In Case 106/80

BERNARD FOURNIER, an official of the Commission of the European Communities, residing in Brussels, represented by Edmond Lebrun of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Advocate, 34B Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Denise Sorasio, a member of its Legal Department, acting as Agent, assisted by Robert Andersen of the Brussels Bar, with an address for service in Luxembourg at the offices of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for an order requiring the defendant to pay the applicant compensation for damage suffered and to take into account certain periods of service as a member of the auxiliary staff for the purpose of calculating the applicant's years of pensionable service,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts

The applicant, Bernard Fournier, entered the service of the Commission on 1 September 1964. His administrative status has been governed by a number of successive contracts and may be summarized as follows:

(a) Period covered by a series of contracts as a member of the auxiliary staff (1 September 1964 to 31 December 1968)

Mr Fournier was recruited under a contract dated 12 August 1964 as a member of the auxiliary staff for a period of six months starting on 1 September 1964. He was placed in Category A, Group I, Class 2, and given the duties of a research assistant in the Directorate-General for External Relations. By decision of the Commission of 2 March 1966 he was assigned to the Directorate-General for the Internal Market, in the Industry, Craft Trades and Commerce Directorate, with effect from 1 January 1966. His contract as a member of the auxiliary staff was extended on several occasions, the last extension being from 10 July 1968 to 31 December 1968.

(b) Period covered by a series of contracts as a temporary servant (1 January 1969 to 31 December 1971)

Subsequently the applicant was engaged under a contract dated 20 January 1969 as a temporary servant in Category B, Grade 1, Step 3, for a period of three months commencing on 1 January 1969, to serve as a Principal Administrative Assistant. He was assigned, in that capacity, to the Directorate-General for Economic and Financial Affairs.

By an application lodged on 21 April 1969 the applicant brought an action before the Court of Justice of the European Communities seeking annulment of the Commission's implied decision rejecting his claim for establishment as an official in Grade A 4. That application was dismissed as inadmissible (judgment of 13 May 1970, Case 18/69 *Bernard Fournier* v *Commission* [1970] ECR 249).

The contract of 20 January 1969 was extended on several occasions, the last extension being from 3 June 1971 to 31 December 1971.

(c) Period covered by a series of contracts as a member of the auxiliary staff (1 January 1972 to 31 December 1972)

Since no further extension of the last-mentioned contract was possible by virtue of the second paragraph of Article 8 of the Conditions of Employment of Other Servants of the European Communities, Bernard Fournier was engaged under a contract dated 11 January 1972 as a member of the auxiliary staff in Category A, Group I, Class 2, for a period of three months starting on 1 January 1972, to carry out research work. He was assigned, in that

capacity, to the Directorate-General for Development Aid. That contract was initially extended to 30 June 1972 and subsequently to 31 December 1972.

On 4 December 1972 Bernard Fournier submitted a request under Article 90 (1) of the Staff Regulations seeking definitive determination of his administrative status by means of establishment in a category, grade and step consonant with his academic and other qualifications, and his experience, age and seniority.

(d) Period covered by a contract as a temporary servant (1 January 1973 to 30 April 1973)

Since, as at 31 December 1972, his contract as a member of the auxiliary staff could not be extended (Article 52 of the Conditions of Employment of Other Servants) the Commission decided on 21 February 1973 to authorize the conclusion of a temporary servant's contract with Bernard Fournier, assigning him to Grade A 6, Step 3, for a period of four months from 1 January 1973. The contract was entered into on 9 March 1973 and Mr Fournier was assigned to the Directorate-General for Development and Cooperation.

(e) Establishment

By decision of 19 July 1973, adopted pursuant to Articles 1, 29 (2), 31, 32 and 34 of the Staff Regulations, he was appointed a probationary official in Grade A 6, Step 3, and assigned as an administrator to the Directorate-General for Development and Cooperation, EDF Programmes and Projects Directorate, Training and Symposia Division, with effect from 1 May 1973. At the end of his probationary period he was established in that post by decision of 25 April 1974, with effect from 1 April 1974. On 1 July 1975 he was assigned to Division VIII-D-4 (Training).

II — Procedure and conclusions of the parties

By letter of 29 March 1979, received at the Commission Secretariat on 30 March 1979, Mr Fournier submitted a request under Article 90 (1) of the Staff Regulations seeking compensation for damage suffered as a result of the Commission's wrongful conduct with regard to his career. That request was rejected by a letter from the Director-General for Personnel and Administration dated 1 August 1979.

