OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 8 December 1987 *

Mr President,
Members of the Court,

1. By a decision of 13 August 1981 taken by the President of the Court in his capacity of appointing authority, Leslie Brown, a clerical officer in Grade C 2, Step 5, was appointed an administrative assistant in Grade B 5, Step 4, with effect from 1 August 1981. At the same time Mr Brown was granted a differential allowance equal to the difference between the net remuneration relating to his former classification in Grade C 2, Step 5, and the net remuneration relating to his classification in Grade B 5, Step 4. Under the system in force at that time, the differential allowance was meant to be absorbed as the net remuneration in the new grade increased.

2. Mr Brown was quick to object that the appointment would cause him to suffer a significant loss compared with what he would have received in his old grade if he had continued to advance to a higher step every two years and had received general salary increases applying to all officials.

3. In a complaint lodged on 12 November 1981 pursuant to Article 90 (2) of the Staff Regulations he relied above all on the second sentence of the second paragraph of Article 46 of the Staff Regulations, which provides that:

'An official appointed to the higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade.'

4. In a letter of 5 February 1982 dismissing the complaint the President of the Court rejected that argument, stating that:

'Article 46 of the Staff Regulations upon which the complainant relies cannot apply either directly or by analogy to the situation. The article concerns only the step in which an official is to be placed on promotion within the same category (see the judgment of 13 July 1972 in Joined Cases 55 to 76, 86, 87 and 95/71 *Besnard and Others* v *Commission* [1972] ECR 543).

In classifying the complainant in Grade B 5 the appointing authority adhered strictly to the principle set out in the second indent of Article 31 (1) of the Staff Regulations which states that as a rule officials shall be appointed to the starting grade for the post for which they have been recruited.'

5. Mr Brown did not pursue his case further and did not bring an action before the Court of Justice.

6. On 5 February 1985 Mr Brown again wrote to the President of the Court asking him to reconsider his complaint of 12

* Translated from the French.

November 1981 in the light of the judgment which the Court had just delivered on 29 January 1985 in Case 273/83 *(Michel* v *Commission* [1985] ECR 347). In that judgment the Court stated in particular that:

'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 comparison with his colleagues on being transferred to the category above, it is . . . necessary to apply to him the principles laid down in Article 46 of the Staff Regulations' (paragraph 22).

Further on, it stated:

'Article 46 has the effect of maintaining the seniority . . . acquired when officials are transferred to a new category' (paragraph 24).

7. The position adopted in the *Michel* judgment on the question of the applicability of Article 46 where an official moves from one category to a higher category therefore differed from the position under the previous case-law on which the President of the Court had relied when rejecting Mr Brown's first complaint in February 1982.

8. Whilst maintaining that Mr Brown's request was time-barred, the President stated in his reply of 4 June 1985 that 'the institutions are examining what consequences to draw from the *Michel* judgment' but pointed out that he could not 'predict what the outcome of this will be, nor how far any change, if there were to be one, could be made retroactive or apply to those promoted before such a change'.

9. On 10 April the President of the Court finally came to adopt the general decision on 'transition' from one category to a higher category against which Mr Brown lodged a complaint on 5 August 1986 under Article 90 (2) of the Staff Regulations. He learned of the existence of that decision through a communication from the Staff Committee of 14 May 1986 and a 'décompte — état comparatif' dated 3 July 1986 drawn up by the Finance Division of the Court which he received on 22 July 1986.

10. In introducing an increasing differential allowance that general decision (the contents of which were officially notified to staff by a communication from the Registrar of 26 March 1987) in substance met the claims of Mr Brown who continued, however, to object to the date of its entry into force, fixed at 1 March 1986, and requested that it be applied as from the date on which the officials concerned are appointed to a higher category or at any rate from the date of the judgment in the *Michel* case.

11. There was a further exchange of letters with the President of the Court who initially wished to treat Mr Brown's complaint as a request under Article 90 (1) of the Staff Regulations before the *ad hoc* Committee of the Court expressly rejected his complaint on 30 January 1987 on the ground that, by virtue of the principle of legal certainty, a decision of general application may not have retroactive effect save in very exceptional circumstances.

12. In his application lodged on 10 April 1987 Mr Brown seeks the annulment of the decision rejecting his complaint directed

against the general decision of 10 April 1986 and a declaration that he is entitled to the differential allowance calculated according to the new method, together with interest, with retroactive effect from the date on which he was appointed to Grade B 5 or at any rate from the date of the judgment in *Michel*.

