In Case 173/80

VOLKER BLASIG, an official of the Commission of the European Communities, residing in Moutfort, Luxembourg, represented by Günther Maximini of the Landgericht Trier, with an address for service in Luxembourg at the latter's Chambers, 96 Rue du Kiem, Neudorf,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Jörn Pipkorn, a member of its Legal Department, acting as Agent, and by Etienne Van Werveke, of the Brussels Bar, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the applicant's classification in Career Bracket B 2/B 3 is incorrect and for compensation for the damage caused thereby,

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

The applicant works for the Commission as a Senior Administrative Assistant in Grade B 3 in administrative unit DG IX Lx 6 (Analysis and Programming) and is assigned to a post provided for in the operating budget.

The description of the duties of officials in Career Bracket B 2/B 3 paid out of the administrative appropriations is the subject of a decision of the Commission of 1 July 1972 describing the basic posts figuring in Annex I A. of the Staff Regulations of Officials of the European Communities and the duties they involve (Staff Courier No 272 of 4 September 1973).

According to that decision an official graded in the said career bracket is responsible for:

— carrying out, in the light of general directives, difficult and complex tasks; and

— assisting the programmer in elaborating machine programmes for electronic computers.

The titles corresponding to those duties are "Senior Administrative Assistant" and "Assistant Programmer".

Principal Administrative Assistants in Grade B 1 are described as being:

— engaged in carrying out especially difficult and complex tasks within the framework of general directives; and

— responsible for working out programmes for electronic computers.

The titles corresponding to those duties are "Principal Administrative Assistant or Head Clerk" and "Programmer".

The applicant has been employed by the Commission since 1 October 1974 as a Senior Administrative Assistant in Grade B 3. He was recruited as a result of Competition No COM/B/106 for Senior Administrative Assistants in Grades 3 and 2 of Category B. In the competition notice published on that occasion in the Official Journal of the European Communities C 71 of 8 September 1973, p. 4, the duties to be performed by successful applicants were described as being those of an:

"Executive official who, on the basis of general instructions, carries out difficult and complex tasks, in particular the preparation and refinement of programmes for third-generation computers."

The applicant's name was entered on the reserve list drawn up pursuant to that competition.

On 6 September 1974 the Commission's Director for Personnel and Adminis-

tration in Luxembourg sent the applicant a letter worded as follows:

"Following our letters of 19 June and 26 July 1974 I have the pleasure of being able to confirm that as a result of your taking part in Competition No COM/B/106 and the medical examination which you underwent we are able to offer you a post as Senior Administrative Assistant (Programmer) with the Commission of the European Communities (Directorate-General for Personnel and Administration, Computer Operations Division) in Luxembourg.

You will be employed as a probationary official in Grade B 3, Step 1."

By a telex message dated 27 September 1974 the applicant confirmed that he would take up his duties on 1 October 1974. By a decision of the appointing authority of 18 October 1974 the applicant was appointed as a Senior Administrative Assistant with effect from 1 October 1974 in Grade B 3, Step 1.

On 6 December 1974 the applicant lodged a complaint against that decision pursuant to Article 90 (2) of the Staff Regulations, claiming that he ought to be given the Grade B 2, Step 1, on the ground that his experience justified that grade.

By decision of the Commission notified to the applicant on 11 June 1975 the complaint was rejected. Subsequently by a decision of the appointing authority on 16 July 1975 the applicant became an established official in his post with effect from 1 July 1975.

On 20 December 1979 the applicant once again made a complaint pursuant to Article 90 (2) of the Staff Regulations alleging that the appointing authority had failed "to adopt a measure prescribed by the Staff Regulations", namely to place the applicant in Grade B 1.

By a letter dated 24 April 1980, sent to the applicant on 30 April 1980, the appropriate member of the Commission, Mr Tugendhat, informed the applicant that the Commission had dismissed his complaint on the ground that his grading in B 3, Step 1, had become unassailable after the expiry of the period for bringing an action following rejection of the complaint made in 1974 against that grading and that in any case the grading was in fact justified having regard to his taking part in a competition specifically organized to fill vacancies in Career Bracket B 2/B 3.

By an application received at the Court on 29 July 1980 the applicant brought the present action based on "an incorrect grading in a post in Career Bracket B 2/B 3."

