

On those grounds,

Upon reading the pleadings;
 Upon hearing the report of the Judge-Rapporteur;
 Upon hearing the parties;
 Upon hearing the opinion of the Advocate-General;
 Having regard to the Staff Regulations of Officials, especially Articles 45, 46, 62 and 66;
 Having regard to the Protocols on the Statute of the Court of Justice annexed to the Treaties establishing the ECSC, the EEC and the EAEC;
 Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 43, 69 and 70,

THE COURT (Second Chamber)

hereby:

- 1. Annuls the contested decisions to the extent to which they refused to classify the applicant on his promotion in the fifth step of Grade A4 without any seniority in step;**
- 2. Orders the parties to bear their own costs.**

Pescatore

Trabucchi

Strauß

Delivered in open court in Luxembourg on 9 July 1970.

A. Van Houtte

P. Pescatore

Registrar

President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND
 DELIVERED ON 18 JUNE 1970¹

*Mr President,
 Members of the Court,*

The applications brought by Mr Brembati, an official of the Commission of the

European Communities, against the decisions determining his step and seniority in step will lead the Court to decide on the meaning and scope of the rather complex provisions of Article 46 of the Staff

¹ — Translated from the French.

Regulations concerning the classification of servants who have been promoted and the determination of the salary to which they are entitled.

1. In the first decision of the Commission dated 24 January 1969 the applicant, who was at that time classified in Grade A5, Step 8 (the last step in the grade), was promoted as from 1 October 1968 to Grade A4, Step 4, without any change in his appointment, with seniority in that step as from 1 November 1966, that is, twenty-three months. A letter from the Director-General for Personnel and Administration informed him that as the basic salary in his new grade (BF 40 800) was BF 100 less than that received in Grade A5, for the month of October 1968 he would receive the latter salary in accordance with the second paragraph of Article 46. On 1 November, the date on which he had been at Step 4 for two years, he automatically advanced to Step 5 of Grade A4 and thus received the salary of BF 40 700 carried by that step. Mr Brembati protested first to the Director-General for Personnel and Administration and then, on 11 June 1969, submitted an application to the President of the Commission. He asked to be awarded Step 5 of Grade A4 as from 1 October 1968, the date of his promotion, and to be acknowledged to hold a notional seniority in that step which takes into account the seniority acquired in Step 8 of Grade A5. When he received no reply, on 15 October 1969 he lodged Application 59/69 against the implied decision of rejection arising from the failure of the Commission to give a reply. However, by means of a measure having general effect adopted after this application had been lodged, the Commission decided that promotions made within the career bracket during the financial year 1968 would take effect as from 1 July 1968. As a result Mr Brembati was informed that he was classified in Grade A4, Step 4, with seniority in that grade as from 1 July 1968 and in that step as from 1 August 1966. In accordance with the interpretation given to Article 46 of the Staff Regulations by the first decision he was to receive the salary payable in Grade A5 for the month of July 1968 and to advance to Step 5 of Grade A4 as from

1 August 1968. Thus, in formal terms Mr Brembati's request had been partly satisfied. However, the decision taken concerning him was merely the consequence of a general measure which concerned all the promotions made within the career bracket and it was still based on the same interpretation of the Staff Regulations. On 2 December 1969, therefore, Mr Brembati lodged his second application before the Court under number 71/69: in this he sought a declaration that he ought to be classified in Grade A4, Step 5, as from 1 July 1968 and that, in calculating the notional salary to which he was entitled, the Commission had to take into account his seniority acquired in Grade A5, Step 8. In spite of an obvious clerical error in the reply, the applicant continues to put forward these conclusions, as he confirmed at the hearing.

2. The Court must first decide on the objection of inadmissibility raised by the Commission against this second application. According to that institution, the decision to which it refers and which merely alters the date on which the earlier decision took effect is not independent of that same earlier decision. It confirms the decision in part and, to the extent to which it makes no changes in the objective legal position defined by the measure confirmed, it cannot be validly contested on the basis of submissions which only refer to factors already contained in the earlier decision. Mr Brembati gives evidence of no interest in support of his second application which is different from that in the first, and for this reason Application 71/69 is inadmissible. I do not consider that this plea of inadmissibility should be accepted. To say that the second decision represents a partial confirmation of the first is to admit thereby that it amends it in part. What is unchanged is the promotion to Grade A4 and the classification on Step 4. The amendment applies to the date on which that promotion took effect and, therefore, to the seniority in the step concerned. It is this seniority which was disputed. It is therefore the first application which has become pointless. On the other hand, the second decision which replaces the first on the point originally contested may perfectly well form the

subject-matter of an application, even if that decision is intended to apply the same interpretation of Article 46 of the Staff Regulations to a changed situation (promotion as from 1 July 1968 rather than from 1 October 1968). I shall therefore suggest that the Court accepts that Application 71/69 was admissible.

