoulis was dismissed by order of 18 November 1999 in Case C-431/98 P *Progoulis* v *Commission* [1999] ECR I-8319); of 12 October 1998 in Case T-235/97 *Campoli* v *Commission* [1998] ECR-SC I-A-577 and II-1731 (the appeal lodged by Mr Campoli was dismissed by order of 30 April 1999 in Case C-7/99 P *Campoli* v *Commission* [1999] ECR I-2679); and of 14 October 1998 in Case T-224/97 *Martínez del Peral Cagigal* v *Commission* [1998] ECR-SC I-A-581 and II-1741 (the appeal lodged by Mrs Martínez del Peral Cagigal is examined in my Opinion of 28 March 2000 in Case C-459/98 P *Martínez del Peral Cagigal* v *Commission*).

14 — See, in particular, judgment of the Court of First Instance in Case T-12/97 *Barnett* v *Commission* [1997] ECR-SC I-A-313 and II-863 and order of the Court of First Instance of 13 February 1998 in Case T-195/96 *Alexopoulou* v *Commission* [1998] ECR-SC I-A-51 and II-117 (the appeal lodged by Mrs Alexopoulou was dismissed by the judgment in Case C-155/98 P *Alexopoulou* v *Commission*).

15 — Paragraphs 1 to 12.

1996, the applicant submitted a request pursuant to Article 90(1) of the Staff Regulations for reconsideration of his classification in grade.

11. On 26 August 1996, the Commission rejected that request on the ground that it had been submitted more than three months after the decision on initial classification taken in respect of the applicant.

12. On 25 November 1996, Mr Gevaert submitted a complaint under Article 90(2) of the Staff Regulations; his complaint was rejected by the Commission by decision of 3 February 1997.

13. The applicant brought his action before the Court of First Instance on 23 May 1997. He claimed that the Court should annul the Commission's decision of 26 August 1996 rejecting his request for reclassification in grade.

14. On 14 November 1997, the Court of First Instance invited the parties to the proceedings, and also the parties to a number of other 'reclassification' cases, to take part in an informal meeting with the Judge-Rapporteur. Following that meeting, most of the applicants designated *Gevaert* v *Commission* as a test case.

15. By a document filed on 26 February 1998, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance.

The Commission claimed that the action was inadmissible on the ground that the applicant had failed to file within the three-month period prescribed by Article 90(2) of the Staff Regulations a complaint against the act adversely affecting him, namely the appointing authority's decision of 18 January 1995 determining his definitive classification. It further claimed that neither the judgment in *Alexopoulou* v *Commission* nor the decision of 7 February 1996 constituted a material new fact which would permit the re-opening of this period for filing a complaint. [16]

III — The contested order

16. Before the Court of First Instance, the applicant emphasised that his request for reclassification was not intended to call into question the appointing authority's decision on his initial classification. On the contrary, it was designed to secure the assessment of his qualifications with a view to having his *current classification* reviewed. His request therefore related only to the possible application of Article 31(2) of the Staff Regulations and, accordingly,

16 — Paragraphs 18 and 19 of the contested order.

an improvement in his classification in grade following the decision of 7 February 1996.

The applicant maintained that, in those circumstances, there was no need to speculate on the existence of a new fact which would permit the re-opening of the period for filing a complaint against his initial classification. [17] In any event, the decision of 7 February 1996 did in fact constitute such a material new fact. [18]

The applicant also claimed that the decision of 7 February 1996 had created a new situation for all staff who had taken up their posts between 1 September 1983 and 5 October 1995 and had been classified according to the criteria declared unlawful by the judgment in *Alexopoulou* v *Commission*. He was accordingly justified in submitting a request pursuant to Article 90(1) of the Staff Regulations for a review of his classification as from 5 October 1995. [19]

The applicant further maintained that, by refusing to reconsider his classification in grade, the Commission had breached its duty of care [20] and infringed the principle of equal treatment enshrined in Article 5(3) of the Staff Regulations. [21]

17. In the contested order, the Court of First Instance held:

'32 It is settled case-law that the time-limits set by Articles 90 and 91 of the Staff Regulations for submitting complaints and lodging appeals are a matter of public policy and are not subject to the discretion of the parties and the Court...