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

II — Conclusions of the parties

The *applicant* claims that the Court should:

"1. Order the defendant to place the applicant in Grade B 1 in accordance with Articles 7 and 31 of the Staff Regulations of Officials of the European Communities, with retroactive effect from 1 October 1974;

2. Order the defendant to pay the applicant the difference between the salary actually paid and that which he would have received if he had been properly graded, together with interest at 8 %;

3. Order the defendant to pay the costs".

The *defendant* contends that the Court should:

"1. Dismiss the action as inadmissible or alternatively as unfounded;

2. Order the applicant to pay the costs".

III — Submissions and arguments of the parties

Admissibility of the action

In his application the *applicant* observes that the object of his complaint of 6 September 1974 was to secure a higher grading *within the same career bracket* in reliance mainly on his experience in computer technology.

At the time the applicant was unaware that the defendant's manner of grading was irregular. Moreover he could not have known it because it was only on 9 October 1979 that he received a copy of the new "Guide to Staff Reports" and Annex I A to the Staff Regulations containing the description of his duties and the grade which he ought to have.

The description of duties had already been published in 1973 but at that time the applicant had not yet taken up employment with the Commission. He considers that it was not for him to obtain those publications but that he was entitled to expect the defendant to deal with his appointment in accordance with the relevant provisions.

As a result the object of the complaint of 20 December 1979 was to invite the defendant to take a decision which it had refrained from taking in spite of the express provisions enjoining it so to do.

The *defendant* maintains that the application is inadmissible because it was lodged after the expiry of the period prescribed in Article 91 (3) of the Staff Regulations. The measure which is alleged to have adversely affected the applicant was the grading in B 3 pursuant to the decision of the appointing authority of 18 October 1974.

Although he had lodged a complaint against that decision on 6 December 1974 the applicant had allowed the period for bringing an action after the rejection of his complaint to expire. The subsequent decisions of the appointing authority merely confirmed the original decision which is alleged to have adversely affected the applicant.

The description of duties published in 1973 in the Staff Courier had been available to all interested officials since the date of its publication. The defendant stresses that the description of the duties attached to posts in Category B as contained in the 1979 Guide to Staff Reports is identical to that contained in the 1973 Guide to Staff Reports.

In the defendant's view the inadmissibility of the first head of the application renders the second inadmissible since that also has its origin in the allegedly incorrect grading. That claim is therefore subject to the same rules on the limitation of actions as the first.

If it is a claim for damages it is time-barred pursuant to Article 43 of the Statute of the Court of Justice of the EEC.

In his reply the *applicant* says that the object of his complaint of 6 September 1974 was to obtain a higher grading *within the same career bracket (B 2/B 3)*, whereas the complaint of 20 December 1979 contemplated grading *in another career bracket*. The reply to that second complaint cannot therefore be regarded as a measure confirming a previous decision.

The applicant stresses, moreover, that when the first periodic report was made on him he was never given a copy of the 1973 Guide to Staff Reports. Further, there was a general ignorance of that guide.

The *defendant* observes that when taking up his employment the applicant received a codified version of the Staff Regulations. Moreover, the 1975 supplement to the Guide to Staff Reports issued in November 1973 was sent to the applicant and to all other officials in active employment.

The only question which arises is whether the discovery of criteria governing the applicant's recruitment constitutes a new factor capable of causing time to start to run afresh. In Case 102/75 *Petersen* v *Commission* [1976] ECR 1777 at p. 1792, the Court held that the discovery of internal criteria on grading does not constitute a new fact having that legal effect. The defendant considers that that finding applies *a fortiori* in the present case.

The main purpose of the appointing authority's reply of 24 April 1980 to the complaint of 20 December 1979 was to show the applicant the unassailable nature of the decision of 18 October 1974 on his recruitment. It should therefore be regarded as confirmation of that decision and is not capable of starting the period of limitation to run afresh.

The fact that the confirmation of the decision taken at the time does not confine itself solely to the unassailable nature of the decision but supplements it by putting forward arguments of substance is not sufficient to lead to any other view.

Substance

The *applicant* alleges that the description of duties in Notice of Competition No COM/B/106 shows that it was intended to recruit experienced programmers ("Executive official who, on the basis of general instructions, carries out difficult and complex tasks, in particular the preparation and refinement of programmes for third-generation computers."). Moreover, in the offer of employment which it made on 6 September 1974 the Commission also used the word "programmer." It follows that the defendant advertised a vacancy for a programmer in Notice of Competition No COM/B/106.

By virtue of Annex I A to the Staff Regulations the duties of a programmer are described as follows:

"— Responsible for working out programmes for electronic computers."

That post is in Grade B 1. The description of duties corresponds to that in Notice of Competition No COM/B/106.

