JUDGMENT OF THE COURT (Second Chamber)
29 January 1985 *

In Case 273/83

Bernard Michel, an official of the Commission of the European Communities, residing at 95/45 Boulevard Mettewie, Brussels, represented by Victor Biel, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 18 A rue des Glacis,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Dimitrios Gouloussis, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's refusal to grant the applicant additional seniority of three steps in his grade,

THE COURT (Second Chamber),

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

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

After hearing the Opinion of the Advocate General delivered at the sitting on 29 November 1984,

**

gives the following

* Language of the Case: French.
** after hearing the Opinion of the Advocate General delivered at the sitting on 29 November 1984,

JUDGMENT

(The summary of the facts and issues contained in the full text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 14 December 1983, Bernard Michel, an official of the Commission of the European Communities, brought an action for the annulment of the decision of 20 September 1983 rejecting the complaint submitted by him on 7 June 1983 against his classification in step on changing from Category B to Category A.

2 It appears from the documents before the Court that the applicant, who was born in 1945, has been a Commission official since 1975. Initially he held a post of Administrative Assistant in Grade B 4, and in September 1979 was promoted to Senior Administrative Assistant in Grade B 3. At the same time, the applicant studied at the Institut d'enseignement supérieur Lucien Cooremans, Brussels, and in 1977 obtained a *Licence en sciences commerciales et consulaires* (civil service qualification in business studies) and qualified as an *Agrégé de l'enseignement secondaire supérieur pour les sciences commerciales* (a person entitled to teach commerce in senior schools). Those qualifications enabled him to take part in competitions for posts in Category A.

3 In 1981 the applicant took part in an open competition (No COM/A/325), based on qualifications and tests, to constitute a reserve of administrators in Grades A 7 and A 6 (Official Journal 1981 C 233, p. 21). The competition notice stated that only candidates born after 1 October 1949 were eligible, but that that age limit did not apply to candidates who, on 1 October 1981, had already been officials or servants of the Communities for at least one year.

4 By a letter dated 23 December 1982, the Head of the Recruitment Division in the Commission informed the applicant that on the basis of the results obtained in the tests he had been placed on the list of suitable candidates for a post of Administrator.

5 By a Commission decision of 11 May 1983, the applicant, who at that time was a Senior Administrative Assistant in Grade B 3, Step 4, was appointed Administrator in Grade A 7, Step 1. According to the preamble to that decision, it was adopted 'Having regard to the Staff Regulations of Officials of the Communities, in particular Articles 1, 2, 29 and 30' and 'Having regard to the Commission decision of 10 March 1971 on criteria for determining the grade and step of officials changing category, as amended by the decision of 7 January 1976'.

6 According to those two decisions, any official appointed to a post in a higher category is to be classified in the starting grade of his new career bracket. As regards the step in that grade, the decisions provide, in conformity with Article 46 of the Staff Regulations, that the official is to be accorded seniority corresponding to the notional step equivalent to or immediately above the notional step reached in his former grade. It is not in dispute that the result of applying those decisions to the applicant is to classify him in the first step of Grade A 7.

7 By a memorandum received by the Commission on 7 June 1983, the applicant submitted a complaint against the Commission decision of 11 May 1983, seeking additional seniority on the basis of the Commission decision of 6 June 1973 on the criteria applicable to grade and step classification upon recruitment. In conformity with the second paragraph of Article 32 of the Staff Regulations, Article 5 of the latter decision provides that:

'To take account of a candidate's professional experience which exceeds that taken into consideration for determining his grade on appointment, the appointing authority shall allow additional seniority within the grade in accordance with the annexed table.'

8 The applicant's complaint was dismissed by a decision dated 20 September 1983. In that decision the Commission emphasized that the applicant's appointment involved a change of category in the course of his service with the Commission and that it could not therefore be treated in the same way as a recruitment *stricto sensu.* The Commission added that the applicant had been appointed an official

directly and had not been required to serve a probationary period in accordance with Article 34 of the Staff Regulations.