13. What view must be taken of this case? First of all, according to the first indent of Article 90 (2) of the Staff Regulations, officials have the right to lodge a complaint and then an appeal against a 'measure of a general nature' of the appointing authority which adversely affects them; the measure need not be of 'individual concern' to them within the meaning of Article 173 of the EEC Treaty.[1] The Court has in fact recognized the admissibility of such actions in *De Dapper* v *Parliament* (judgment of 29 September 1976 in Case 54/75 [1976] ECR 1381) and *Diezler and Others* v *Economic and Social Committee* (judgment of 27 October 1987 in Joined Cases 146 and 431/85 [1987] ECR 4283). In this case, Mr Brown lodged within the prescribed periods a complaint and then an appeal against the general decision of the President of the Court of 10 April 1986. It may also be said that Mr Brown may claim to have an existing personal interest in seeing that the general decision of 10 April 1986 is given greater retroactive effect than it has been given.

14. Moreover, it may be observed that the Committee of the Court vested with the power to determine complaints of officials did not declare the applicant's complaint inadmissible but rejected it as regards the substance.

15. At first sight, therefore, the application should be regarded as admissible.

16. However, the Court, as an administration and a defendant, has reached the opposite conclusion. It has raised an objection of inadmissibility against the application on the ground that its real purpose is to call in question the methods of calculating the differential allowance which was determined on 13 August 1981 when the applicant was appointed to Grade B 5. In the Court's view, the application is therefore out of time.

17. Under established case-law:

'the time-limits laid down in Articles 90 and 91 of the Staff Regulations are mandatory and are not subject to the discretion of the parties or of the Court, since they were laid down with a view to ensuring clarity and legal certainty'.[2]

18. It follows that, even if:

'under Article 90 (1) of the Staff Regulations any official may request the appointing authority to take a decision relating to him, . . . 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

1 — On this point see my Opinion of 11 June 1986 in Joined Cases 269 and 292/84 *Fabbro and Scharf* v *Commission* [1986] ECR 2983, p. 2996.

2 — See the judgment of 7 May 1986 in Case 191/84 *Barcella and Others* v *Commission* [1986] ECR 1541, paragraph 12.

justify the submission of a request for the review of such a decision'. [3]

19. It is true that in the present case Mr Brown did not formally lodge a new request with the appointing authority. Instead, he strongly objected to the treatment of his complaint of 5 August 1986 as a request.

20. However, an official cannot revive a limitation period which he has allowed to lapse by lodging a complaint through official channels on the same subject-matter as the act which can no longer be contested. [4]

21. It is true that, in the present case, Mr Brown's complaint of 5 August 1986 was expressly directed against the general decision of 10 April 1986 and not against the individual decision of 13 August 1981.

22. But Mr Brown does not contest the substance of the general decision which corresponds to that which he has always sought. In his complaint he requests that that decision be applied retroactively from 'the date when all officials concerned have had to accept a lower salary after a promotion or, in any event, from 29 January 1985 (the date of the judgment of the Court in Case 273/83 *Michel* v *Commission*) as the date from which the system applied by the Court of Justice to officials passing from one category to another must be considered illegal'.

23. Mr Brown is therefore primarily requesting that he and the other officials who have not brought actions against the differential allowance granted to them when they changed from one category to a higher category should have their allowance adjusted with retroactive effect from the date of their appointment to the new category. However, that is tantamount to calling in question the conditions of his appointment after they became final.

24. In its judgment of 1 December 1983 in Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981, the Court held that:

'an official cannot be permitted to challenge the conditions of his initial recruitment once that recruitment has become definitive'.

It went on to state that:

'*A fortiori*, he may not raise retrospective claims relating to his classification and, consequently, to his past and future remuneration' (paragraph 10).

25. However, what applies to the conditions of recruitment must logically also apply to the conditions of appointment following promotion or a change of category. The differential allowance granted upon such an event is one of those conditions.

26. Only the emergence of a new fact might therefore possibly justify time running afresh.

27. The defendant points out quite rightly in this regard that the judgment of 29 January 1985 in the *Michel* case cannot constitute such a new fact since it is established case-law that:

Commission [1971] ECR 1059, *§| 'apart

3 — See the order of 19 February 1987 in Case 101/86 *Mogensen* v *Commission* [1987] ECR 825, paragraph 9.

4 — See the judgment of 15 December 1971 in Case 17/71, *Tontodonati* v *Commission* [1971] ECR 1059, paragraph 3 at p. 1062.

from the actual parties in proceedings before the Court, the only persons concerned by the legal effects of a judgment of the Court annulling a measure are the persons directly affected by the measure which is annulled'

so that

'such a judgment can only constitute a new factor as regards those persons'. [5]

28. The applicant's counter-argument, formally confirmed at the hearing, is that it is not the judgment in the *Michel* case which constitutes such a new fact but the general decision of 10 April 1986.