In placing the applicant in Grade B 3 the defendant disregarded Article 31 (1) and Article 7 of the Staff Regulations. The defendant avoided placing the applicant

in Grade B 1, the grade corresponding to the description of duties quoted above, by placing at the head of Competition No COM/B/106 the description of duties of an executive official in a department of general administration and thus grading the vacancy in Career Bracket B 2/B 3.

The *defendant* observes that Notice of Competition No COM/B/106 announced that a reserve list for Senior Administrative Assistants in Career Bracket B 2/B 3 would be drawn up. The description of duties is basically in accordance with the decision published in Staff Courier No 272 of 4 September 1973 and in the Guide to Staff Reports of November 1973 and September 1979.

It explains that there is none the less a difference between the description of the duties of officials in Career Bracket B 2/B 3 who are paid out of the administrative appropriations (Annex 1 A to the Staff Regulations) and the description of the duties of officials in Grades B 3 to B 5 paid out of the research funds (Annex 1 B to the Staff Regulations). The latter are described as "programmers" and officials in Grades B 1 and B 2 of that category are called "chief programmers".

The defendant could employ the applicant only on the basis of the results of Competition No COM/B/106 and solely to occupy a post in Career Bracket B 2/B 3. It never gave any assurance to any other effect. The summary description of the applicant's work in the word "programmer" which sometimes appears in administrative memoranda has never had any purport other than to complement the official designation of "Senior Administrative Assistant" applied to officials in Career Bracket B 2/B 3.

The argument to the effect that the applicant does work demanding the qualifications of those more highly paid is, even if it were correct, irrelevant for it would not give entitlement to a higher grade. According to decisions of the Court access to a higher career bracket is possible only as a result of promotion. The claim for payment of arrears of salary is also unfounded because the applicant's grading is in accordance with the Staff Regulations.

In reply the *applicant* says that the definition of every post and the publication of a table of duties and tasks relating thereto is of great importance (judgment of 16 December 1964 in Joined Cases 109/63 and 13/64 *Muller* v *Commission* [1964] ECR 663).

The defendant, in the applicant's view, overlooks the fact that Competition No COM/B/106 was not intended to recruit assistants with general duties but executive officials who, on the basis of general instructions, would carry out difficult and complex tasks, in particular the preparation and refinement of programmes for third-generation computers. That description corresponds to that of the duties appertaining to the post of "programmer", which is a post in Career Bracket B 1.

It appears from a proposed amendment to the table of descriptions of duties sent by the Commission to the Central Staff Committee in January 1975 that programmers could be recruited only in Career Brackets B 1 (Programmer) and B 2/B 3 (Assistant Programmer) and that in future the task of assisting programmers would be carried out by "young programmers" to be recruited in Career Bracket B 4/B 5. The applicant infers that he was recruited upon the

terms of grading provided for in the proposed new version and not according to the descriptions in force in 1973.

In its rejoinder the *defendant* adheres to the contentions which it put forward in the defence.

IV — Oral prodecure

At the hearing on 19 March 1981 the parties presented oral argument.

The Advocate General delivered his opinion on 14 May 1981.

Decision

1 By application lodged at the Court Registry on 29 July 1980 Volker Blasig, an official of the Commission, brought an action for an order that the Commission place him in Grade B 1 with retroactive effect from 1 October 1974 and pay him the difference, with interest, between the salary actually paid and that which he would have received as an official in Grade B 1.

2 The applicant commenced his duties in 1974 after taking part in an open competition (Competition No COM/B/106) for the post of Senior Administrative Assistant in Grades 3 and 2 of Category B. In the competition notice the duties were described as those of an: "Executive official who, on the basis of general instructions, carries out difficult and complex tasks, in particular the preparation and refinement of programmes for third-generation computers." As a result of the competition the Commission offered the applicant "the post of Senior Administrative Assistant (Programmer)" in Directorate-General IX "as a probationary official in Grade B 3". The applicant accepted the offer and confirmed that he would take up his employment on 1 October 1974. The decision appointing the applicant, which was adopted on 18 October 1974, placed him as a Senior Administrative Assistant in the first step of Grade B 3.

3 On 6 December 1974 the applicant lodged a complaint against that decision alleging that in view of his experience with third-generation computers he

ought to be placed in the first step of Grade B 2 or at least in the third step of Grade B 3. That complaint was rejected by a decision of the Commission of 2 June 1975 which was founded on the principle that the appointing authority appoints every successful applicant as a probationary official in the basic grade of the basic career bracket of his category.

4 At the end of his probationary period the applicant became an established official in his post with effect from 1 July 1975.

