OPINION OF ADVOCATE GENERAL GULMANN
delivered on 10 February 1994 *

Mr President,
Members of the Court,

1. This appeal is brought by Mr Klinke, an official of the Court of Justice, against the judgment delivered by the Court of First Instance in Case T-30/92 on 30 March 1993. [1] By that judgment, the Court of First Instance dismissed the action brought by Mr Klinke for a declaration that his classification in grade on his appointment as an official in category A was not in accordance with the applicable law.

2. The appellant entered the service of the Court of Justice on 1 April 1982 as a lawyer-linguist in the German Translation Division. He was classified in Grade LA 6. With effect from 1 June 1985, the appellant was placed at the disposal of the Court's Information Service, in which he was appointed an administrator on 1 July 1991, having passed an internal competition. He was classified in Grade A 7, Step 3; it was decided at the same time to grant him a compensatory allowance equal to the difference between the net remuneration which he received in Grade LA 6, Step 6, and that relating to his new classification in Grade A 7, Step 3.

3. Mr Klinke submitted a complaint against the decision appointing him an administrator, inasmuch as it classified him in Grade A 7, and requested that he be classified in Grade A 6. He maintained, first, that, by classifying him in Grade A 7, the appointing authority had not taken into account the exceptional circumstance that he had performed for six years the duties pertaining to the post to which he was ultimately appointed. Whilst recognizing that the appointing authority has a discretion in that regard, he submitted that

'discretion cannot be exercised otherwise than by classification in Grade A 6. This is a necessary consequence of the principle of equal treatment for all officials: no other official has worked in his post for six years whilst remaining in his starting grade.'

He maintained, second, that it was unlawful to place him at the disposal of the Information Service, and that the duty to have regard for the welfare and interests of officials, laid down in Article 24 of the Staff Regulations, was such as to require him to be classified in Grade A 6, in order to make up for the adverse effects of his secondment. The complaint goes on to state:

'The appointment ... of the undersigned to that post in a way regularizes his position; he has been occupying the post for six years as

* Original language: French.
1 — [1993] ECR II-375.

an official on secondment. If the position is regularized on the basis of an appointment in the starting grade (A 7) of the new category, the adverse effects of the previous secondment — which infringes the Staff Regulations and is thus unlawful — will be prolonged, to the detriment of the undersigned.'

4. That complaint was rejected by decision of the Administrative Committee of 20 January 1992, which found that the classification had been decided '... in accordance with the consistent practice of the Court, which was decided on the basis of its case-law at the administrative meeting on 11 July 1979'. The Administrative Committee's decision went on to state:

'According to the Court's case-law, an official may only in exceptional circumstances be appointed in a higher grade within the starting and intermediate career brackets; such appointment lies in any event within the discretionary power of the administration.

In the exercise of that discretion, the Court, by its aforementioned decision of 11 July 1979, which was taken in compliance with the principle of equal treatment in the recruitment of officials, took the decision in principle to recruit officials from the Language Service at Grade A 7.

In the circumstances of this case, the Administrative Committee is of the view that, in applying that decision to you, the administration did not commit an error in its assessment of the facts and did not treat you unequally vis-à-vis other officials who are called upon to perform similar duties.

That conclusion is not altered by the fact that you have been placed at the disposal of the Information Service for approximately six years. First, it is not open to you to rely on the alleged unlawfulness of that arrangement, to which you consented and which corresponded to your personal aspirations. Second, the practical experience acquired by you in the performance of those duties has been taken into account, within the limits allowed by Article 32 of the Staff Regulations, for the purposes of your classification in step within your new grade.'

5. Mr Klinke then brought proceedings before the Court of First Instance, pleading *inter alia* a manifestly erroneous assessment of the facts, breach of the principle of non-discrimination and breach of the duty to have regard for the welfare and interests of officials laid down by Article 24 of the Staff Regulations. The Court of First Instance dismissed the action as unfounded.

6. Mr Klinke asserts in support of his appeal that the Court of First Instance erred in its assessment of the three pleas referred to. The

respondent contends, primarily, that the appeal is inadmissible and, in the alternative, that it should be dismissed as unfounded.

7. In support of its plea of inadmissibility, the respondent argues that, for the purposes of deciding appeals, the jurisdiction of the Court of Justice is limited to examining only questions of law, and that the appellant's pleas relate only to questions of fact. The respondent has not particularized that objection of inadmissibility.

8. In commenting on that objection, it should be noted, first, that there is no dispute whatever between the parties as to the facts of the case and, second, that the Court has established that its task in deciding appeals is also to '... verify whether the findings and assessments made by the Court of First Instance within the scope of its sole jurisdiction show that the lower court correctly carried out a legal characterization of the facts ...'. [2]

Given that the appeal essentially reflects merely the appellant's view that the Court of First Instance failed to take into account the full significance of the principles of Community law — which constitutes, according to Article 51 of the Protocol on the Statute of the Court of Justice of the EEC, a legitimate ground of appeal — I regard the appeal as admissible.

2 — Judgment of the Court of Justice in Case C-220/91 P *Commission* v *Stahlwerke Peine-Salzgitter* [1993] ECR I-2393, paragraph 30.

9. Before proceeding to examine the various pleas concerning the substance of the case, I think it would be helpful to consider the scope of judicial review in a case such as this.

10. Both Mr Klinke and the appointing authority accept as an established fact the contention that the appointing authority has a discretion to take a decision such as that at issue in this case. However, Mr Klinke takes the view that the exercise of that discretion must necessarily have resulted in his being appointed to Grade A 6. According to him, the fact that he had for six years performed entirely satisfactorily the duties attaching to the post to which he was finally appointed must necessarily entail such classification. The crux of Mr Klinke's argument — if I have understood it correctly — is that in 'normal circumstances', that is to say, if he had been appointed to that post from the start of the period when he was placed at the disposal of the Information Service, he could have expected to be promoted after having satisfactorily carried out those duties for six years.

11. According to the statement of reasons on which the appointing authority's decision is based, the appointing authority certainly took into account the six years during which Mr Klinke occupied the post. However, that was clearly only one of the factors which the appointing authority took into account. In all probability, the appointing authority had some difficulty in reaching its decision, since — in my view at any rate — the point made by Mr Klinke is clearly valid.

12. The aim of judicial review is not, however, to substitute, in place of the appointing authority's assessment, that of the Court.

The Court's task is to make sure that the decision is not vitiated by defects which may give rise to its annulment, and is thus, in the present case, to give a ruling on the merits of the appellant's argument that the applicable rules entitle him to be appointed to Grade A 6 on the ground that he satisfactorily occupied his post for over six years.

It is in that regard undeniable, and is, moreover, not disputed, first, that the starting point is the fact that administrators are appointed to Grade A 7 and are only appointed to Grade A 6 in exceptional circumstances and, second, that the Staff Regulations do not place any specific restrictions on the appointing authority's power to decide not to appoint a person to Grade A 6.

13. As to the various pleas put forward in support of the appeal, the first alleges that the Court of First Instance erred in its assessment of the plea advanced in support of the application, to the effect that there had been a manifestly erroneous assessment of the facts.

In the proceedings before the Court of First Instance, Mr Klinke argued that, taking into account his lengthy experience in the Information Service and his ability, which was highly regarded by his hierarchical superior, it was not open to the appointing authority to consider that his personal circumstances warranted his recruitment at Grade A 7 without thereby committing a manifest error of assessment.

The Court of First Instance found that that argument presupposed that the appointing authority's assessment of his qualifications was relevant to the application or non-application of Article 31(2) of the Staff Regulations (paragraph 24 of the contested judgment).

However, the judgment went on to state that, as is apparent from the case-law of the Court of Justice (Case 146/84 *De Santis* v *Court of Auditors* [1985] ECR 1723), 'it is not ... permissible to recruit staff to the higher grade of a career bracket save in exceptional cases where the application of Article 31(2) is justified by the specific needs of the service, which call for the recruitment of a specially qualified official'. Thus the object of Article 31(2) is to permit the appointing authority to ensure that the specific needs of a particular service are met by offering enticing terms with a view to attracting particularly well-qualified candidates.

14. Next, the Court of First Instance found that Mr Klinke had produced no evidence whatsoever to show that in the present case the needs of the Information Service were such as to require the recruitment of a particularly well-qualified official (paragraph 27). According to the Court of First Instance, therefore, 'the applicant's qualifications were irrelevant to the determination of

his classification in grade on his appointment and ..., even though the applicant was eminently qualified for the A 7 post to which he was appointed and which he occupies to the general satisfaction of all concerned, that still does not mean that exceptional qualifications were required in order to occupy that post' (paragraph 28).

15. Neither the appellant nor the respondent is able to concur with that reasoning. They refer, in particular, to the judgments in Case 343/82 *Michael* v *Commission* [1983] ECR 4023, Joined Cases 314/86 and 315/86 *De Szy-Tarisse and Feyaerts* v *Commission* [1988] ECR 6013 and Case T-18/90 *Jongen* v *Commission* [1991] ECR II-187, contending that, according to those decisions, Article 31(2) gives the appointing authority a wide discretion in assessing, *inter alia*, the practical experience of the person recruited. [3]

16. As to the question whether Article 31(2) allows the individual qualifications of the official recruited to be taken into account on his classification in grade, the starting point in answering that question must clearly be the wording of the provision. [4]

17. As the parties have rightly maintained, the relevant provisions are silent as regards the criteria to be taken into account for the purposes of appointing an official to a higher grade. It is common ground, therefore, that, according to its wording, Article 31(2) does not preclude the appointing authority from taking an official's qualifications into account when determining his classification in grade. As the provision is silent on that point, I am of the view that fairly compelling arguments are needed if we are to accept the interpretation that the provision precludes the appointing authority from taking into account wholly legitimate considerations regarding an official's qualifications.