29. When considered independently from the judgment in the *Michel* case, the decision of 10 April 1986 does in fact appear to be a quite fundamental change in the administrative practice of the Court. However, in its judgment in *Schots-Kortner and Others* v *Council, Commission and Parliament* [6] the Court held that a general change of direction in administrative practice, even following upon judgments finding on a preliminary point of law that a provision of the Staff Regulations is not applicable, 'must in the present circumstances be considered as the anticipated application of a formal amendment in the Staff Regulations but must not be understood as permitting the retrospective reopening of a situation resulting from decisions taken in relation to the applicants, which at the expiry of the time-limits for appeals had become final'. The Court therefore dismissed those appeals as inadmissible.

5 — See, for example, the judgment of 17 June 1965 in Case 43/64 *Richard Müller* v *Councils of the EEC, EAEC and ECSC* [1965] ECR 385 at p. 397.

6 — Judgment of 21 February 1974 in Joined Cases 15 to 33, 52, 53, 57 to 109, 116, 117, 123, 132 and 135 to 137/73 *Schots-Kortner and Others* v *Council, Commission and Parliament* [1974] ECR 177, at pp. 191 and 192.

30. In my view, the Court's reasoning in its judgment in the *Schots-Kortner* case is also applicable to the principal claim set out in Mr Brown's application.

31. Since Mr Brown has not lodged in good time an application for the annulment — possibly based on the infringement of Article 46 — of the decision of 13 August 1981 fixing his differential allowance, that decision has become final. The claim that he be granted with retroactive effect from that date a higher differential allowance covering the difference between his salary in Grade B 5, Step 4, and the salary which he would have obtained if he had stayed in Grade C 2, Step 5, is therefore inadmissible.

32. However, in his application Mr Brown alternatively claims a declaration that he 'is entitled to the differential allowance intended to make up the difference between his salary in his former Grade C 2, Step 5, and the salary in Grade B 4, Step 2, in accordance with Article 46 of the Staff Regulations with effect from 1 February 1985', which is the first day of the month following the judgment of the Court in the *Michel* case.

33. In his complaint of 5 August 1985 Mr Brown justified that claim by the fact that since the date of the judgment in *Michel* the system previously applied by the Court when an official changes category must be regarded as illegal.

34. In Mr Brown's view, the decision of the President of the Court of 10 April 1986 simply draws the consequences which *necessarily* ensue from the interpretation of the Staff Regulations laid down in the judgment

in *Michel*. Those consequences should have been drawn immediately after the delivery of that judgment because the administration of a Community institution is not at liberty to pursue, if only temporarily, a practice contrary to the clear meaning of the Staff Regulations.

35. The question whether that argument of the applicant is correct is obviously related to the substance of the case on which I may not express my views at this stage.

36. I must simply examine the question whether Mr Brown's alternative claim, which can by all means be considered independently of his other claims, is admissible or not.

37. It must be said that the purpose of the alternative claim is not to call in question a decision which was previously taken with regard to the applicant and which became final upon the expiry of the period for bringing an action. The applicant is simply exercising the right which, as I pointed out at the beginning of this Opinion, any official has to challenge a measure of a general nature of the appointing authority adversely affecting him. Mr Brown has lodged a complaint and then an appeal within the periods prescribed by the Staff Regulations. He also has an existing personal interest in the adoption of the solution he proposes.

38. Finally, it may not be objected that, since he claims to derive rights from the interpretation of the Staff Regulations contained in the judgment in *Michel*, he ought to have submitted a 'request' in relation to that judgment and not a 'complaint' about the decision of 10 April 1986. Since 5 February 1985 he has in fact requested that his complaint of 1981 be reconsidered in the light of the judgment and this may also be regarded as a 'request'. He was told, quite rightly, that a judgment of the Court only has effect between the parties but that the institutions were examining the consequences to be drawn from the judgment in *Michel* although it was not possible to predict the outcome of that examination, in particular as regards the retroactive effect of any measures which might be taken. As soon as he became aware of the decision of 10 April 1986 Mr Brown lodged a complaint and then made this application.

Conclusion

39. For the reasons set out above I propose that the Court should declare Mr Brown's application admissible in so far as he seeks a declaration that the new rules concerning the differential allowance ought to have been applied as from 1 February 1985, that it should declare the rest of the application inadmissible and that it should reserve costs until delivery of the judgment on the substance.