OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 2 July 1986 *

Mr President,
Members of the Court,

1. This case follows on from the proceedings in which the Court gave judgment on 16 October 1984 in Case 257/83 *Williams* v *Court of Auditors* [1984] ECR 3547 in which the Court, upon the application of Mr Williams, annulled the decision of 24 March 1983 appointing Hartmut Schwiering a probationary official in Grade A 5 following an internal competition. Mr Schwiering, who did not intervene in those proceedings, is now the applicant in this case.

From 1 December 1977 Mr Schwiering was attached to the Cabinet of Mr Leicht, the German Member of the Court of Auditors. In 1982 he applied to take part in the internal competition. He was placed first on the list of suitable candidates drawn up by the Selection Board and on 1 April 1983 he was appointed a probationary official in Grade A 5 and assigned to a post of principal administrator. He was established with effect from 1 January 1984. In its judgment in Case 257/83 the Court held that the decision making that appointment should 'be treated as if it had never been taken' (paragraph 24 of the decision).

In order to comply with that decision the Court of Auditors adopted the following two measures:

(i) on 18 October 1984 it appointed Mr Williams, who was second on the list of suitable candidates, as a principal administrator, a post which Mr Schwiering could no longer occupy;

(ii) on 24 October 1984 it notified Mr Schwiering of the annulment with effect from 16 October 1984 of the decision appointing him an official and offered to him, with effect from that date, a contract as a member of the temporary staff in Grade A 7, Step 3. It was also decided that 'the negative financial effects resulting from Mr Schwiering's particular administrative position would take effect on the first day of the month following notification, namely 1 November 1984'.

In a letter of 25 October 1984 addressed to the defendant, Mr Schwiering maintained that he was not responsible for the situation created by the judgment in Case 257/83 and that he accepted the temporary contract offered to him 'only subject to the express condition that it could if necessary be renewed before the question of (his) position (in particular with regard to the resultant loss of income) was finally resolved'. It may be noted that the temporary contract has been renewed without interruption.

On 19 December 1984 the applicant's lawyer proposed a settlement to the Court of Auditors. The proposal was based on the proposition that the 'retroactive annulment of Mr Schwiering's appointment automatically entailed the nullity of the implied termination of his previous position as a

* Translated from the French.

member of the temporary staff' and that therefore he was still entitled to hold that position. It was proposed that with effect from 1 April 1983 until a 'date to be agreed' he should receive the remuneration payable under his former contract as a member of the temporary staff 'which was still in force on 1 April 1983'. At the date agreed upon the former temporary contract would be replaced by another contract for a permanent post in Grade A 5 or Grade A 7/A 6, with, in the latter case, the payment of a compensatory allowance, which would be in accordance with the case-law of the Court concerning Community servants. In addition, 'the Court of Auditors would give Mr Schwiering the opportunity to take part in an internal competition organized with a view to filling definitively the post to which he had been appointed', corresponding to his qualifications. In the event of an agreement, Mr Schwiering would waive any right to legal action. In that letter, in addition, it was stated that Mr Schwiering reserved the right to request compensation 'with respect to the legal consequences of the contract of employment of 15 December 1977 together with its amendment of 1979 and to the annulment of the decision establishing him'.

On 16 January 1985, Mr Schwiering requested that appointing authority to consider the letter from his lawyer as a complaint within the meaning of Article 90 (2) of the Staff Regulations.

By a letter of 15 February 1985, the President of the Court of Auditors acknowledged that request but, at the same time, rejected the complaint. It was stated in that letter, in the first place, that all persons attached to the cabinet of a Member of the Court of Auditors whose contracts, like Mr Schwiering's, did not contain a clause linking the termination of the contract to the expiry of the Member's term of office had received a letter informing them that their contracts 'would be terminated automatically at the end of the term of office of the Member concerned if his term of office were not renewed', and, secondly, that the duty to provide for his welfare had been entirely respected since he had been placed in the most favourable situation possible having regard to the provisions of the Staff Regulations.