3. I now come to the substance of the application.

In order to understand the arguments of the parties it is first necessary to recall the wording of Article 46 which appears in Chapter 3 of Title III of the Staff Regulations headed 'Reports, Advancement to a Higher Step and Promotion', and which is at the centre of the dispute. This article is worded as follows:

'An official appointed to a higher grade shall, in his new grade, have the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for that grade. For the purposes of this provision, each grade shall be divided into notional steps corresponding to months of service and notional salaries rising by one twenty-fourth of the two-yearly increment for that grade throughout the span of the actual steps. An official appointed to a higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade. An official appointed to a higher grade shall be classified not lower than the initial step for that grade.'

Let us now consider the respective positions of the parties.

The Commission in fact works out Mr Brembati's classification in the following way:

It takes into consideration the salary corresponding to Step 8 — the last step in Grade A5 — plus the amount of the two-yearly increment for that grade, that is, BF 40 900 + BF 1 700 = BF 42 600. However, it refuses to take into account the notional step which he had reached in his former grade since it considers no more notional steps to exist when an official has reached the last step in his grade. This being so, the notional

salary next above BF 42 600 in the table of notional steps for Grade A4 is BF 42 620.83, which corresponds to the twenty-third notional step following Step 4. The applicant is thus classified in Step 4 of that grade with a notional seniority in that step of twenty-three months. However, the basic salary for this step is BF 40 800, that is, BF 100 less than that which he had received in his former grade. The Commission then applies the last sentence of the second paragraph of Article 46 and continues to pay the applicant his former salary for one month until he is entitled to receive a salary in his new grade which is higher than that paid in his former grade.

The applicant's argument is first to the effect that, as on his promotion he had more than twenty-four months' seniority in the eighth and final step of his grade, he was entitled to have the twenty-four months' seniority acquired taken into account, which would have led to his classification being calculated on the basis of a total salary of BF 44 300. He should therefore be classified in Step 5 of Grade A4 with twenty-one months' seniority.

In the alternative, if it should be considered that he was not entitled to this notional step, he should still have been awarded Step 5 of Grade A4 without any seniority, that is, BF 42 700, since the purpose of the second sentence of the second paragraph of Article 46 is to alter, in the cases to which it relates, the classification determined on the sole basis of the first paragraph, to which it makes an express exception. The disagreement thus concerns two points which I shall examine in succession: the notional step and the scope of the last sentence of the second paragraph of the article in question.

4. Let me say at once that it is quite clear to me that, as the Commission maintains, once the final step of a grade is reached no further notional steps exist.

The applicant refers both to the wording and the spirit of the provisions in dispute in order to maintain the contrary.

According to him, the formula 'notional steps ... rising ... throughout the span of the actual steps' implies that every step, from the first to the last, is included and that if the legislature had wished to exclude the last

step it would have provided 'throughout the span of the actual steps excluding the final step' or 'between the first actual step and the last'.

I shall accept that the formula used is ambiguous and may, according to the context or the *ratio legis*, include or exclude the final step. What is, in my opinion, more interesting from the point of view of the wording is that where the French and Italian versions of Article 46 speak of 'échelons virtuels' or of 'scatti virtuali', the German version employs the phrase 'Dienstalterszwischenstufen', that is, 'intermediate steps'. This term cannot apply to notional steps which would follow the last actual step.

However, it is in particular the spirit of the provision in question which must be considered. In the opinion of the applicant the author of the Staff Regulations considered it reasonable to protect the 'normal' development of the career of an official who, on being recruited in the first step of his grade, obtains an increment every two years and two years after reaching the final step is promoted to a higher grade. This concept seriously fails to consider the distinction made by the Staff Regulations between advancement to a higher step and advancement to a higher grade: although according to Article 44 the former is automatic after an official has been at one step in his grade for two years, promotion, which involves the appointment of the official to the higher grade in his category, is under Article 45 carried out exclusively by selection. Thus, a servant who has reached the final step in his grade has no guarantee that his salary will continue to rise or that he will 'normally' be promoted to a higher grade two years later. Thus, the provisions regarding notional steps contained in the second paragraph of Article 46 cannot apply to this last step. Such steps correspond to months of service representing a series of potential increases in salary which are justified to the extent to which an official may advance automatically, as a result of the mere passage of time, to a new actual step which carries a higher salary within the same grade. Once the final step has been reached it is no longer possible to advance automatically to a higher salary

and there is no longer any reason for notional steps to exist.