33 It is common ground that the applicant failed, within the three-month period provided for by Article 90(2) of the Staff Regulations, to lodge a complaint against the appointing authority's decision of 18 January 1995 concerning his classification on recruitment. Consequently, the applicant's classification in grade became definitive with effect from the expiry of the time-limit for lodging a complaint, that is to say, 31 August 1995, the applicant having acknowledged receipt of the appointing authority's decision on 31 May 1995 ...

34 The Court reiterates that, as the Community judicature has already held, an official cannot be permitted to chal-

17 — Paragraph 20 of the contested order.

18 — Paragraph 31 of the contested order.

19 — Paragraphs 21 and 22 of the contested order.

20 — Paragraphs 27 to 30 of the contested order.

21 — Paragraphs 23 to 26 of the contested order.

lenge the conditions of his initial recruitment once that recruitment has become definitive...

35 The Court considers that the specific purpose of the applicant's request [for reclassification] of 24 June 1996 was to challenge the conditions of his initial recruitment, in particular his classification in grade. It must be emphasised, in that regard, that it is clear from the wording of his request that the applicant was of the opinion that he had "sufficient experience and skills to request a review of [his] actual grade"... However, Article 31(2) of the Staff Regulations relates to classification in grade on initial recruitment. Consequently, even if the applicant's request should, as he maintains, be interpreted as seeking only to secure a review of his current classification and not his classification on recruitment, the fact remains that the request, being based on Article 31(2) of the Staff Regulations, necessarily sought to challenge the conditions of his initial recruitment.

36 Even assuming that the request [for reclassification] of 24 June 1996 must be interpreted narrowly, as the applicant proposed... that is to say, as seeking only to have his qualifications assessed with a view to the possible application of Article 31(2) of the Staff Regulations, the fact remains that his request is susceptible of indirectly challenging the appointing authority's decision of 18 January 1995, which has become definitive.

37 It is settled case-law that although, under Article 90(1) of the Staff Regulations, any official may request that the appointing authority take a decision relating to him, that right does not allow the official to circumvent the time-limits laid down in Articles 90 and 91 for the lodging of a complaint or an appeal by indirectly calling in question by means of a request a previous decision which has not been challenged within the period prescribed. Only the existence of new substantial facts may justify the submission of a request for a review of such a decision...

38 At this stage of the argument, it is therefore necessary to examine whether the applicant has established the existence of a material new fact, allowing a request for reclassification to be submitted after expiry of the time-limit for lodging a complaint.

39 As regards the decision of 7 February 1996 amending the general decision of 1 September 1983, the Court considers that, by its very nature and legal scope,

it cannot constitute a new fact. It was neither the purpose nor the effect of this decision to challenge administrative decisions which had become definitive before it entered into force...

40 In that context, the fact that 5 October 1995 (the date of the judgment in *Alexopoulou* v *Commission*) was taken as the date on which the decision of 7 February 1996 was to take effect means that it applies only to officials recruited after 5 October 1995. As already stated (see paragraph 34 above), Article 31(2) of the Staff Regulations relates to classification in grade on initial recruitment.'

18. The Court of First Instance also rejected the applicant's arguments alleging breach of the principle of care [22] and infringement of the principle of equal treatment. [23]

19. It therefore declared the applicant's action inadmissible.

22 — Paragraphs 46 to 48 of the contested order.

23 — Paragraphs 41 to 45 of the contested order.

IV — The appeal

20. By this appeal, Mr Gevaert is asking the Court to set aside the contested order and give a ruling on the substance of the case. He is thus requesting the Court to annul the Commission's decision of 26 August 1996 rejecting his request for reconsideration of his classification in grade and to order the defendant to pay the costs of both sets of proceedings.