2. By an action brought on 14 May 1985, Mr Schwiering claims that the Court should:

primarily

(i) annul the decision taken by the President of the Court of Auditors on 15 February 1985 rejecting the applicant's complaint and the decisions taken by the President of the Court of Auditors on 24 October 1984;

(ii) order the Court of Auditors to maintain him in the career bracket which he was in until the judgment of 16 October 1984;

in the alternative

annul the internal competition and, in the event of his being appointed to a grade or step lower than that which he held prior to 16 October 1984, order that he be awarded a compensatory allowance;

in the further alternative

grant compensation 'amounting to a reasonable proportion of the remuneration which he would have received on the basis of his legal status before 16 October 1984 as a principal administrator in Grade A 5 until he was 65 years of age'.

3. That application, which substantially reiterates the terms of the letter of 19 December 1984 sent to the Court of Auditors by the applicant's lawyer, is founded essentially, as regards the primary claim, on the following considerations.

Whatever efforts it has made, the appointing authority has failed to take in relation to the applicant all the measures

required by its duty to provide for the welfare of an official who through no fault of his own had been prejudiced by an administrative act. In accordance with the rules governing public service recognized in most of the Member States, it was necessary to apply the principle that unlawful administrative acts must not affect the careers of the officials concerned. The applicant was an official of the Communities since 1 January 1984 and was entitled to retain that legal status after the Court had established the effects of the irregularity of the appointment procedure.

By analogy, it is, in the applicant's view, necessary to apply the Court's case-law according to which, after a promotion decision has been annulled, an official is restored to his previous position. In accordance with the principle of legal certainty, the applicant ought therefore to have been reinstated as a member of the temporary staff in Grade A 4, a position which had been terminated only by implication, and he should continue to receive the remuneration relating to that grade in order to prevent any financial loss, in accordance with the duty to have regard for the welfare of officials.

Those same arguments form the basis of the claim for a compensatory allowance.

As regards the other alternative claims, the applicant argued essentially that neither Mr Williams nor the other candidates satisfied the conditions for admission to the competition any more than he did.

Finally, the claim for compensation is based essentially on the applicant's loss of income, his 'anxiety' and the 'equivocal position' in which he finds himself in relation to his colleagues as a result of a situation for which the Court of Auditors is wholly responsible.

4. The Court of Auditors contests the admissibility of the application and contends, in the alternative, that it should be dismissed.

In its view, no complaint within the meaning of the Staff Regulations was made inasmuch as the letter from the applicant's lawyer, which was regarded as a complaint by the applicant, did not clearly state the object of the complaint nor the measure which was contested, nor, finally, the precise measure which the appointing authority was requested to take. The appointing authority's reply of 15 February 1985 was intended merely to inform the applicant of that authority's position on certain of the legal points raised by him. The claim for annulment is therefore inadmissible. As regards other claims they were never submitted in any form whatsoever prior to the bringing of this action. They too are therefore inadmissible.

As regards the substance, the Court of Auditors considers that it has fully complied with the duty to have regard for the welfare of its officials within the limits imposed by the provisions of the Staff Regulations. In the first place, the temporary contract would in any event have been terminated on the departure of Mr Leicht. Secondly, the applicant's acceptance of a post as an official entailed an implied resiliation of the temporary contract which could not be brought back into force. Moreover, following the Court's judgment of 16 October 1984 it would have been impossible to allow the applicant to continue in his career as an established official. Finally, the Court of Auditors draws attention to the Court's judgment of 29 September 1976 (in *Giuffrida* v *Council* [1976] ECR 1395), according to which the organization by the appointing authority of a competition 'for the sole purpose of remedying the anomalous administrative status of a specific official' constitutes a misuse of powers.

The alternative claims are not founded because the applicant received the most favourable treatment possible and no fault can be attributed to the defendant. In that respect, the Court of Auditors argued that the applicant ought to have known that the assessment of professional experience was decisive for admission to the competition and that his qualifications in that regard could give rise to difficulties.

The Court of Auditors considers that it has unreasonably been caused to incur costs and therefore contends that the Court should order the applicant to pay all the costs.

Calvin Williams has intervened in these proceedings in support of the conclusions of the Court of Auditors.