Mr Fournier lodged a complaint regarding the rejection of his request under Article 90 (2) of the Staff Regulations. That complaint, which was received at the Secretariat on 25 October 1979, sought compensation for damage suffered and claimed that the Commission should take into account the applicant's service as a member of the auxiliary staff in determining his pension rights.

Upon expiry of the period prescribed in Article 90 (2) *in fine*, Mr Fournier instituted these proceedings before the Court on 29 March 1980.

In his application he alleged that the Commission had placed him in an uncertain and precarious position, that it had employed him and continued to employ him for tasks of a trivial nature which did not even correspond to his

starting grade and that that wrongful conduct on the part of the Commission had damaged his health and that of his family.

In the meantime, the appointing authority reached a decision on 19 May 1980 on the complaint lodged by the applicant and notified its decision to him on 22 May 1980.

That decision satisfied the applicant's claims in part in so far as the Commission decided to take into account for Community pension purposes his periods of employment as a member of the auxiliary staff from 1 January 1966 to 31 December 1968 and from 1 January 1972 to 31 December 1972. As a result, for part of the period of employment between 1 September 1964 and 31 December 1969 (mentioned above under (a)) and for the whole of the period of employment between 1 January 1972 and 31 December 1972 (mentioned above under (c)), the Commission decided that the contracts in question whereby the applicant was employed as a member of the auxiliary staff were to be regarded as temporary servant's contracts, with all the legal consequences which that entails as regards calculation of his years of pensionable service.

Accordingly, in his reply lodged on 30 December 1980, the applicant amended his conclusions in the light of the new situation.

Having regard to the order of the Court of 7 May 1980 dismissing as inadmissible the joint applications of his wife and children (Cases 114 to 117/79), the applicant, in his reply lodged on 30 December 1980, asked the Court to decide in the first place as to the admissibility of his claim for damages.

At this stage of the proceedings, *Mr Fournier* claims that the Court should:

A. In so far as the application claims compensation for damage suffered:

1. Declare the application admissible;

2. Before giving a decision on the substance of the case, direct that the written procedure be re-opened, for the exchange of reply and rejoinder, and allow the oral procedure to take place;

B. In so far as the application concerns pension rights:

3. Declare that all the contracts concluded from 1 September 1964 to 31 December 1965 between the Commission and the applicant are to be treated as having been concluded with a temporary servant;

4. Order the Commission to take that period into account in calculating the applicant's years of service for the purpose of his retirement pension under the Community pension scheme and in calculating his years of service within the meaning of the first paragraph of Article 77 of the Staff Regulations;

5. Annul, to that extent, the Commission's decision of 22 May 1980 regarding the complaint lodged by the applicant on 25 October 1979 and, in so far as may be necessary, the implied decision and the subsequent express decision (1 August 1979) rejecting the request submitted by the applicant on 29 March 1979 and the implied decision rejecting the above-mentioned complaint;

6. Order the Commission to pay the costs.

The *Commission* contends that the Court should:

— Dismiss the application as inadmissible and, in any case, unfounded; and

— Order the applicant to pay the costs.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

At this stage, the proceedings relate to the admissibility of the claim for compensation and the substance of the claim that the period from 1 September 1964 to 31 December 1965 should be taken into account for calculation of the applicant's years of pensionable service.

III — Submissions and arguments of the parties

(a) As regards the admissibility of the application in so far as it seeks compensation for damage suffered

In its defence, the *Commission* contends that the application is inadmissible on the ground that on 21 April 1969 the applicant brought an action for annulment of the Commission's implied decision rejecting his request to be established as an official in Grade A 4 and a declaration that he should be established in that grade. That application was declared inadmissible. Furthermore, on 4 December 1972 the applicant submitted a request to the Commission under Article 90 (1) of the Staff Regulations seeking definitive determination of his administrative status in a category, grade and step consonant with his aspirations. The applicant did not receive the response to that request for which he had hoped.

The defendant objects to this action on the ground that the applicant may not obtain, by means of an action for damages, an effect equivalent to advantages which were denied him by a decision against which an application for annulment has been adjudged inadmissible or against which no application was lodged within the prescribed period.

In his reply, the *applicant* asserts that the instances of wrongful conduct alleged against the defendant constitute a single whole and that certain grounds for complaint are still continuing. He emphasizes that the most serious damage suffered, namely, that relating to his state of health, is not such that a judgment annulling any particular decision could have been a substitute for compensation.

(b) As regards the pension rights

In his reply, the *applicant* states in the first place that the dispute regarding pension rights is now confined, by reason of the Commission's decision of 22 May 1980, to the period of so-called auxiliary service from 1 September 1964 to 31 December 1965.

