decision of the appointing authority because it gives rise to specific benefits.

4. Since the temporary posting of an official arises from an assessment of the interests of the service, the party involved cannot, by reason only of the fact that he is performing the functions of the post in question, claim a right to obtain the benefit of this temporary posting.

5. The interests of the service and the impartiality of recruitment may render desirable an internal competition notwithstanding the possibility of filling a vacant post by way of promotion or transfer within the institution.

In Case 23/74

BERTHOLD KÜSTER, an official of the European Parliament, residing at 243 rue des Romains, Bertrange (Luxembourg) represented by Victor Biel, Advocate of the Cour Supérieure de Justice du Grande-Duché, 71 rue des Glacis, Luxembourg, in whose chambers he has chosen his address for service,

applicant

v

EUROPEAN PARLIAMENT, represented by its Secretary-General, Hans Robert Nord, assisted by Alex Bonn, of the Luxembourg Bar, having chosen its address for service in his chambers

defendant,

Application pursuant to Article 7 (2) of the Staff Regulations for recognition of the status of official called upon to occupy temporarily a post in category A3 and for the differential allowance relating thereto and the annulment of the appointments made by the European Parliament by virtue of internal competition No A/43.

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. M. Donner (Rapporteur), and A. O'Keeffe, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments developed by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

The applicant, an official in Grade A4, entered the service of the High Authority in April 1959. In May 1961 he joined the Language Service of the European Parliament; from January 1963 he was attached to the services of the Parliamentary Committees, ultimately with the Committee on Public Health and the Environment under the direction of Mr Van Nuffel. When as a result of an internal reorganization Mr Van Nuffel was appointed to the post of Director and transferred to another Directorate-General, the post of Secretary to the Committee on Public Health and the Environment became vacant and from 1 September 1973 it was assumed by the applicant.

By letter of 26 November 1973 the applicant approached the Director-General, Mr Pasetti-Bombardella, with a view to obtaining an official decision in relation to the post which he in fact temporarily occupied. This letter remained unanswered. He thereupon, by letter of 13 February 1974 addressed to the Secretary-General of the European Parliament, repeated his application, asking for a reply at the earliest possible date. He emphasized that he had in fact occupied the post since 1 September 1973.

On 22 February 1974 he made a formal complaint to the appointing authority within the meaning of Article 90 (2), requesting the grant of the interim allowance provided for under Article 7 (2) of the Staff Regulations.

By letter dated 4 March 1974 in reply to the letter of 13 February 1974 the Secretary-General observed that there had been no proposal for temporary appointment, because consequent upon competition A/43 the post was shortly to be filled.

Meanwhile by Notice of Vacancy No 875 of 26 September 1973 five posts of head of division in the Directorate-General for Committees and Interparliamentary Delegations were declared vacant. The Notice of Vacancy stated that the posts would be filled according to Article 29 (1) (a). On 28 September 1973 the applicant submitted his application in the proper form. By letter of 5 October 1973 addressed to Mr Berkhouwer, the President of the European Parliament, the applicant asked him to ensure that all the possibilities afforded by Article 29 (1) (a) were exhausted. This letter remained unanswered.

On 23 November 1973 Notice of internal competition A/43 was published. As a result of this new procedure the applicant asked the Secretary-General by letter of 26 November 1973 to inform him of the results of the consideration under Article 29 (1) (a). If appropriate, he insisted upon knowing the reasons why this consideration had produced no result. A copy of this letter was sent to the President of the European Parliament.

By identical letters of 20 December 1973 from the President and the Secretary-General the applicant was informed that it had seemed preferable to find a wider basis of choice for filling the vacant posts. By application dated 30

November 1973 the applicant submitted his candidature for competition No A/43.

By decisions of 14 February 1974 the President of Parliament, at the conclusion of the competition, appointed five other candidates to the vacant posts.

By complaint of 7 March 1974 the applicant requested that these decisions be annuled and that he be apointed to one of the vacant posts of head of division.

By letter of 14 March 1974 the President informed him that, given the lack of precision in his complaint, he was not in a position to accede to the applicant's requests.

By application dated 19 March 1974, entered at the Registry of the Court on the same date, the applicant instituted the present proceedings.

The written procedure followed a normal course.

On hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court (First Chamber) decided to (a) invite the defendant to explain the grounds which induced it not to fill the posts in question by way of promotion, (b) invite the defendant to produce the table of marks annexed to the Selection Board's report in competition A/43.

Upon receipt of the replies to these questions the Court decided by order of 20 November 1974 to summon Mr Opitz, the chairman of the Selection Board, as a witness to be examined as to the criteria adopted by the Selection Board.