9 The applicant states that the purpose of his action is twofold, in so far as he claims that the Court should:

(a) Declare that all candidates in an open competition must be treated on an equal footing, so that external candidates have no advantages regarding classification either in grade or in step by comparison with other candidates who are already officials; and

(b) Declare that the applicant is entitled to additional seniority on account of his working experience acquired before his new appointment, since that experience is relevant and specific to his post.

10 As regards the first of these two claims, the applicant submits that his appointment following an open competition is an instance of recruitment and not of promotion. The preamble to the decision appointing him refers to Articles 29 and 30 of the Staff Regulations, which are in the chapter on recruitment. Moreover, there could be no question of promotion since, before commencing a competition procedure, the appointing authority must have exhausted all the possibilities provided for in subparagraphs (a), (b) and (c) of Article 29 (1) of the Staff Regulations, including therefore the possibility of promotion. The appointing authority ought therefore to have taken his specific working experience into account pursuant to Article 32 of the Staff Regulations, which deals specifically with recruitment, and therefore should have accorded him the benefit of Article 5 of the Commission decision of 6 June 1973 laying down detailed rules governing the classification of officials on the basis of the second paragraph of Article 32 of the Staff Regulations.

11 Moreover, the applicant submits that all successful candidates in an open competition must be treated in the same way. The fact of according to successful candidates recruited externally advantages which it is sought to deny to candidates who are already officials leads to discrimination which is incompatible both with the spirit of the Staff Regulations, in particular Article 5 (3) thereof, and with the overriding principle of non-discrimination. According to the practice followed by the Commission, only candidates recruited externally are entitled to have their previous experience taken into account and internal candidates are deprived of that right by the Commission decisions of 10 March 1971 and 7 January 1976 laying down detailed rules governing the classification in step of officials changing to a

higher category on the basis of the principles laid down in Article 46 of the Staff Regulations.

12 In the Commission's view, the fact of an official's changing from one category to a higher category cannot be treated as a recruitment. Whilst it is true that the change of category is not a promotion within the meaning of Article 45 (1) of the Staff Regulations, it is nevertheless a promotion in the broad sense. The fact that the rule on changes of category is contained in Article 45 (2) proves clearly that that broad concept of promotion underlies the said rule. It is for that reason, therefore, that the Commission applied to the applicant the principles laid down in Article 46 of the Staff Regulations rather than those contained in Article 32. The applicant fails to appreciate the distinction between 'recruitment' and 'appointment'; recruitment occurs only once in the career of an official, whereas appointment may occur on several occasions.

13 Moreover, argues the Commission, the principle of equality must in this case be considered in relation to the officials in Category B who entered the service at the same time as the applicant, the latter's circumstances when he took part in the competition being different from those of the external candidates taking part in the same competition. In fact, the Staff Regulations do not accord the same treatment to officials and persons from outside. Thus, Article 29 (1) requires that the procedure by way of an open competition is to be commenced after the other appointment procedures have been exhausted and Article 1 (1) (g) of Annex III favours officials, in so far as competition notices may — and this was done in the competition in question — extend the age limit for officials taking part in an open competition.

14 It is appropriate to review the provisions of the Staff Regulations whose applicability to the present case is at issue. They are Article 32, which is in Title III, Chapter 1, entitled 'Recruitment', and Articles 45 and 46, which are in Title III, Chapter 3, entitled 'Reports, advancement to a higher step and promotion'.

15 According to the first paragraph of Article 32, 'An official shall be recruited in the first step in his grade'. The second paragraph adds: 'However, the appointing authority may, taking account of the training and special experience for the post

of the person concerned, allow additional seniority in his grade', that seniority being limited to 48 months, that is to say two steps, for the grade in question.

16 Article 45 (1) of the Staff Regulations provides *inter alia* that promotion 'shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs.' In addition, paragraph (2) of that article provides that 'An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition'.

17 Finally, the first paragraph of Article 46 provides that 'An official appointed to a higher grade shall, in his new grade, have the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for his new grade', it being provided in the third paragraph of that article that an official appointed to a higher grade is to be classified not lower than the initial step for that grade.

