ORDER OF THE THIRD CHAMBER OF THE COURT
19 February 1987 *

In Case 101/86

Sven-Ole Mogensen, an official of the Commission of the European Communities, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 13 boulevard Royal,

applicant,

v

Commission of the European Communities, represented by Marie Wolfcarius, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

concerning, at this stage of the proceedings, the admissibility of the action,

THE COURT (Third Chamber)

composed of: Y. Galmot, President of the Chamber, U. Everling and J. C. Moitinho de Almeida, Judges,

* Language of the Case: French.

Advocate General: M. Darmon
Registrar: P. Heim

after hearing the views of the Advocate General,

makes the following

Order

1 By an application lodged at the Court Registry on 23 April 1986 Mr Mogensen brought an action for the annulment of the decision of 24 June 1985 of the Director-General for Personnel and Administration of the Commission rejecting the applicant's request for a review of his grading, submitted on 29 October 1984, and of the implied decision rejecting the complaint regarding that decision submitted by him on 24 September 1985.

2 On 25 June 1986 the Commission raised an objection of inadmissibility pursuant to Article 91 (1) of the Rules of Procedure, on the grounds that the applicant's request and complaint were both out of time.

3 Mr Mogensen was appointed an official in Grade LA 6, third step, on 4 April 1977. On 29 October 1984 he submitted a request for regrading with effect from 1 April 1977.

4 By a letter dated 29 January 1985 the Grading Committee asked Mr Mogensen to provide it with a number of documents and certificates, and on 19 April 1985 it issued an opinion in favour of his request. However, the request was rejected by a decision of the appointing authority on 24 June 1985. On 24 September 1985 Mr Mogensen submitted a complaint against that decision. No reply was given to his complaint.

5 In support of its objection of inadmissibility, the Commission argues first of all that Mr Mogensen's request for regrading was out of time, on the ground that the act adversely affecting him was in fact the decision of 1 April 1977 appointing him, against which no complaint was made and which has become final. The Commission does acknowledge that Mr Mogensen submitted his request for regrading after the publication of the decision adopted by the Commission on 1 September 1983 on the 'criteria applicable to grade and step classification upon recruitment', which repealed and replaced the decision of 6 June 1973 which was in force when the applicant was recruited. However, the memorandum of 21 October 1983 of the Director-General for Personnel and Administration which accompanied the publication of that decision in 'Administrative Notices' set a period of three months for the submission of requests for regrading. Mr Mogensen submitted his request for regrading only on 29 October 1984, although that three-month period had expired on 21 January 1984.

6 Secondly, the Commission argues that even supposing the request for regrading to have been submitted in good time, the complaint of 24 September 1985 was in any event out of time. An implied decision rejecting the request for regrading must be deemed to have been made on 29 February 1985, and Mr Mogensen submitted no complaint against that implied decision within the period of three months. The express rejection of his request for regrading on 24 June 1985 could not have the effect of reopening a complaint period which had already expired.

7 The applicant, on the other hand, argues that Article 90 (1) of the Staff Regulations lays down no limitation period for the submission of requests, and an official may therefore submit the same request to the appointing authority on several occasions. Furthermore, relying on the Court's case-law, the applicant emphasizes that the regrading of one or more of his colleagues who were in a situation similar to his own must be regarded as a new fact substantial enough to allow him to request his regrading. A colleague of his, Mr Pedersen, who in the applicant's view was in a situation similar to his own, was regraded on 20 November 1984 after a favourable opinion issued by the Grading Committee on 21 September 1984. He considers therefore that his own request dated 29 October 1984 was not out of time.

8 With regard to the objection that his complaint was out of time the applicant argues that the four-month period within which the administration was obliged to reply to his request started to run only on 1 March 1985, the day on which a complete request was submitted to the Commission. Since an express decision rejecting the request was given on 24 June 1985 the applicant submitted his complaint within the three-month period provided for by Article 90 (2) of the Staff Regulations.

9 It must be pointed out first of all that under Article 90 (1) of the Staff Regulations any official may request the appointing authority to take a decision relating to him. However, the Court has consistently held that that right does not allow an official to evade the time-limits laid down in Articles 90 and 91 for the lodging of a complaint and an appeal by indirectly calling in question by means of a request a previous decision which was not challenged within the period prescribed. Only the existence of substantial new facts may justify the submission of a request for the review of such a decision.

10 Although the decision of 1 April 1977 appointing Mr Mogensen was not contested within the prescribed period, the Commission does not dispute that its decision of 1 September 1983, referred to above, constituted a new fact of such a nature as to permit the applicant to bring proceedings against his initial grading (on this point see the judgment of 1 December 1983 in Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981). It is clear, however, that the applicant did not submit his request for regrading within the three-month period granted to him by that decision.

11 With a view to taking advantage nevertheless of that further period for bringing proceedings against his grading the applicant argues that he submitted his request after one of his colleagues, Mr Pedersen, obtained his regrading. That, says the applicant, was a substantial new fact of such a nature as to allow him to submit his own request (judgment of 15 May 1985 in Case 127/84 *Esly* v *Commission* [1985] ECR 1437).

12 It is true that in its judgment of 15 May 1985 the Court held that the regrading of one or more colleagues of an official, who were in a position similar to his own, must be regarded as a new fact permitting him to submit a request for regrading in spite of the fact that a previous decision was not contested.

13 However, the period laid down by the administration for the submission of requests for regrading applied equally to all officials of the Commission. Mr Mogensen should therefore have expected that colleagues in a position similar to his own would be regraded on their requests submitted within the prescribed period.

14 Consequently, the regrading of Mr Pedersen cannot be regarded as a new fact justifying a review of the applicant's grading. It follows that the applicant's request for regrading submitted on 29 October 1984 was out of time.

15 The application must therefore be dismissed as inadmissible, and it is not necessary to examine the second objection of inadmissibility raised by the Commission.

Costs

16 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70, institutions are to bear their own costs in proceedings commenced by officials.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the parties to bear their own costs.

Luxembourg, 19 February 1987.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber