

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
6 March 1996 *

In Case T-93/94,

Michael Becker, an official at the Court of Auditors of the European Communities, residing in Luxembourg, represented by Roy Nathan, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 18 Rue des Glacis,

applicant,

v

Court of Auditors of the European Communities, represented by Jean-Marie Stenier and Jan Inghelram, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Court of Auditors, 12, Rue Alcide de Gasperi, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Court of Auditors of 2 December 1993 rejecting the applicant's complaint concerning his classification in step,

* Language of the case: German.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: A. Saggio, President, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 November 1995,

gives the following

Judgment

Facts and legal background

- 1 The applicant entered the service of the Court of Auditors on 1 September 1981. He was first employed in the Chambers of the German Member until the latter's term of office expired on 17 October 1983. When he ceased carrying on that initial function, the applicant was classified in Grade A 4, step 1.

- 2 On 17 October 1983 the applicant was given a new contract as a member of the temporary staff and classified in Grade A 7, step 3, his seniority in step to run from 18 October 1983.

- 3 On 18 October 1984, having been successful in a competition for administrators, the applicant was appointed an official and classified in Grade A 7, step 3, his seniority in step to run from 18 October 1984.
- 4 At the time when the applicant was recruited as an official, Article 32 of the Staff Regulations of Officials of the European Communities (hereinafter the 'Staff Regulations') provided, in its first paragraph, that: 'an official shall be recruited at the first step in his grade.' However, its second paragraph added: '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 was pursuant to that second paragraph that the applicant was classified in step 3 instead of step 1, when appointed.
- 5 Article 8 of Council Regulation (EEC, Euratom, ECSC) No 3947/92 of 21 December 1992 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities (hereinafter 'Regulation No 3947/92') added a third paragraph to Article 32 of the Staff Regulations. That paragraph provides that 'members of the temporary staff graded in accordance with the grading criteria adopted by the institution shall retain the seniority in the step acquired in that capacity if they are appointed officials in the same grade immediately following the period of temporary service.' Regulation No 3947/92 was published in the *Official Journal of the European Communities* on 31 December 1992 (OJ L 404, p. 1) and, pursuant to Article 14 thereof, entered into force on 1 January 1993.
- 6 By letter of 5 February 1993 the applicant requested the appointing authority of the defendant institution to review his classification in step, taking into account the new rule inserted in the Staff Regulations. While accepting, in that letter, that the wording of Article 32 of the Staff Regulations did not, in 1984, permit a higher

classification, the applicant based his request on the institutions' duty to have regard to the interests of officials, on the fact that in comparable cases the appointing authority of the Court of Auditors had carried out reclassifications in step and on the importance of seniority in step in the context of promotion procedures.

- 7 In connection with the duty to have regard to the interests of officials, the applicant pointed out in his letter that when the appointing authority adopts a measure concerning the situation of a member of its staff it must take into account not only the interests of the service but also those of the person in question.
- 8 Since there was no response from the defendant, the applicant reiterated his request by letter of 6 May 1993, in which he again pointed out the importance of seniority in step in the context of promotion procedures.
- 9 By letter of 2 June 1993 the defendant rejected the applicant's request. In support of its rejection, it stated that classification in step takes place once only, namely at the time of recruitment, that Regulation No 3947/92 does not have retroactive effect and that the appointing authority of the Court of Auditors had never revised a classification in step following an amendment to the Staff Regulations.
- 10 On 4 August 1993 the applicant lodged a complaint within the meaning of Article 90(2) of the Staff Regulations against the rejection of his request. In that complaint he stressed that he was asking not for revision with retroactive effect, but only for his classification in step to be upgraded with effect from 1 January 1993, the day on which Regulation No 3947/92 entered into force. In that context he referred to a decision of the President of the Court of Justice allowing precisely such upgrading in the case of 102 officials of that institution and to the consistent practice of the Commission whereby it has for several years applied the present version of the Staff Regulations.

- 11 In his complaint the applicant also gave an example, by way of illustration, of the undesirable consequences for persons recruited earlier of their exclusion from the new system laid down in the third paragraph of Article 32 of the Staff Regulations. Thus he stated that a member of the temporary staff who was successful in the internal competition then under way at the Court of Auditors for filling an A 5 post could be classified directly in Grade A 5, step 6, whereas he himself could only be classified in step 3, notwithstanding professional experience of more than 18 years in category A posts. The applicant pointed out that such an imbalance would clearly place him at a disadvantage in future promotion procedures.
- 12 The Court of Auditors rejected the complaint by letter of 2 December 1993. In support of its rejection it reiterated, first, that the new third paragraph of Article 32 of the Staff Regulations could not apply to the applicant, since his classification in step had taken place before 1 January 1993 and could take place once only, namely on his recruitment. The defendant went on to state that although other institutions had applied the new provision to officials recruited before 1 January 1993, that circumstance could not render the treatment accorded to the applicant by the Court of Auditors discriminatory. Breach of the principle of equal treatment could never be established by comparing the treatment of a particular situation with treatment which, though more favourable, was unlawful.

