OPINION OF ADVOCATE GENERAL TESAURO
delivered on 2 June 1994 *

Mr President,
Members of the Court,

1. In this appeal, Mr Rasmussen asks the Court to set aside the judgment delivered by the Court of First Instance on 6 July 1993 in Case T-32/92 [1] and to uphold the original application for annulment of the Commission's decision rejecting his candidature for the post of Director of the Press and Information Office in Lisbon, together with the decision to fill the post in question by engaging a member of the temporary staff.

2. I shall briefly summarize the facts of the case. On 11 November 1990, the Commission published Notice of Post No 587 with a view to filling the post of Director of the Lisbon Office. As that notice indicated, the post in question was subject to the rotation system which the Commission had established for the staff of the press and information offices in the Member States by decision of 24 November 1976. That decision provided, *inter alia*, that the rotation would in principle be effected by means of a general redistribution and that, in the course of that redistribution, staff would be re-assigned together with their budgetary posts.

On 28 November 1990, Mr Rasmussen submitted his application for the job in question. The appointing authority, in view of the rotation committee's opinion that none of the candidates met the necessary requirements, decided to terminate the rotation procedure, to allocate a temporary post in Grade A 3 to the Lisbon Office and to initiate the procedure for filling the post in question by engaging a member of the temporary staff. Mr Rasmussen brought proceedings before the Court of First Instance contesting those decisions, claiming that they infringed Articles 4, 29 and 45 of the Staff Regulations, which lay down the procedure which the administration is required to follow, where a vacant post exists, with regard to appointments and promotions.

3. The Court of First Instance dismissed the action by its judgment of 6 July 1993, cited

* Original language: Italian.

1 — *Rasmussen* v *Commission* [1993] ECR II-765.

above, in which it came to the conclusion that 'the provisions of Articles 4, 29 and 45 of the Staff Regulations are not applicable to the procedure at issue' (paragraph 42).

In particular, the Court of First Instance, after noting that the procedure initiated by Notice of Post No 587 is subject to the rotation system established by the decision of 24 November 1976 and that that system is based on the principle that the official concerned is re-assigned together with his post (paragraph 35), concluded that in the case under consideration no vacant post existed within the meaning of Articles 4 and 29 of the Staff Regulations (paragraph 37). The existence of a vacant post cannot, in the opinion of the Court of First Instance, be inferred either 'from the existence of a job, of a permanent nature, as Director of the Lisbon Office, or from the subsequent engagement of a member of the temporary staff in Grade A 3 for that job' (paragraph 38).

It is essentially those statements in the judgment under appeal that Mr Rasmussen is disputing, claiming that the Court of First Instance erroneously decided that the post to be filled in Lisbon was not a vacant post and consequently infringed Articles 4 and 29 of the Staff Regulations. Mr Rasmussen claims that the rotation system concerns permanent jobs which are provided for in the budget and which are therefore to be regarded as 'posts' within the meaning of Article 6 of the Staff Regulations [2] from which it follows that, when the appointing authority terminated the rotation procedure, it was under an obligation to restart the procedure from the beginning, that is to say, in accordance with the rules of procedure laid down by Articles 4 and 29 of the Staff Regulations. Mr Rasmussen also claims that, by making an arbitrary distinction between members of the temporary staff according to whether they are engaged to fill a permanent post or a temporary post, the Court of First Instance has also infringed Article 9 of the Conditions of Employment of Other Servants of the European Communities (hereinafter the 'employment conditions of other servants'), which draws no distinction, for the purposes of the recruitment procedure, between the various categories of temporary staff listed in Article 2 of those conditions.

4. Thus, in essence, it must be established whether the Court of First Instance correctly classified the recruitment procedure initiated by publication of Notice of Post No 587 and, more specifically, whether or not the post to be filled was to be classified as a vacant post.

It may be taken to be common ground that the availability of the post advertised by Notice of Post No 587 was a matter within the scope of the rotation system, and I would observe that the Court has recognized on several occasions the lawfulness of the system whereby staff are re-assigned

2 — That article states: 'The list of posts appended to the section of the budget relating to each institution shall indicate, for each category and each service, the number of posts in each grade for each career bracket'.

together with their budgetary posts in the course of the rotation procedures established by the Commission. [3] The Court has also expressly confirmed that the formalities prescribed by Articles 4 and 29 of the Staff Regulations 'do not apply when an official is re-assigned with his post because such a transfer does not give rise to a vacant post'. [4] In other words, the movement of staff provided for under the rotation system is not to be regarded as a transfer, but as a re-assignment to new places of employment — precisely because the posts held by those members of staff are themselves re-assigned together with their holders.

However, is the fact that the job in question is for the press and information offices sufficient to preclude the existence of a vacant post within the meaning of the Staff Regulations, even where the post in question is not filled by means of rotation, that is to say, by re-assignment of the member of staff together with his post? That is the issue raised by this appeal.