5 On 20 December 1979 the applicant lodged a further complaint and sought to be placed in Grade B 1. By a letter dated 24 April 1980 Mr Tugendhat, a member of the Commission, informed the applicant that the Commission had rejected the complaint on the ground that the placing in the first step of Grade B 3 had become unassailable after the expiry of the period for bringing an action pursuant to the rejection of the complaint made against that grading in 1974. Further, the contested grading was in fact justified in view of the nature of the competition on the basis of which the applicant had been engaged. The present action is essentially directed against that decision to reject the complaint.

6 The Commission submits that the action was brought after the expiry of the period laid down in Article 91 (3) of the Staff Regulations and is therefore inadmissible.

7 The applicant, who maintains that the duties which he performs are those of a Programmer and not of a Senior Administrative Assistant and that they therefore correspond to a post in Grade B 1, makes two submissions to show that his application is not time-barred. In the first place, the purpose of the complaint of 1979 was different from the purpose of the complaint made in 1974 which sought only a higher grading in the same Career Bracket (B 3/B 2); the Commission's decision rejecting the complaint of 1979 should in those circumstances not be regarded as being of a confirmatory nature. Secondly, the unlawfulness of his being placed in a grade other than B 1 became apparent to him only in October 1979 after he received the "Guide to Staff Reports" compiled by the Commission pursuant to Article 43 of the

Staff Regulations; it included in the descriptive table of basic posts a reference to "Programmer" in the column relating to Grade B 1 and a reference to "Assistant Programmer" in the column relating to Grades B 2 and B 3.

8 It is relevant to observe first of all that the measure adversely affecting the applicant which is the subject of the action is the appointing authority's decision of 18 October 1974 placing him in Grade B 3. Since the Commission rejected a complaint which was lodged against that decision within the requisite period it was not required, unless important new facts arose, to consider a fresh complaint against the same decision.

9 The first submission must therefore be rejected and it is necessary to consider whether the circumstances cited in the second submission may be regarded as a new act capable of starting the period of limitation to run afresh.

10 The Commission observes in that regard that the description of duties relating to posts in Category B given in the 1979 Guide to Staff Reports is identical to that contained in the 1973 Guide to Staff Reports. The latter was published in the 1973 Staff Courier (No 272 of 4 September 1973) and was available to all interested officials as from the date of its publication.

11 The applicant does not deny that the description of the basic posts had already been published in 1973. He points out however that at that time he had not yet taken up employment with the Commission. In his view he was not bound to check the content of publications, issued prior to his taking up employment, which might concern him. It is for the appointing authority to supply officials with all publications relative to the correspondence between their duties and their grade; the applicant however was not notified of the Guide to Staff Reports until he received a note from the Commission dated 9 October 1979.

12 The essence of the applicant's argument, therefore, is to submit that the fact that the existence and application of the description of the basic posts annexed to the Guide to Staff Reports came to his attention constitutes a new fact capable of starting the period of limitation to run afresh.

13 That argument cannot be accepted. The purpose of the Guide to Staff Reports is to provide guide-lines for senior officials responsible for preparing periodic reports pursuant to Article 43 of the Staff Regulations. It is published in order to inform the officials concerned of the criteria applicable under that procedure. Accordingly, the description of the basic posts which it contains does not entitle the staff to demand appointment in a given grade or *a fortiori* to require, after appointment in a given grade, a higher grade outside the normal promotion procedure.

14 Accordingly, the application is inadmissible in so far as it asks for the applicant to be placed in Grade B 1. It follows that the application for payment of the difference between the salary actually received and that payable on the applicant's re-grading must fail.

15 The action must therefore be dismissed as inadmissible in its entirety.

Costs

16 According to Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 thereof the costs incurred by the institutions in actions by servants of the Communities are to be borne by the institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the parties to bear their own costs.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 18 June 1981.

A. Van Houtte
Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 14 MAY 1981 [1]

Mr President,
Members of the Court,

In the autumn of 1973 the Commission announced in the Official Journal of the European Communities (C 71, p. 4, of 8 September 1973) that it was organizing an open competition on the basis of qualifications and tests to draw up a reserve list of Senior Administrative Assistants in Grades 3 and 2 of Category B (Notice of Competition No COM/B/106).

The duties attached to the posts to be filled were described as being those of an:

"Executive official who, on the basis of general instructions, carries out difficult and complex tasks, in particular the preparation and refinement of programmes for third-generation computers."

Candidates were to be not less than 28 and not more than 40 years of age. The requisite qualifications and experience

1 — Translated from the German.