II — Conclusions

The *applicant* claims that the Court should:

A. 1. rule that the administration of the European Parliament was wrong in not confirming to the applicant at his request that he actually temporarily occupied the vacant post at the Committee on Public Health and the Environment;

2. order the European Parliament to pay the applicant the differential allowance provided for under Article 7 (2) of the Staff Regulations;

B. 1. rule that the opening of internal competition A/43 is illegal, and accordingly annul the said competition with all the consequences resulting therefrom;

2. alternatively rule that the European Parliament must produce the list of suitable candidates as well as any document on the basis of which such list was prepared, including the last annual reports of the candidates who were promoted;

annul as contrary to the provisions of Articles 7, 29 and 45 of the Staff Regulations, and accordingly illegal, the five appointments made consequent upon competition A/43;

C. order the defendant to pay the costs.

The *defendant* contends that the Court should:

A. place on record that the defendant agrees to produce in the proceedings the list of suitable candidates prepared by the Selection Board in internal competition A/43 as well as the reasoned report of that Selection Board, with the exception of the marks obtained by candidates other than Mr Küster;

reject the remainder of the request submitted by the applicant for production of documents;

B. rule that the action is inadmissible or alternatively unfounded;

dismiss the same;

C. rule on the matter of costs in accordance with the provisions applicable.

III — Submissions and arguments of the parties

1. *On the first conclusion*

The *applicant* argues that the meaning of Article 7 (2), first sentence, of the Staff Regulations, under the terms of which 'an official *may be called upon* to occupy temporarily a post...' is not clear. Article 25, third paragraph, of the Staff Regulations, which lays down in an exhaustive fashion the relevant provisions as to appointment, establishment, promotion, transfer, determination of administrative status and termination of service of an official, contains no reference to a decision as to temporary posting under Article 7 (2). This means that notwithstanding the ambiguous wording of this provision, temporary posting is a matter of fact, not requiring to be incorporated in a formal *ad hoc* decision. In the event the applicant had found himself *de facto* instructed to carry out tasks entrusted to his superior; he had been given charge of the Secretariat of the Committee on Public Health and the Environment after the previous holder of that post had been promoted. A formal *ad hoc* decision was not therefore necessary at the time. The situation that had thus come about had been evident to all the officials concerned. It follows that the applicant was entitled to the differential allowance under Article 7 (2), second sentence, as from the moment that he had in fact carried out temporarily the functions of Secretary of the aforementioned Committee.

The *defendant* considers the first claim in the action to be inadmissible. If one considers that the applicant had by his letter of 26 November 1973 made a request within the meaning of Article 90 (1) of the Staff Regulations with a view to obtaining a decision entrusting him with the temporary occupancy of the post of Secretary to the Committee on Public Health and the Environment, then the reply of the Secretary-General of 4 March 1974 was given within the timelimit of four months laid down. It is only against this decision that Mr Küster could make a complaint within the meaning of Article 90 (2) of the Staff Regulations. The complaint which as from 22 February he in fact made against the failure to pay him the differential allowance under Article 7 (2) did not relate to the decision asked for and was also premature since it was in advance of the decision that was in fact made. Accordingly the complaint is inadmissible. It follows that the action before the Court is in turn inadmissible since it was not preceded by a valid complaint within the meaning of Article 90 (2) of the Staff Regulations. If one accepts the applicant's argument that interim posting constitutes a *de facto* situation, of a kind that confers on him the right to the differential allowance without a formal decision of the administration, then the complaint of 22 February constitutes the first procedural act necessary to ensure the admissibility of an action before the Court. On this assumption the action would still be inadmissible because the complaint of 22 February would have to have been the subject-matter of an express or implied decision of rejection. The letter of 4 March 1974 from the Secretary-General cannot be treated as such, since it relates to Mr Küster's requests of 26 November 1973 and 13 February 1974. Consequently, on this reasoning also, the action is premature and therefore inadmissible.

On the merits, the defendant points out that from the wording of Article 7 (2), first sentence, it follows that temporary appointments must be the result of a

formal act on the part of the appointing authority, this being an interpretation confirmed by the Court in its judgment of 16 March 1971 in Case 48/70, *Bernardi* v *European Parliament,* Rec. 1971, p. 175. Accordingly the payment of the differential allowance can only take place on the basis of an *ad hoc* act. The administration has a discretionary power in the matter which cannot be the subject matter of an action under Article 91 (1) of the Staff Regulations. Accordingly it was entitled to leave the post in question unfilled whilst awaiting the results of the internal competition A/43.