18 It must be acknowledged that the terms of the relevant provisions vary so considerably that they render any purely literal interpretation difficult. On the one hand, the transfer of an official from one category to another does not constitute 'recruitment' in the usual sense of that word. On the other hand, as the Commission recognizes, it is likewise not a 'promotion' within the meaning of Article 45 (1). Finally, whilst the expression 'appointment' used in Article 46 appears in fact to cover this case, there is room for doubt as to whether a transfer from one category to another constitutes an appointment 'to a higher grade'. It is therefore necessary, for the purpose of interpreting those provisions, to have regard also to the context in which they appear and to their purpose.

19 In that connection, it is to be noted in the first place that the provision regarding transfers from one category to another appears in the chapter concerning advancement to a higher step and promotion. It is part of Article 45, the first paragraph of which concerns promotion in the strict sense, and it immediately

precedes Article 46. In view of the close relationship between Article 45 and Article 46, it seems appropriate to take the provisions of the latter article to refer both to situations covered by Article 45 (1) and to those covered by Article 45 (2).

20 As regards the respective purposes of Articles 32 and 46, it is to be emphasized that the first of those provisions is intended in particular to leave open the possibility for the appointing authority to take into account, albeit within rather strict limits, training and professional experience acquired by a candidate before he takes up his duties as a Community official.

21 On the other hand, the purpose of Article 46 is to ensure the greatest possible continuity regarding an official's seniority and salary as his career develops. The need for such a provision derives in particular from the fact that, according to the table of basic salaries, the salaries for the highest steps in a grade and those for the lower steps in the grade above overlap.

22 There is a similar overlap between the various categories. In order to ensure that an official in one of the highest grades in a category does not suffer a loss, which might in some cases be substantial, of seniority and salary by comparision with his colleagues on being transferred to the category above, it is therefore necessary to apply to him the principles laid down in Article 46 of the Staff Regulations.

23 It follows from the foregoing that the relevant provisions of the Staff Regulations must be interpreted as meaning that the classification in step of an official moving from one category to another must be based on the principles laid down in Article 46 and not on those laid down in the second paragraph of Article 32. The appointing authority cannot therefore be criticized for applying to the applicant the decisions of 10 March 1971 and 7 January 1976, which were rightly based on the principles laid down in Article 46 of the Staff Regulations.

24 The application of those decisions does not constitute discrimination against the applicant by comparison with the external candidates who took part in the same competition. If, in a competition organized to constitute a reserve for the starting grade of a category, there have participated not only external candidates but also officials seeking to be transferred to that category in accordance with Article 45 (2), the appointing authority in fact takes account of the experience of the candidates in the two groups for the purpose of their classification in step. External candidates may have the experience which they acquired before entering the service taken into account pursuant to and within the limits of the second paragraph of Article 32. In the case of officials transferred from a lower category, the appointing authority will as a general rule already have taken account of any such experience when they were recruited to that category and their experience as officials in the service of the Communities will have been taken into account by their advancement to higher steps and by promotions within that category. Quite properly, Article 46 has the effect of maintaining the seniority thus acquired when officials are transferred to a new category.

25 The fact that account is taken of relevant experience by means of two separate systems, each of which applies to one of two different groups of candidates, does not constitute discrimination, provided that the two groups are objectively different and the two systems are adapted to the particular circumstances of each group, and notwithstanding the fact that, in a specific instance, the other system proves more advantageous to the candidate in question. The disadvantage of which the applicant complains is, moreover, offset by the advantages — in the form of dispensation from the age-limit and probationary period — accorded to him but not to external candidates and similarly founded on the objective difference between the circumstances of the two groups.

26 Consequently, the applicant's arguments against the rejection of his complaint are without foundation and the application must be dismissed.

Costs

27 Pursuant to Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of those rules, institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 29 January 1985.

P. Heim
Registrar

O. Due
President of the Second Chamber