18. It is not easy to identify any such arguments. One argument could be that Article 32 of the Staff Regulations expressly governs the way in which the practical experience of the official recruited is to be taken into account.

3 — See, for example, paragraph 26 of the judgment in *De Szy-Tarisse and Feyaerts* v *Commission*, in which the Court of Justice stated:
'... it must be pointed out that, according to a line of cases decided by the Court, the appointing authority has a wide discretion, within the limits laid down by Article 31 and the second paragraph of Article 32 of the Staff Regulations or by the internal decisions implementing those articles, in assessing the previous experience of a person recruited as an official, both as regards the nature and length of that experience and as regards the extent to which it meets the requirements of the post to be filled'.

4 — Article 31(1) and (2) provides:
'1. Candidates thus selected shall be appointed as follows:
— officials in Category A or the Language Service:
to the starting grade of their category or service;
...
2. However, the appointing authority may make exceptions to the foregoing provisions within the following limits:
(a) in respect of Grades A 1, A 2, A 3 and LA 3,
...
(b) in respect of other grades,
— up to one third of the appointments to posts becoming vacant;
— up to half the appointments to newly created posts.'

Article 32 provides:

'An official shall be recruited at the first step in his grade.

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; this shall not exceed 72 months in Grades A 1 to A 4, LA 3 and LA 4 and 48 months in other grades.'

It could be argued that the objective of Article 32 is to recompense the previous experience of the official recruited, whereas that of Article 31(2) is to take into account the specific needs of the service where the recruitment of a particularly well-qualified candidate is required; that would prevent his previous experience from being recompensed twice over. However, in order for such an argument to be valid, good reasons would have to be advanced for the view that Article 32 lays down exhaustive rules regarding the taking into account of the training and experience of the official recruited. I have difficulty in identifying any such reasons, particularly given that the decision regarding classification in grade is taken at the same time as that regarding classification in step. Consequently, and with reference to the case-law cited by the parties, I propose that the Court should quash that part of the judgment of the Court of First Instance.

19. Having regard to Article 54 of the Protocol on the Statute of the Court of Justice of the EEC, I further propose that the Court give final judgment in the matter, given that the state of the proceedings so permits.

20. In the context of the first plea, therefore, it only remains to resolve the question whether the appointing authority did in fact commit an error of assessment by appointing Mr Klinke to Grade A 7, despite his lengthy experience in the Information Service and his ability, which was highly regarded by his hierarchical superior, given, of course, that judicial review is limited to the question whether the appointing authority exercised its discretion in a manner which is manifestly wrong. [5]

21. That plea must be rejected, given that Mr Klinke has not even attempted to demonstrate the validity of the essential premiss underlying his argument, namely that specific experience may entitle the person who possesses it to be appointed to the higher grade in the career bracket.

22. As to the second plea, alleging a breach of the principle of non-discrimination, it should be noted that this was rejected by the

5 — See, *inter alia*, the judgment of the Court of First Instance in Case T-38/89 *Hochbaum* v *Commission* [1990] ECR II-43, paragraph 24.

Court of First Instance in the following terms (paragraphs 35 to 37):

'At all events, the Court considers that the discrimination allegedly suffered by the applicant must be examined in the light of the rationale for the provision the application of which he claims discriminated against him, as defined in the judgment in *De Santis* v *Court of Auditors*, cited above.

The relevant criterion for the purposes of comparison is not the category or service in which the officials appointed have hitherto been employed, nor their qualifications, but the specific requirements of the different posts to be filled.

The Court noted at the hearing that since the decision of 11 July 1979 was communicated to the staff members concerned, no official moving from an LA post to category A has been recruited to a grade other than A 7. In the circumstances, the applicant cannot claim that any posts comparable with his have been filled at Grade A 6.'

23. Mr Klinke maintains in his appeal that the Court of First Instance was wrong in its view that the relevant comparative criterion can only be the specific requirements of the different posts to be filled. Mr Klinke asserts that the comparative criterion for the purposes of assessing whether he has suffered discrimination 'can only be the individual circumstances of the (in this case, hypothetical) candidates who passed the competition' organized to fill the post to which he was ultimately appointed. Moreover, the appeal states that Mr Klinke's position 'is different from the position of any of his rivals for that post, and from that of any rival of his who expects shortly to be appointed to any post whatever: the applicant has in fact been occupying for over six years the post which he is now being called upon to occupy in an official capacity, and has been performing the tasks pertaining to that post'.