The *applicant* denies that his letters of 26 November 1973 to Mr Pasetti-Bombardella and of 13 February 1974 to the Secretary-General amounted to requests within the meaning of Article 90 (1) of the Staff Regulations. These two letters only amount to an exchange of correspondence with the administration, since the only authority competent in matters of temporary appointments in Category A is the President of the European Parliament. Accordingly, since no time-limit is prescribed as regards correspondence with the administration, the applicant's complaint of 22 February 1974 is admissible. The bringing of an action before the Court of Justice before the time-limit for the appointing authority to adopt a position in the matter had expired is justified by the fact that Mr Küster had presented an application for interim measures on 25 March 1974. Since this request was declared admissible by the President of the First Chamber of the Court of Justice in his order of 28 March 1974, it is appropriate to apply the rule of Article 91 (4) of the Staff Regulations according to which the proceedings in the principal action before the Court of Justice shall be suspended until such time as an express or implied decision rejecting the complaint is taken'. Since the time-limit for replying to the complaint of 22 February 1974 expired on 23 June 1974, the admissibility of the action as regards the temporary posting is not subject to doubt.

The *applicant* argues that he had been instructed by his immediate superior, who had just been promoted, to direct, as head of the department, the Secretariat of the Committee on Public Health and the Environment. The applicant thereupon carried out these functions for eight and a half months until 20 May 1974. It follows that the administration had used the provision of Article 7 (2). It is evident that the defendant ought to assume the financial obligations that result from the *de facto* temporary posting. As from the moment when the applicant was instructed by his superior to exercise the superior functions of head of the department, he was entitled to the differential allowance. In this matter the Parliament no longer has any discretionary power.

The *defendant* replies that the legal effect of Mr Küster's letters of 26 November 1973 and 13 February 1974 ought to be deduced not from the authority to which they were addressed but from their content. It is common ground that by means of these letters Mr Küster asked to be temporarily appointed in accordance with Article 7 (2) of the Staff Regulations, a request within the meaning of Article 90 (1) of the Staff Regulations. It matters little who is the addressee because in any event Article 90 (3) provides that requests on the part of officials to which Article 90 (1) relates must be submitted through the immediate superior. Besides, it is shown by the wording of the complaint of 22 February 1974 that the applicant himself considered the aforementioned letters as requests within the meaning of Article 90 (1).

Even if one were to consider the correspondence of 26 November 1973 and 13 February 1974 as not amounting to a request within the meaning of Article 90 (1), the complaint is still inadmissible. Under the provisions of Article 80 (2) of the Staff Regulations the complaint must be submitted against an

act adversely affecting him either where the authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The second hypothesis is the one adduced by the applicant. But if there had been no requests there could have been no complaint against a wrongful failure on the part of the authority to recognize the temporary appointment. As regards the non-payment of the allowance, the action cannot avoid being inadmissible by relying on the application for interim measures of 25 March 1974 and on Article 91 (4) of the Staff Regulations. That application only relates to the second head of claim, that is to say for annulment of the five appointments. Accordingly one cannot rely on this application for interim measures with a view to curing the premature nature of the proceedings insofar as the temporary posting is concerned.

On the merits the defendant further points out that it is clear from the letters of 26 November 1973 and 13 February 1974 and from the complaint of 22 February 1974 that the applicant himself considered that the situation would only be regularized after he had obtained a formal *ad hoc* decision from the administration. This attitude is exactly in line with the Court's case-law on Article 7 (2).

Since the differential allowance is only a consequence of the temporary posting, it is dependent on the decision under Article 7 (2), first sentence. It is from the date when that administrative act has taken place that the fourth month, as from which the indemnity is due, is calculated.

2. *As regards the appointments*

According to the *applicant* one ought in the first place to examine the question of the intrinsic legality of the internal competition A/43 which replaced the Notice of Vacancy No 875. By this Notice of Vacancy the appointing authority had promised in the first instance to fill the vacancies by promotion or transfer within the institution. An applicant who fulfilled all the conditions for promotion to one of the vacant posts had an interest in the administration proceeding according to the procedure laid down by Article 29 (1) (a) of the Staff Regulations. It follows from the Court's case-law (Judgment of 4 March 1964 in Case 15/63, *Lassalle* v *European Parliament*, [1964] ECR 31) that this procedure could not be abandoned before the administration had exhausted all possibilities. Now in the present case there is nothing to suggest that the authority had completely examined the possibilities of proceeding by way of promotion. Moreover the decision by which the administration opened internal competition A/43 contained no indication justifying the abandonment of the method originally envisaged by Notice of Vacancy No 875. This is why the opening of the internal competition A/43 is illegal and ought to be annulled, along with the five appointments in question. In the alternative the applicant argues that the internal competition A/43 had taken place in an irregular manner. He expresses doubts as to the criteria for selection applied by the Selection Board, which he says had no relation to the interests of the service. In this sense they are contrary to Article 7 (1) of the Staff Regulations. Moreover, the procedure was not in accordance with the imperative requirements of Article 45 of the Staff Regulations requiring a consideration of the comparative merits of the reports. It is for this reason that the applicant argues that the other side ought to produce all the documents in support of the list of suitable candidates for the vacant posts, including the list itself and if necessary, the last annual reports of the candidates who were promoted.