21. The Commission contends that the Court should dismiss the appeal and order the applicant to pay the costs of these proceedings.

22. In support of his appeal, the applicant puts forward three pleas in law:

— an error in the legal classification of his request for reclassification;

— an error in the legal classification of the decision of 7 February 1996 and infringement of the principle of equal treatment and of Article 5(3) of the Staff Regulations;

— failure to state the grounds of the contested order.

23. I shall examine the three pleas in the order in which they were submitted.

First plea, alleging an error in the legal classification of the applicant's request for reclassification

24. The applicant maintains that the Court of First Instance made an error in its legal classification of the facts when it held[24] that his request for reclassification of 24 June 1996 sought to challenge the conditions of his initial recruitment.

He reiterates that the request in issue did not seek to challenge his initial classification. On the contrary, its purpose was to secure an assessment of his qualifications with a view to having his *current classification* reviewed with effect from 5 October 1995.

This error in legal classification had direct consequences since it led the Court of First Instance to ask whether there existed a material new fact capable of re-opening the period for submitting a complaint about the appointing authority's decision on the applicant's initial classification. Rather than addressing that question, the Court should have asked whether there had been a material change of circumstances since the adoption of the decision on classification. According to the case-law of the Court of Justice,[25] such a change of circumstances entitles the applicant to submit a request pursuant to Article 90(1) of the Staff Regulations for reconsideration of his administrative status.

25. It must be borne in mind that, under Article 51 of the EC Statute of the Court of Justice, an appeal is to be limited to points of law. Furthermore, Article 112(1)(c) of the Rules of Procedure of the Court of Justice states that an appeal is to contain the pleas in law and legal arguments which support the form of order which the applicant is asking the Court to make. According to settled case-law, the Court of Justice takes the view that:

'It follows from those provisions that an appeal must indicate precisely the contested

24 — At paragraphs 35 and 36 of the contested order.

25 — The applicant cites the Opinion of Advocate General Reischl in *Williams* v *Court of Auditors* (Case 9/81 [1982] ECR 3301); the Opinion of Advocate General Trabucchi in *Kortner and Others* v *Council, Commission and Parliament* (Joined Cases 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 [1974] ECR 177); and the judgments in Case 28/72 *Tontodonati* v *Commission* [1973] ECR 779, paragraphs 1 to 5; Case 127/84 *Esly* v *Commission* [1985] ECR 1437, paragraphs 10 to 12; and *Williams* v *Court of Auditors*, cited above, paragraphs 12 to 15.

elements of the judgment which the appellant seeks to have set aside and the legal arguments *specifically* advanced in support of the appeal'. [26]

Thus, the Court of Justice has consistently declared inadmissible '... an appeal [or plea] which simply repeats or reproduces *verbatim* the pleas in law and arguments already submitted to the Court of First Instance, including those based on factual allegations expressly dismissed by that Court'. [27] The Court of Justice considers that '... in reality, such an appeal amounts to no more than a request for a re-examination of the application submitted to the Court of First Instance which, under Article 49 of the EC Statute of the Court of Justice, falls outside the jurisdiction [of the Court of Justice]...'. [28]

More specifically, the Court of Justice rejects as manifestly inadmissible appeals by which 'the appellant... merely *repeats his criticism of the arguments which were submitted by the Commission to the Court of First Instance* and were held to be irrelevant'. [29]

26. In the present case, the applicant is indeed merely reiterating the arguments which he put forward before the Court of First Instance in response to the objection of inadmissibility raised by the Commission.