24. I am unable to concur with the reasoning of the Court of First Instance, having regard to the aforesaid considerations concerning the discretion conferred on the appointing authority by Article 31(2). Nor am I able to concur with Mr Klinke's argument.

25. Mr Klinke maintains that the contested decision constitutes discriminatory treatment, that is to say, the appointing authority either treated comparable situations differently or treated different situations in the same way, without any objective justification for doing so.

Mr Klinke has not asserted that any other persons in situations corresponding to his own have been appointed by the appointing authority to Grade A 6. Consequently, his

plea must be understood as meaning that the appointing authority has treated different situations in the same way. This corresponds, in my view, to Mr Klinke's basic argument; although he has occupied the post satisfactorily for six years, he has received the same treatment as that accorded to individuals who are recruited without possessing the relevant experience.

That plea of discrimination would appear merely to reflect the basic argument that the appointing authority was bound to draw the conclusion desired by Mr Klinke, by reason of his six years' service in the post in question.

In my view, that plea does not alter the substance of the case. The six years' service in the post constitutes one of the factors which was to be, and which in fact was, taken into account by the appointing authority in the exercise of its discretion; as noted above, that factor is not such as to oblige the appointing authority to exercise its discretion in a given way and thus to adopt the decision desired by Mr Klinke.

26. I therefore propose that the Court should set aside the reasons which led the Court of First Instance to reject that plea alleging breach of the principle of non-discrimination, but uphold the rejection of the plea by finding that the appointing authority did not act in breach of the principle of equal treatment.

27. Lastly, Mr Klinke considers that the Court of First Instance failed to take account of his plea concerning the duty to have regard for the welfare and interests of officials. More precisely, Mr Klinke maintains that that duty, which is enshrined in Article 24 of the Staff Regulations, obliged the appointing authority to remedy the adverse consequences suffered by him as a result of his having been placed, unlawfully or contrary to the Staff Regulations, at the disposal of the Information Service.

28. The Court of First Instance rejected that plea as inadmissible, in the following terms (paragraphs 41 and 42):

'The Court notes that the applicant accepts that he was placed at the disposal of the Information Service for a period of approximately six years culminating in his appointment as an administrator on 1 July 1991. Moreover, he has annexed to his application a copy of a memorandum dated 5 June 1985 in which the Registrar of the Court of Justice informed him of the decision taken at the Court's administrative meeting on 22 May 1985 authorizing his secondment to the Information Service. That memorandum states that he is to perform, on a temporary basis, the duties of an administrator in that service, retaining his original grade.

In those circumstances, the Court finds that the time-limit laid down by Article 90(2) for

contesting the legality of his secondment has long since expired.'

29. In his appeal, Mr Klinke challenges that reasoning, maintaining that he suffered adverse consequences from his secondment only because the period in question lasted for over six years. He goes on to state: 'That argument concerning secondment in circumstances not provided for under the Staff Regulations for a period in excess of six years is different from the argument which the Court of First Instance understood him to be putting forward. It was only the persistence of a situation not in conformity with the Staff Regulations' which adversely affected Mr Klinke.

30. Allow me to point out that the substance of the case is not altered by that plea either; it is not open to Mr Klinke, by invoking the duty to have regard for the welfare of officials, to impose on the appointing authority an obligation to produce, in the exercise of its discretion, a result which is not provided for by the Staff Regulations.

31. Apart from that observation, I consider that the Court of First Instance was correct in regarding that plea as inadmissible, since the system of legal remedies provided for by Articles 90 and 91 of the Staff Regulations would be undermined if an official were allowed to accept the adverse consequences of an allegedly unlawful act on the part of the appointing authority, only to be in a position later on to assert at any time that those consequences should be mitigated by the application of the general principle of the duty to have regard for the welfare of officials.

Even if it were possible to accept Mr Klinke's argument that it was the duration of his secondment which adversely affected him, the fact remains that the appropriate response would have been to request the termination of his secondment, thereby triggering the procedure laid down by the relevant articles.

32. Mr Klinke's appeal is therefore unfounded in its entirety. Even though my analysis has shown that the reasons for the contested judgment cannot be upheld in every respect, the operative part of the judgment is well founded on other legal grounds, and the appeal must be dismissed in accordance with the decision in *Lestelle* v *Commission*. [6]

33. Given that the reasons for the contested judgment have proved to a certain extent to be incorrect, and that, as a result, there was some justification for bringing an appeal, I consider, on the basis of the second indent in the second paragraph of Article 122 of the Rules of Procedure, that each party should bear its own costs.

6 — Case C-30/91 P, [1992] ECR I-3755. The Court of Justice stated in paragraph 28: '... if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed'.

Conclusion

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

— dismiss the appeal as unfounded

and

— order each party to bear its own costs.