He criticizes the Commission for refusing to take into account the period of employment from 1 September 1964 to 31 December 1965 for the purpose of calculating his years of pensionable service and his years of service within the meaning of the first paragraph of Article 77 of the Staff Regulations.

He pleads infringement of the Conditions of Employment of Other Servants of the European Communities,

in particular Articles 2 (b), and 3, the second paragraph of Article 40 and Article 52 (b), breach of the principle whereby the legal nature of a contract must prevail over the description given to it by the parties, and breach of the principles of equity, equality of treatment, distributive justice and good administration.

The applicant states that also during the period of so-called auxiliary service he carried out permanent, well-defined, Community public service duties, which implies that the contracts concluded with him in that period are to be regarded as having been concluded with a temporary servant (cf. judgment of 1 February 1979, Case 17/78 *Deshormes* v *Commission* [1979] ECR 189).

The Commission states that it is precisely by applying the *Deshormes* judgment that it concluded that the period from 1 September 1964 to 31 December 1965 should not be taken into account in calculating the years of service within the meaning of the first paragraph of Article 77 of the Staff Regulations. The Commission maintains that during the period concerned the applicant carried out, under his contract as a member of the auxiliary staff, essentially temporary tasks as a research assistant assigned to the Directorate-General for External Relations, with responsibility for studies relating to the external trade of the Community (annexes 8 and 9 to the defence).

In his reply, the *applicant* states that during the period at issue he was assigned to the Directorate-General for External Relations, where he performed the duties of research assistant, that is to say he carried out studies relating to the external trade of the Community.

Although as from 1 January 1966 he was assigned to the Directorate-General for the Internal Market, all the subsequent contract extensions stipulated that the working conditions and the other provisions contained in the initial contract of 12 August 1964 were to remain unchanged. Included among those other provisions is that relating to his duties: research assistant. In the applicant's view, that proves that the duties performed before 1 January 1966 are of the same nature as those performed after that date, which the Commission had recognized to be permanent, well-defined, Community public service duties.

Moreover, the duties performed during that period were included in 1972 among the duties of officials. The duties performed by the applicant during the period in question were taken over by an official and were still being performed in 1972 (annex 74 to the application).

In its rejoinder, the *Commission* states that it inferred from the *Deshormes* judgment (cited above) that it is necessary to take into account, for the purpose of the Community pension scheme, periods of employment under contract as a member of the auxiliary staff to the following extent:

1. Regardless of their duration, all contracts engaging as members of the auxiliary staff officials who fulfil precisely the conditions indicated by the Court in the *Deshormes* case, that is to say officials:

   (i) who carried out exactly the same duties during their period as

members of the auxiliary staff as after their recruitment as officials or their engagement as temporary servants occupying permanent posts, and

(ii) were in fact entrusted with the performance of duties corresponding to permanent posts vacant in the department to which they were assigned,

are to be regarded as temporary servants' contracts.

2. As regards officials who do not fulfil the above-mentioned conditions, but who have served as members of the auxiliary staff for more than 12 months:

— The part of the period of auxiliary service in excess of 12 months, immediately preceding recruitment as an official or engagement as a temporary servant occupying a permanent post, during which the servant undertook duties identical to those undertaken after recruitment as an official or engagement as a temporary servant, is regarded as having been completed by the person concerned in the capacity of a temporary servant occupying a permanent post.

An analysis of the various stages of the applicant's career shows that only the contract of employment concluded, and then extended, for the period between 1 September 1964 and 31 December 1965 during which he carried out the duties of research assistant in the Directorate-General for External Relations was legally classifiable as a contract for auxiliary service.

In fact, the applicant's duties during that period were not "well-defined . . . public-service duties appearing in the organization plan of a Community institution, the posts of such staff being shown in a list of posts." The Commission merely wanted to make use for a short time of an "outside helper" (in German "Aushilfskraft") for the purpose of carrying out administrative duties of a short-term character, in particular work relating to a major study which had to be carried out by the Directorate-General for External Relations.

According to the Commission, it is clear from the documents produced by it that from 1 September 1964 to 31 March 1966, or at least until 31 December 1965, the date of his new posting, the applicant actually carried out administrative duties which might have been performed by a member of the auxiliary staff. The Commission states that, in the absence of documents establishing with sufficient precision the exact nature of the duties carried out by the applicant in the Directorate-General for the Internal Market between that date and the termination of his employment as a member of the auxiliary staff on 31 December 1968, it has presumed that those duties corresponded to permanent Community public service duties and, applying in a broad sense the principles derived from the *Deshormes* judgment, has extended that presumption to the whole period of the applicant's employment with the Directorate-General for the Internal Market. It is of the opinion that that is as far as it may reasonably go.