In his observations on that objection of inadmissibility, Mr Gevaert had summarised the Commission's argument as follows:

'The Commission maintains that by his request for reclassification and by the action to which it gave rise, the applicant sought to challenge his initial classification, adopted more than three months previously. It infers that this challenge is out of time in the absence of any new fact which would permit the re-opening of the period laid down in the Staff Regulations for filing a complaint, which had expired in the meantime'. [30]

And, relying on a line of decisions identical to those which he invokes in support of this

26 — Order of 26 April 1993 in C-244/92 P *Kupka-Floridi* v *ESC* [1993] ECR I-2041, paragraph 9, emphasis added. See also orders of 26 September 1994 in Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, paragraph 12; and of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 37; and judgments in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraph 25; Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 49; Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 23; and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 113, and order of 20 January 2000 in Case C-171/99 P *Clauni and Others* v *Commission* (not published in the ECR), paragraph 15.

27 — Order in *Kupka-Floridi* v *ESC*, cited above, paragraph 10. See, in addition to the judgments and orders cited in the previous footnote, orders of 17 October 1995 in Case C-62/94 P *Turner* v *Commission* [1995] ECR I-3177, paragraph 17; of 24 April 1996 in Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 30; of 11 July 1996 in Case C-148/96 P(R) *Goldstein* v *Commission* [1996] ECR I-3883, paragraph 24; of 12 December 1996 in Case C-49/96 P *Progoulis* v *Commission* [1996] ECR I-6803, paragraph 25; and of 27 January 2000 in Case C-341/98 P *Proderec* v *Commission* (not published in the ECR), paragraph 31.

28 — Order in *Proderec* v *Commission*, cited above, paragraph 31.

29 — Order of 14 March 1996 in Case C-31/95 P *Del Plato* v *Commission* [1996] ECR I-1443, paragraph 22, emphasis added.

30 — Point 16 of Mr Gevaert's observations on the plea of inadmissibility in Case T-160/97.

plea, he had answered that argument as follows:

'The request for reclassification is not intended to challenge the initial decision on the applicant's classification. Its sole purpose is to secure an examination of his qualifications with a view to the possible review of his current classification (see, to that effect, the judgments in Case 9/81 *Williams* v *Court of Auditors*... , paragraph 13, and Case T-93/94 *Becker* v *Court of Auditors* [1996] ECR-SC II-301, paragraphs 6 and 10, in which the question of admissibility was not even raised, either by the defendant or by the Court of First Instance of its own motion).

There is therefore no need to consider whether or not there exists a new fact which would permit the re-opening of the period for filing a complaint against the decision on initial classification. The only factors to be considered relate to whether the fact that new classification criteria have been defined is capable of adversely affecting the applicant and to the nature of the decision rejecting his request (see paragraph 13 of the judgment in *Williams* v *Court of Auditors*)'. [31]

27. Since it merely reproduces the arguments put forward before the Court of First Instance, the first plea must be rejected as manifestly inadmissible.

31 — Ibid., point 17.

Second plea, alleging an error in the legal classification of the decision of 7 February 1996 and infringement of the principle of equal treatment and of Article 5(3) of the Staff Regulations

28. By his second plea, the appellant maintains that the Court of First Instance made an error in its legal classification of the facts when it held [32] that the decision of 7 February 1996 did not constitute a material new fact which would permit the re-opening of the periods for lodging complaints and bringing actions laid down in Articles 90 and 91 of the Staff Regulations. Furthermore, the applicant claims that the Court of First Instance infringed the principle of equal treatment and Article 5(3) of the Staff Regulations.

29. In the five pages of the appeal devoted to the second plea, the applicant merely *copied verbatim* the arguments which he had put forward before the Court of First Instance. [33]

For the reasons stated in point 25 of this Opinion, I therefore propose that the Court

32 — At paragraphs 39 to 45 of the contested order.