The *defendant* wonders whether the complaint which commences the administrative stage of the action ought not already to set out in a summary

form the allegations of illegality on which the action will be based. In this respect the defendant draws attention to the fact that having found that the complaint of 7 March 1974 did not indicate any grounds of illegality, it had by its (administrative) decision of 14 March invited Mr Küster to detail his complaint more fully. He in fact submitted these details by letter of 18 March 1974, whilst pointing out that the secret nature of the Selection Board's actions rendered his task difficult. In the light of this supplementary document, the administrative stage has not finished, as the decision of 14 March 1974 expressly declared. The applicant ought therefore to have awaited the definitive decision of the appointing authority before placing the matter before the Court.

The defendant states that it observed the provisions of Article 29 of the Staff Regulations when in the first place it conducted an examination of the possibilities of promotion and transfer under Article 29 (1) (a). Notice of Vacancy No 875 clearly indicated that the President of the European Parliament envisaged filling the vacant post in the first place by promotion or transfer. Only after it had become apparent that this first stage of the procedure could not produce satisfactory results did the authority proceed to the second stage under Article 29 (1) (b) by publishing Notice of internal competition A/43 of 23 November 1973. The applicant cannot therefore argue that the authority started the second stage of the procedure of Article 29 without having exhausted the first. Statements of Mr Küster on this point are contradicted by the correspondence between him and the President of 5 October 1973, 23 November 1973 and 20 December 1973.

Besides, no proof can be asked of the administration insofar as relates to details of the examination which it must undertake during the first stage of the procedure of Article 29 (1). The examination in question forms part of the discretionary power with which the administration is endowed and which concerns the possibilities available to it by the first stage of the procedure.

The defendant declares itself prepared to produce the list of suitable candidates agreed by the Selection Board in the course of its functions, as well as the reasoned report under Article 5, last paragraph, of Annex III of the Staff Regulations and the marks obtained by Mr Küster in the competition. However, the defendant does not consider itself authorized to divulge the marks obtained by other candidates or their reports. It is emphasized that Mr Küster was not entered on the list of suitable candidates under Article 30 of the Staff Regulations. Consequently the appointing authority could not have upheld Mr Küster's candidature.

The criticism of the criteria adopted by the Selection Board must be considered inadmissible. Under the provisions of Article 5 of Annex III of the Staff Regulations the Selection Board shall, whilst adhering to the requirements of the notice of competition, determine how the candidates' qualifications are to be assessed. In this task it enjoys a full discretionary power. Besides, the criteria adopted and their assessment are in accordance with the notice of competition and do not reveal irregularity of a kind that could tend to lay the legality of the procedure open to question.

The *applicant* points out that the letter of 14 March from the President of the European Parliament constitutes a reply to his complaint of 23 February 1974. It emerges clearly from the originating application of 19 March 1974 that he had considered the letter of 14 March 1974 as a reply amounting to a rejection of his complaint. The applicant's letter of 18 March, furnishing certain supplementary details in support of his complaint, is equally clear in this respect. The defendant's theory that the complaint already ought to contain in summary fashion the arguments upon

which the action is based has no legal basis in the Staff Regulations. Besides, given the fact that the applicant has no access to the documents in question, it would have been impossible for him to formulate these grounds at the administrative stage of the action.

On the main issue, the applicant again stresses that the transition from the first to the second stage of procedure under Article 29 of the Staff Regulations ought to take place by way of a formal document, stating the reasons why it had not been possible to fill the vacant posts by promotion or transfer within the institution. In the event, the recourse which was had to an internal competition amounts to a misuse of powers. In this respect the reasons which in the applicant's view ought to have resulted in his promotion to head of division are recapitulated as:

1. his long professional experience with the Committee on Public Health and the Environment;
2. his merits in the service in question which were highly appreciated by his immediate superiors;
3. the excellent reports on him;
4. the fact that the Head of Administration of the European Parliament, the Director-General Mr Pasetti-Bombardella, had suggested him for promotion;
5. the fact that he had in fact occupied a post of Grade A3 for eight and a half months.