5. On the question of admissibility it is necessary to refer to a principle which has been consistently upheld by the Court and was confirmed recently in its judgment of 7 May 1986 in Case 52/85 *Rihoux and Others* v *Commission* [1986] ECR 1555. The Court held that:

'... Article 91 of the Staff Regulations is designed to permit and encourage the amicable settlement of differences which have arisen between officials and the administration. In order to comply with that requirement it is essential that the administration should be in a position to know with sufficient certainty the complaints or wishes of the person concerned. On the other hand, it is not the purpose of that provision to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claims submitted at this stage change neither the legal basis nor the subject-matter of the complaint (judgment of 1 July 1976 in Case 58/75 *Sergy* v *Commission* [1976] ECR 1139, at p. 1139; judgment of 20 March 1984 in Joined Cases 75 and 117/82 *Razzouk and Bedoun* v *Commission* [1984] ECR 1509; judgment of 23 January 1986 in Case 173/84 *Rasmussen* v *Commission* [1986] ECR 197)' (paragraph 12 of the decision).

There is no doubt that the applicant did indeed submit a complaint which, although in the form of a letter from his lawyer, was recognized as such by the appointing authority, which, after acknowledging the applicant's request that that letter should be regarded as a complaint, repeatedly used the expression: 'Your complaint is rejected'.

The complaint concerned the administrative and financial situation in which the applicant found himself after 1 April 1983. The primary claims are therefore admissible. On the other hand, the alternative claim for the annulment of the competition was not set out in the complaint and is therefore inadmissible.

The claims in the alternative and in the further alternative for a compensatory allowance and for compensation were mentioned, albeit briefly, in the complaint. They must therefore also be declared admissible.

6. Within the limits described I consider that the application is not well founded. This case in fact concerns the situation resulting from the annulment by the Court of a decision appointing a member of the temporary staff as an official.

Therefore I do not consider it relevant to rely in this case on the Court's decisions concerning the unlawful promotion of officials. The analogy required would amount to extending the provisions of Article 47 of the Staff Regulations, which applies only to officials, to cover members of the temporary staff. As a result of the judgment of 16 October 1984, in respect of which it is no longer open to Mr Schwiering to bring third party proceedings, Mr Schwiering never had the status of official.

The essential difference between the conditions of employment for members of the temporary staff, to which he was subject, and those applying to officials, lies in uncertainty. By taking up on 1 April 1983 the duties relating to a post of probationary administrator, Mr Schwiering necessarily terminated his previous employment contract. The annulment of his appointment as an official could not have had the effect of reviving that contract. His primary claim must therefore be declared ill-founded.

For the same reasons, his alternative claim for the payment of a compensatory allowance cannot be accepted. Mr Schwiering, who is deemed never to have possessed the status of official and who cannot ask to be reinstated in his post as a member of the temporary staff, cannot derive any right from the two circumstances which he relies on in support of his claim in this regard.

It may be noted, moreover, that the duty to have regard for the welfare of officials does not allow the provisions of the Staff Regulations to be ignored. In addition it would seem that that duty has been fully observed inasmuch as the Court of Auditors offered the applicant a temporary post in Grade A 7/A 6 and continued to pay him until 1 November 1984 the remuneration which he received in respect of the annulled appointment.

7. It remains to consider the claim in the further alternative for damages. As I stated in my Opinion in the *Williams* case, the appointing authority had a duty to ascertain whether Mr Schwiering, once included in the list of suitable candidates by the Selection Board, 'actually meets the requirements laid down by the appointing authority itself with regard to diplomas or experience'. In failing to do so, it committed an error prejudicial to Mr Schwiering, since in the circumstances described above he had to terminate his temporary contract.

Nevertheless, that prejudice was wholly compensated by the measures which the administration took in Mr Schwiering's favour precisely on account of its duty to provide for the welfare of its officials. Mr Schwiering's temporary contract came to an end on 30 March 1983. There was every reason for assuming that it would normally have been continued until 17 October 1983, when Mr Leicht's term of office came to an end. However, there are no grounds suggesting that it would have been extended following the arrival of Mr Leicht's successor. The applicant, who continued to receive the remuneration for the A 5 post from 1 April 1983 to 1 November 1984, has since been employed under a new temporary contract. Although he is less well paid under that contract, it affords him a period of employment which the administration was not required to give him under the Staff Regulations.

In my view, Mr Schwiering cannot therefore claim to have suffered any lasting prejudice.

Consequently, I propose that the Court should dismiss the application. As regards the costs, I do not consider that the circumstances of the case warrant a departure from the usual practice of applying Article 69 (2) (1) of the Rules of Procedure, subject to Article 70 of those rules. The costs of the intervention must be borne by the defendant institution.