It is true that legal writers are divided on this question. While Euler (*Europäisches Beamtenstatut*, Vol. II, p. 376) appears to exclude the existence of notional steps within the last step of a grade, Holtz (*Handbuch des Europäischen Dienstrechts*, p. 325) accepts it. In my opinion, however, it follows clearly from a comparison of Articles 44 and 45 of the Staff Regulations that the second paragraph of Article 46 must be interpreted as concerning all the actual steps with the exception of the final step. It is thus as a result of a precise interpretation of that provision that, in classifying Mr Brembati in his new grade, no account was taken of 'the notional step reached in his former grade', and the applicant's main argument must be set aside.

5. There remains the second point: the interpretation of the final sentence of the second paragraph according to which 'An official appointed to a higher grade shall in no case receive a basic salary lower than that which he would have received in his former grade'.

Mr Brembati accepts that if he is not entitled to a notional step the exclusive application of the first paragraph of Article 46 would lead to his classification in the fourth step of Grade A4, as actually happened; however, he considers that that institution is obliged to check whether the guarantee contained in the second sentence of the second paragraph is observed and, after finding that in his new grade the official concerned would have to receive a lower basic salary than that received in the former grade, it must grant him the basic salary corresponding to the step next above, without any seniority. According to him, the purpose of the provision in dispute is precisely to provide an exception to the first paragraph.

On the other hand, the Commission contests whether this provision may be interpreted as capable of involving the alteration of the classification determined on the basis of this first paragraph (it will, in addition, be noted that the second paragraph appears to have been adopted in implementation of the first). The Commis-

sion regards it as a safeguard clause of an economic nature — which is, moreover, to be found in the laws governing the public services of certain Member States — the purpose of which is essentially to prevent promotion resulting in a worsening in the material position of the official concerned, which would be unacceptable in both psychological and practical terms.

In fact, this provision is no more perfectly clear than is Article 46 as a whole. However, as the Commission observes, it appears that the effect of the interpretation which the applicant seeks to give to the sentence in question is to remove the justification for the third paragraph of that article, according to which 'An official appointed to a higher grade shall be classified not lower than the initial step for that grade'. If the continued existence of this last paragraph is to be justified, Mr Brembati's interpretation of the preceding paragraph must be set aside.

However, it is above all on grounds of common sense, that is, that classification is determined on the basis of the first paragraph of Article 46 and that it may be complemented — although not amended — by a mere safeguard clause, that I am led to adopt the argument contained in the contested decision and therefore to reject the alternative arguments in the application.

6. I have finally to reply to two arguments, one legal and the other factual, put forward by the applicant.

First, according to the first paragraph of Article 62 of the Staff Regulations 'save as otherwise expressly provided, an official who is duly appointed shall be entitled to the remuneration carried by his grade and step'. In the applicant's opinion, the award of the salary corresponding to Grade A5,

Step 8 in respect, first, of October 1968 and then, after amendment of the original decision, of July 1968 constitutes an infringement of the said Article 62.

It may be replied to this that the remuneration referred to therein is that arising under the first paragraph of Article 46. The second sentence of the second paragraph of the same article, which in cases such as the present authorizes payment to an official of the salary received in his former grade where it is higher than that payable in the new grade, constitutes the express provision to the contrary provided for in Article 62. As regards the factual argument to which the applicant refers briefly, it is based on the fact that an official who held the same grade and step as he was classified on his promotion not in Step 4, but in Step 5 with notional seniority. The Commission replies that in that instance it had been necessary to take into account a compensatory allowance awarded to the official concerned by the High Authority of the ECSC. In the absence of any other details about this case it is impossible to know the exact nature of this allowance, or to say whether it had to be taken into account for the classification; however that may be, even if Article 46 had been applied incorrectly in that instance it gave rise to no rights in favour of the applicant.

I shall thus suggest that you decide that Application 59/69 has become pointless and that you dismiss Application 71/69.

Having regard to the fact that costs are in the discretion of the Court where a case does not proceed to judgment, I consider it reasonable in the light of the rather obscure nature of the provision to be applied to order the Commission to pay all the costs of Application 59/69.

I am therefore of the opinion that:

— the Court should decide that there is no reason for a₂^v decision to be taken on Application 59/69;

- Application 71/69 should be dismissed;
- the Commission should pay the costs of Application 59/69 and that the costs of Application 71/69 should be apportioned according to the terms of Article 70 of the Rules of Procedure.