IV — Oral procedure

At the sitting on 2 July 1981 the parties presented oral argument.

The Advocate General delivered his opinion at the sitting on 15 October 1981.

Decision

1 By an application lodged at the Court Registry on 28 March 1980, Bernard Fournier, an official of the Commission, brought an action claiming that the Commission should be ordered, first, to pay him the sum of BFR 18 560 000 as compensation for damage caused by the Commission's wrongful conduct towards him and, secondly, to take into account, in the calculation of his years of pensionable service within the meaning of Article 77 of the Staff Regulations of Officials (hereinafter referred to as "the Staff Regulations") the periods of service during which the applicant had the status of a member of the auxiliary staff, namely from 1 September 1964 to 31 December 1968 and from 1 January 1972 to 31 December 1972.

2 The applicant, who entered the service of the Commission on 1 September 1964 as a member of the auxiliary staff, was established in 1974, with effect from 1 April of that year. Before his appointment as a probationary official, in Grade A 6, on 19 July 1973, his administrative status was governed by 25 successive contracts, some of which were extensions of previous contracts. Thus he worked: (i) as a member of the auxiliary staff in Category A in the Directorate-General for External Relations from 1 September 1964 to 31 December 1965, and in the Directorate-General for the Internal Market from 1 January 1966 to 31 December 1968; (ii) as a temporary servant in Category B in the Directorate-General for Economic and Financial Affairs from 1 January 1969 to 31 December 1971; (iii) as a member of the auxiliary staff in Category A in the Directorate-General for Development Aid from 1 January 1972 to 31 December 1972; and (iv) as temporary servant in Grade A 6 in the Directorate-General for Development and Cooperation from 1 January 1973 until his appointment as a probationary official.

3 It is that career, and the circumstances surrounding it, which have given rise to this action, the two parts of which raise different problems. It is appropriate first to examine the question of the applicant's pension rights.

The applicant's pension rights

4 In the request which he submitted pursuant to Article 90 (1) of the Staff Regulations and in the complaint which he lodged against the rejection of

that request, the applicant submitted that it was illegal for the Commission to leave him in a precarious position during the long period of his engagement as a member of the auxiliary staff. He maintained that his periods of employment as a member of the auxiliary staff should therefore be regarded as having been completed by him in the capacity of a temporary servant and should be taken into account in calculating his years of service for the purpose of his retirement pension within the meaning of the first paragraph of Article 77 of the Staff Regulations.

5 In this regard the applicant relied on the judgment of the Court of 1 February 1979 (Case 17/78 *Deshormes* v *Commission* [1979] ECR 189), where it was held that the purpose of the conditions applicable to auxiliary staff is to ensure that duties which, either intrinsically or because of the absence of an official, are of a precarious nature may be carried out by occasional staff, and that those conditions may not be improperly used to entrust permanent duties for long periods to such personnel, who would thus be used in an inappropriate manner and subjected to prolonged uncertainty.

6 After the expiry of the period prescribed in Article 90 (2) of the Staff Regulations and after the commencement of this action, the Commission replied to the applicant's complaint, admitting that the duties carried out by him during the periods from 1 January 1966 to 31 December 1968 and from 1 January 1972 to 31 December 1972 were not temporary duties as defined in the judgment cited above. For that reason, it decided to take those periods into account in calculating the applicant's years of pensionable service.

7 Accordingly, in his reply the applicant confined his claim to the period from 1 September 1964 to 31 December 1965. It is therefore necessary to examine the nature of the duties entrusted to the applicant during that period.

8 According to the Commission, during that period the applicant carried out essentially temporary duties as a research assistant in the Directorate-General for External Relations, with responsibility for studies relating to the Community's external trade. However, the applicant maintains that the duties carried out by him during that period did not differ in any way from

those entrusted to him after 1 January 1966; both before and after that date he was working on studies and the only change was the subject-matter thereof.

9 In this respect it should be remembered that the judgment of 1 February 1979 cited above took the view that the distinction between auxiliary staff and temporary staff lies in the fact that the latter occupy permanent posts included in the list of posts, whereas the former, except in the case of the temporary replacement of an official, perform administrative work without being assigned to a post included in the list of posts and the outstanding feature of contracts for auxiliary staff is their precariousness since they may be used only to provide a temporary replacement or to ensure the performance of administrative duties which are of a transitory nature or which fulfil an urgent need or which are not clearly defined.