Procedure and forms of order sought by the parties

- 13 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 1 March 1994, the applicant brought the present action pursuant to Article 91(2) of the Staff Regulations.
- 14 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory enquiry. The parties presented oral argument and replied to the oral questions put to them by the Court at the hearing on 8 November 1995.

15 The applicant claims that the Court should:

- annul the decision of the Court of Auditors of 2 December 1993;
- order the defendant to pay all the costs.

16 The defendant contends that the Court should:

- dismiss the application;
- make an appropriate order as to costs.

Substance

17 The applicant essentially puts forward two pleas in law in support of his action. The first alleges infringement of the principle of equal treatment. The second alleges a breach of the duty of the administration to have regard to the interests of members of staff.

First plea in law: breach of the principle of equal treatment

Brief summary of the parties' arguments

18 In support of his first plea in law, the applicant relies on Article 5(3) of the Staff Regulations, according to which 'identical conditions of recruitment and service

career' are to apply to officials belonging to the same category. The applicant considers that there has been an infringement of that provision on two counts. First, unequal treatment is alleged within the Court of Auditors as between officials who remain classified pursuant to the former version of Article 32 of the Staff Regulations and those who have been or will be classified pursuant to the new version of that article. Secondly, unequal treatment is alleged as between the officials of the Court of Auditors whose classification was decided on the basis of the former version of Article 32 of the Staff Regulations and those in the other institutions.

- 19 With regard to the first type of inequality, the applicant states that the Court of Auditors has classified officials who are younger and less experienced than him in higher steps. He maintains that the defendant ignored the objective of Regulation No 3947/92, which was precisely to put an end to the long-term disadvantages caused by the former version of Article 32 of the Staff Regulations. In that connection, the applicant confirmed, when a question was put to him at the hearing, that in his view the defendant infringed Regulation No 3947/92 in failing to interpret it correctly in the light of its objective and of the principle of equality.
- 20 The applicant points out further that the defendant has regularly rectified classifications in step in cases comparable to his. Some of those rectifications even took place after all the administrative time-limits had expired. The applicant accordingly assumes that the defendant took that course on grounds of expediency.
- 21 As regards cases reportedly comparable to his, the applicant refers more particularly to the rectification of the classification in step of Mr R, despite the fact that the latter's complaint was rejected and the time-limit for bringing an action had expired, to the classification in step of the head of the defendant's Personnel Department and, lastly, to the case of an official who had passed an internal competition and whose classification in step was decided taking into account the professional experience that he had already acquired in Category A.

- 22 The defendant disputes that the cases to which the applicant alludes are comparable to his. The rectifications to the classification in step of Mr R and the official concerned in the Personnel Department took place following the interpretation of Article 32 of the Staff Regulations given by the Court in its judgments in Case 17/83 *Angelidis v Commission* [1984] ECR 2907 and in Case 273/83 *Michel v Commission* [1985] ECR 347, and cannot therefore be relied upon by the applicant since he is seeking reclassification following a legislative amendment. As far as the third case to which the applicant refers is concerned, the defendant states that that is a 'highly exceptional case involving the application of Article 32 of the Staff Regulations a second time' which falls outside the ambit of this dispute.
- 23 The defendant points out that only cases involving officials who were appointed before 1 January 1993 and were classified, as members of the temporary staff, in the same grade immediately prior to their appointment are comparable to the applicant's case. The defendant has emphasized, both in its pleadings and at the hearing, that none of those officials has secured from the Court of Auditors rectification of his classification in step, since the third paragraph of Article 32 of the Staff Regulations can be interpreted only as applying to appointments made after the date on which Regulation No 3947/92 entered into force.
- 24 With regard to the second type of inequality, the applicant, comparing the defendant's conduct with that of the other institutions, points out that the Court of Justice and the Commission automatically revised the classification in step of all officials whose situation was comparable to his. He notes that the content of the Staff Regulations is the same for all officials of the Communities and in consequence the defendant should take account of contrary practices in the other institutions. He also stresses that that difference in treatment will place him at a considerable disadvantage should he transfer to another institution.
- 25 According to the defendant, a comparison with the practice in other institutions is of no relevance. If the Court of First Instance considers that the Court of Auditors has applied Regulation No 3947/92 incorrectly, a comparison with the way it is

applied in the other institutions will not be necessary. If, conversely, the Court of First Instance considers that the Court of Auditors has applied Regulation No 3947/92 correctly, that will imply that the Court of Justice and the Commission have applied it incorrectly. In the latter case, there would be no question of unequal treatment since, as the Court of First Instance has itself held, the principle of equality must be consistent with the principle of legality (see the judgment of the Court of First Instance in Case T-8/93 *Huet v Court of Auditors* [1994] ECR-SC II-365).