5. Mr Rasmussen claims that, since the post of Director of the Lisbon Office, like all the posts filled by means of the rotation system, is a permanent post entered in the budget of the institution concerned, and is therefore to be classified as a vacant post within the meaning of the Staff Regulations, it follows that, once the rotation procedure has been terminated, Articles 4 and 29 of the Staff Regulations should again become applicable.

In that connection, the Court of First Instance, after observing that 'the existence of a given "job", as opposed to a "post", falls within the competence of the institution with respect to its departmental organization, whereas the question of the existence of a vacant post depends upon whether there is, amongst the total number of permanent posts set out in the budget, a post that is not filled' (paragraph 39), held that 'in so far as the budget does not define the duties amongst which the total number of posts is to be distributed, the existence at Lisbon of a vacant post within the meaning of the Staff Regulations cannot be inferred from the mere fact that the job of Director of the Lisbon Office has remained temporarily unfilled following the re-assignment of the former director together with his post' (paragraph 39).

6. That reasoning is not affected by Mr Rasmussen's claim that, since it is usually officials who fill the posts subject to the rotation system, the job of Director of the Lisbon Office must be included in the list of posts provided for in the budget, from which it follows that it must be a vacant post within the meaning of the Staff Regulations. However, no vacant post can arise under the rota-

3 — See Joined Cases 161/80 and 162/80 *Carbognani and Coda Zabetta* v *Commission* [1981] ECR 543; Case 791/79 *Demont* v *Commission* [1981] ECR 3105; Case 117/81 *Geist* v *Commission* [1983] ECR 2191.

4 — See Joined Cases 161/80 and 162/80, cited above, paragraph 19.

tion system precisely because, as the Court has confirmed in the relevant case-law, [5] it involves the re-assignment of members of staff together with their respective posts.

It follows that the existence of a vacant post within the meaning of the Staff Regulations cannot be inferred, as the Court of First Instance rightly emphasized, from the fact that in the present case, in order to fill the job in question, the administration did not proceed by way of re-assigning a member of staff together with his post. The fact remains that, since the job of Director of the Lisbon Office is subject to the rotation system, it cannot give rise to a vacant post within the meaning of the Staff Regulations.

7. That conclusion is borne out by the fact that the administration, in order to be able to engage a member of the temporary staff for the position in question, arranged for a temporary post to be added to the total staff of the Directorate-General concerned. The member of the temporary staff who was subsequently engaged for the Lisbon position was recruited, as the Court of First Instance noted in paragraph 40 of its judgment, under Article 2(a) of the employment conditions of other servants, that is to say, 'to fill a post which is included in the list of posts appended to the section of the budget relating to each institution and which the budgetary authorities have classified as temporary'.

The first complaint is therefore unfounded, since, in the circumstances under consideration, no error in law can be discerned in the judgment delivered by the Court of First Instance.

8. With regard to the second complaint alleging infringement of Article 9 of the employment conditions of other servants — in so far as the Court of First Instance drew a distinction between members of the temporary staff according to whether they are engaged to fill a permanent post or a temporary post — the Commission raises an objection of inadmissibility under Article 113(2) of the Rules of Procedure. It claims that the second complaint represents a new ground for appeal which changes the subject-matter of the proceedings before the Court of First Instance, in so far as Mr Rasmussen seeks thereby to call in question the legality of the Commission's decision to fill the position concerned by engaging a member of the temporary staff. The Commission further contends that the distinction at issue derives from Article 2 of the employment conditions of other servants and not from a question of law raised by the decision of the Court of First Instance.

Mr Rasmussen claims, on the other hand, that the complaint in question challenges the legality of the reasoning contained in the judgment under appeal and does not, therefore, in any way alter the subject-matter of

5 — See the cases cited above at footnote 3.

the proceedings before the Court of First Instance.

9. In the light of the foregoing, I consider that the complaint at issue must be regarded as challenging the view expressed by the Court of First Instance to the effect that the very fact of having engaged a member of the temporary staff under Article 2(a) of the employment conditions of other servants, that is, for a position which the budgetary authorities have classified as temporary, precludes the existence of a permanent position and therefore of a vacant post within the meaning of the Staff Regulations. However, no question of inadmissibility on the ground of new subject-matter having been introduced can arise, in so far as the complaint challenges a statement made by the Court of First Instance.

However, it suffices to observe in that connection that the Court of First Instance merely drew attention to a distinction inherent in Article 2 of the employment conditions of other servants. The fact that Article 9 of those conditions does not draw any distinction, for the purposes of recruitment, with regard to the various categories of members of the temporary staff, is irrelevant in this context, in so far as, bearing in mind that the position at issue is subject to the rotation system, it does not impinge on the question of whether or not a vacant post exists within the meaning of the Staff Regulations.

Accordingly, the second complaint must be declared unfounded.

10. In the light of the foregoing considerations, I therefore propose that the Court dismiss the appeal brought by Mr Rasmussen.

I suggest that the appellant be ordered to bear the costs of these proceedings, including the defendant's costs in the appeal proceedings.