10 In this case, the applicant has been unable to prove that the duties which he performed between 1 September 1964 and 31 December 1965 corresponded to a post included in the list of posts. The Commission, on the other hand, has produced a number of letters and notes addressed to the applicant by the Director-General for External Relations during that period which mentioned the essentially transitory nature of the work entrusted to the applicant.

11 It follows that this part of the application must be dismissed as unfounded.

Damages

12 The applicant alleges that numerous incidences of unlawful and improper conduct by the Commission, extending over the whole period from his first contract of employment until the present time, have caused him considerable damage. The heads of damage are: (i) ill health, (ii) mental suffering resulting from the ill health of his wife and three children, (iii) mental suffering resulting from the absence of a normal career, (iv) loss of earnings resulting from lack of advancement, (v) his establishment in Grade A 6

instead of Grade A 4, and (vi) mental suffering arising from the triviality of the duties assigned to him.

13 In its defence the Commission contested the admissibility of the application. It submitted that the applicant could not obtain by means of an action for damages advantages equivalent to those which had been denied him by a decision against which an action for annulment had been adjudged inadmissible (judgment of 13 May 1970, Case 18/69 *Fournier* v *Commission* [1970] ECR 249) or by decisions against which no action had been brought within the prescribed period.

14 Since the argument between the parties was thereafter confined to the question of the admissibility of this part of the application, the Court (First Chamber) decided to examine that issue first without giving judgment on the substance of the claim.

15 For that purpose, it is appropriate to examine the acts and omissions of the Commission which are alleged in the application to constitute unlawful and improper conduct on the part of that institution.

16 The application sets out the following circumstances:

(a) The Commission kept the applicant as regards his administrative status in a position which amounted to a "record period of uncertainty and instability".

(b) The applicant had to suffer "tribulations" regarding his grading and was demoted on several occasions.

(c) He was established "in a starting grade", namely Grade A 6, lower than the one to which he was entitled.

(d) The Commission made "improper use of the rules permitting the engagement of auxiliary staff" for a long period.

(e) The applicant was the victim of "harassment" and "acts of intimidation" on the part of the Commission and, moreover, the Commission entrusted only minor duties to him.

(f) The Commission disregarded warnings from several doctors about the applicant's health and that of his family.

17 It is clear from an examination of the foregoing list that the matters indicated under (f) do not constitute a separate head of claim, but may only be taken into consideration in relation to the other heads of claim. As regards the matters set forth under (b), (c) and (d), they are intended to establish the unlawfulness of several individual decisions taken by the Commission with respect to the applicant. The application is based on the alleged unlawfulness of those decisions and is therefore indistinguishable from an action for annulment. It should be borne in mind that an official who fails to contest in due time a decision of the appointing authority affecting him is not permitted to rely on the alleged unlawfulness of that decision in an action for damages.

18 The same arguments do not however apply with regard to the complaints set forth under (a) and (e). The harassment referred to in point (e) may consist of mere circumstances of fact unrelated to the decisions alleged to be unlawful. The resumption of the written procedure on the substance of the case will give the applicant an opportunity to clarify his allegations in that respect. Neither does the fact of the applicant's having been kept in a state of insecurity for more than 10 years, the complaint set forth under (a), necessarily merge with the complaints concerning the unlawfulness of the individual decisions taken with respect to the applicant. In fact, it is not possible to say at this stage that the improper use of contracts for the engagement of auxiliary staff has not given rise to damage otherwise than in relation to the pension rights on which this judgment has given a ruling. In this respect also, the applicant should have an opportunity to give more precise details of his complaints when the procedure is resumed on the substance of the case.

19 It may be seen from the foregoing considerations that the action for damages must be dismissed as inadmissible, in so far as it is based on the alleged unlawfulness of the Commission's decisions with respect to the applicant regarding his establishment, classification in a grade or step or the engagement of the applicant as a member of the auxiliary staff or as a temporary servant, but the application is otherwise admissible, subject to the conditions indicated above.

Costs

20 The costs must be reserved pending a decision on the rest of the case.

For those reasons,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as unfounded in so far as it concerns the taking into account of the applicant's period of service from 1 September 1964 to 31 December 1965 for the purpose of calculating his years of pensionable service within the meaning of Article 77 of the Staff Regulations of Officials;**

2. **Dismisses the application as inadmissible in so far as it seeks compensation for damage caused by allegedly unlawful decisions taken by the Commission with respect to the applicant;**

3. **Declares the application otherwise admissible;**

4. **Reserves costs.**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 19 November 1981.

J. A. Pompe
Deputy Registrar

G. Bosco
President of the First Chamber