33 — Examination of the relevant pleadings does indeed show perfect correspondence between:
- points 32 to 34 of the appeal and points 18 to 20 (first subparagraph) of the applicant's observations on the plea of inadmissibility in Case T-160/97;
- point 36 of the appeal and point 21 of the observations on the plea of inadmissibility;
- points 36 (second subparagraph) to 42 of the appeal and points 22 to 25 of the observations on the plea of inadmissibility;
- point 43 of the appeal and point 26 (second subparagraph) of the observations on the plea of inadmissibility;
- point 45 of the appeal and point 27 of the observations on the plea of inadmissibility; and
- points 47 to 52 of the appeal and point 28 of the observations on the plea of inadmissibility.

reject this second plea as manifestly inadmissible.

Third plea, alleging failure to state the grounds of the contested order

30. By his third plea, the appellant maintains that the statement of reasons for the contested order contains a contradiction.

In paragraph 39 of the order, the Court of First Instance held that 'the decision of 7 February 1996... cannot constitute a new fact [on the ground that it] has neither the purpose nor the effect of calling in question administrative decisions which had become final before it entered into force'. The appellant states that 'definitive decisions' are to be understood as decisions on classification in grade which were not challenged within the three-month period prescribed in Article 90(2) of the Staff Regulations.

On the other hand, in paragraph 40 of the contested order, the Court of First Instance stated that 'the fact that 5 October 1995 (the date of the judgment in *Alexopoulou* v *Commission*) was taken as the date on which the decision of 7 February 1996 was to take effect means that it applies only to officials recruited on or after 5 October 1995'. The applicant points out that, on the date on which the decision of 7 February 1996 was adopted, the decisions on classification in grade of officials recruited on 5 October 1995 had also become definitive, since more than three months separate the two dates.

The applicant thus alleges that the Court of First Instance,

(a) by declaring his action inadmissible, denied him the opportunity to challenge the decision on his classification in grade on the ground that it had become definitive, but

(b) by stating that the decision of 7 February 1996 applied to officials recruited on or after 5 October 1995, accepted that such officials could challenge the decisions on their classification in grade even though those decisions had also become definitive.

31. It should be noted that, within the context of the first plea, the appellant did not put forward any evidence from which it might be concluded that the Court of First Instance had erred in law in considering that his request for reclassification sought to challenge the conditions of his initial classification. Moreover, in support of the second plea, the applicant did not put forward any argument capable of upsetting the Court's finding that the decision of

7 February 1996 did not constitute a material new fact capable of re-opening the periods laid down in the Staff Regulations for lodging a complaint and bringing an action against the classification. As I see it, I must conclude that there is no new fact enabling the applicant to challenge the appointing authority's decision of 18 January 1995 on his initial classification.

As the Court of Justice pointed out recently:

'It is settled case-law that *only the existence of material new facts* may justify the submission of a request for a review of a decision following the expiry of the time-limits prescribed by Articles 90 and 91 of the Staff Regulations'. [34]

Therefore, even on the assumption that the Court of First Instance did contradict itself in stating that the decision of 7 February 1996 was applicable to staff recruited on or after 5 October 1995, to set aside the contested order on that point still could not justify the applicant's request for reclassification in grade. Since he has not adduced any evidence of an error in law relating to the only factor susceptible of allowing him to submit a request for a review of the definitive decision on his classification in grade following the expiry of the three-month period prescribed by Article 90(2) of the Staff Regulations, it would not avail the appellant if the contested order were to be set aside on the point criticised in the present plea.

32. In those circumstances, I consider that the third plea of the appeal is inoperative. I therefore propose that the Court reject it as such. [35]

Costs

33. Under Articles 69(2) and 118 of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 70 of the Rules of Procedure, in staff appeals the institutions are to bear their own costs. However, under the second paragraph of Article 122 of the Rules of Procedure, Article 70 is not to apply to appeals brought by officials or any other servants of an institution against the institution. Since the appellant has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by the Commission.

34 — Order of 18 November 1999 in *Progoulis* v *Commission*, cited above, paragraph 36, emphasis added.

35 — See, for example, Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 31.

Conclusion

34. In the light of the foregoing considerations, I therefore propose that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs of these proceedings.