Findings of the Court

- 26 The Court points out, at the outset, that the Staff Regulations must be interpreted in such a way as to ensure that there is no breach of a superior rule of law (see Case 156/78 *Newth v Commission* [1979] ECR 1941, paragraph 13, *in fine*). According to consistent case-law, the principle of equal treatment constitutes a superior rule of law (see, for example, Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL and Others v Council and Commission* [1978] ECR 1209, paragraph 5, and Case T-489/93 *Unifruit Hellas v Commission* [1994] ECR II-1201, paragraph 42).
- 27 In the light of that case-law, the question to be examined is whether the third paragraph of Article 32 of the Staff Regulations may be interpreted as being inapplicable to appointments made before it entered into force without such an interpretation disregarding the principle of equal treatment.
- 28 In that connection the defendant has contended that in the absence of any indication that the Community legislature intended Regulation No 3947/92 to have retroactive effect, an interpretation of the third paragraph of Article 32 of the Staff Regulations as not being applicable to appointments made before it entered into force was necessary in order to comply with the general principles of non-retroactivity and legal certainty.

29 The Court of First Instance does not share that view. The non-retroactivity of Regulation No 3947/92 cannot preclude immediate application of the provisions inserted by it in the Staff Regulations to all persons who fall within their scope, including members of the temporary staff appointed as officials before that regulation entered into force. The wording of the third paragraph of Article 32 of the Staff Regulations does not, moreover, exclude such an interpretation. That provision merely states that members of the temporary staff appointed as officials in the same grade immediately following the period of temporary service are to retain the seniority in step acquired in that capacity, and it does not contain any restriction as regards the date of such appointment.

30 Furthermore, the interpretation of the third paragraph of Article 32 put forward by the defendant could lead to officials appointed after the said regulation entered into force being classified more favourably than officials appointed prior thereto.

31 It follows that the fact that the applicant was appointed before the third paragraph of Article 32 of the Staff Regulations entered into force cannot prevent the provision being applied in his favour from the date of its entry into force. Only that interpretation of the said provision is consistent with the principle of equal treatment.

32 It is clear from the foregoing that by refusing to apply the third paragraph of Article 32 of the Staff Regulations to the applicant, the defendant acted in breach of that provision and of the principle of equal treatment.

33 On the basis of all the above considerations, the first plea in law must be accepted.

Second plea in law: breach of the duty to have regard to the interests of officials

Brief summary of the parties' arguments

- 34 The applicant considers that the defendant has disregarded its duty to have regard to his interests. He points out that the institutions must, when they adopt a measure concerning the situation of their officials, balance the interests of the service against the interests of the officials concerned. The facts of the case, and in particular the defendant's refusal to interpret the new Article 32 of the Staff Regulations in accordance with its purpose, show that no such weighing of the interests involved ever took place.
- 35 Against that line of argument, the defendant refers to Case T-123/89 *Chomel v Commission* [1990] ECR II-131 and Case T-65/92 *Arauxo-Dumay v Commission* [1993] ECR II-597 and points out that the duty to have regard to the interests of officials is limited to complying with the rules currently in force. In view of that limitation, it considers that there cannot have been any breach of that duty since it applied Article 32 of the Staff Regulations correctly.

Findings of the Court

- 36 It has been consistently held that compliance with the duty to have regard to the interests of officials implies that, in reaching a decision on the situation of an official, the administration must take into account not only the interests of the service but also the interests of the official and that such a duty cannot lead the administration to construe a Community provision in a manner contrary to its actual

wording (Case T-123/89 *Chomel v Commission*, cited above, paragraph 32; Joined Cases T-33/89 and T-74/89 *Blackman v Parliament* [1993] ECR II-249, paragraph 96, and Case T-65/92 *Arauxo-Dumay v Commission*, cited above, paragraphs 37 and 38).

- 37 In this case the third paragraph of Article 32 of the Staff Regulations has been interpreted as applying to all officials, including those who were appointed before Regulation No 3947/92 entered into force (see paragraphs 26 to 33 above). Accordingly, when examining the applicant's request for reclassification, the administration had no discretion with regard to his classification in step and consequently was not required to compare the interests of the service with the interests of the official at the time when the decision was adopted.
- 38 It follows that, in this case, the plea in law alleging a breach of the duty to have regard to the interests of officials is not relevant.
- 39 In the light of all the foregoing considerations, the application must be upheld.

Costs

- 40 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Court of Auditors has failed in its submissions and costs were applied for, it must be ordered to pay all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Annuls the refusal of the Court of Auditors to reclassify the applicant in step, pursuant to Council Regulation (EEC, Euratom, ECSC) No 3947/92 of 21 December 1992 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities, with effect from 1 January 1993, as he had requested by letter of 5 February 1993, together with the Court of Auditors' decision of 2 December 1993 rejecting the applicant's complaint against that refusal;
2. Orders the Court of Auditors to bear its own costs and to pay the costs incurred by the applicant.

Saggio

Tiili

Moura Ramos

Delivered in open court in Luxembourg on 6 March 1996.

H. Jung

A. Saggio

Registrar

President