On a more general aspect, the opening of internal competition A/43 is also tainted by irregularities, in particular in that it contravenes Article 45 of the Staff Regulations which provides that officials in order to be eligible for promotion shall have completed a minimum period in their grade. On this point the applicant affirms that the other side intended to take an option on certain candidates amongst the temporary officials attached to the political secretariats of the European Parliament.

The applicant refutes the department's argument that the Selection Board for a competition has an unfettered discretionary power. On the contrary, the Selection Board is tied to well-defined legal rules which must be meticulously observed. The other side's thesis would result in the Selection Board's work escaping any judicial control. In fact the Court necessarily possesses a power of control which does not stop at secret deliberations of the Selection Board.

Having stressed that he insists upon the defendant producing all the documents asked for, the applicant then proceeds to an examination of the documents furnished. Taking them in the same order as the various criteria adopted by the Selection Board, he makes the following observations:

> *Criterion No 1:* Seniority of service in Category A or in Category LA on whatever basis. *Marking:* 1 point per completed year with a maximum of 10 points.

This criterion is to the disadvantage of all officials, including the applicant, who have more than 10 years of seniority in Category A.

> *Criterion No 2:* Seniority acquired in the career bracket immediately below that corresponding to the posts to be filled, that is to say career bracket A 4/5 and LA 4/5. *Marking*: 1 point per completed year with a maximum of 10 points.

Here the same remarks apply as in the case of Criterion No 1.

> *Criterion No 3:* Age. *Marking:* 1 point as from 30 years of age, 2 points as from 35 years of age up to 5 points beyond 50 years of age.

Since this criterion has nothing to do with merit it is misplaced. Since the average age of the candidates who entered for the competition is

approximately 35, this criterion might favour a particular candidate.

Criterion No 4: Appearing on a list of suitable candidates for a post in Grade A 3 consequent upon a previous competition based on tests. *Marking:* 3 points.

Although this criterion is not convincing — it might be used to give an advantage to certain predetermined candidates — it does not lend itself to *a priori* criticism.

Criterion No 5: University diplomas and certificates. *Marking:* 0 to 10 points.

The applicant, who is a holder of a university diploma, wonders why the Selection Board awarded him only 4 points. The applicant considers that he was discriminated against in the light of the criteria adopted in Notice of Vacancy A/43. Besides, one wonders why the Selection Board ignored equivalent professional experience.

Criterion No 6: Studies more specifically connected with the specific requirement of the posts to be filled. *Marking:* 0 to 10 points.

On this point one wonders what particular studies can be meant here. Since the competition involved 5 different posts, a fair application on comparable bases is impossible.

Criterion No 7: General reports and professional assessments within the Community institutions. *Marking:* 0 to 10 points

The applicant notwithstanding his excellent reports only obtained 7·5 points whilst two candidates in respect of whom no report existed were given 7 points 'for reasons of equity'. On the other hand, two other candidates who had no report had received no points. Such examinations cannot be taken seriously.

Criterion No 8: Prior experience or activities of an analogous kind or amounting to a preparation for posts corresponding to those to be filled. *Marking:* 0 to 10 points.

The application of this criterion provides the best proof of misuse of powers. According to the documents submitted by the other side Mr Küster received no points on the basis of this criterion, whilst he could lay claim to three years' professional activity in different posts in German industry. Besides, this criterion of necessity distorts the results of the competition because by virtue of its application candidates who entered the service of the Community institutions either immediately after their studies, or a short time subsequently, would necessarily be at a disadvantage when compared with those who recently came to the institutions. The applicant wonders on what basis the Selection Board could judge these previous activities. He concludes that this criterion had been made to measure with a view to eliminating those candidates having a long professional experience with the institutions.

Criterion No 9: Ability to direct a high-level team. *Marking:* 0 to 10 points.

The applicant, who obtained 4 points, states that this mark contradicts his report.

Criterion No 10: Ability at organization and methods. *Marking:* 0 to 10 points.

Here the same observations apply as in the case of the previous criterion.

Criterion No 11: Verification of linguistic ability. *Marking*: 0 to 10 points.

Criterion No 12: Verification of a very thorough knowledge of the structure and functioning of the European Communities and of the institutions, in particular of Parliament, as well as of the Treaties and of Community legislation. *Marking:* 0 to 10 points.

To apply these criteria amounts to a virtual competition based on oral tests and accordingly contravenes the Notice of competition A/43 which only provides for an internal competition based on qualifications. It is acceptable for the Selection Board to see the candidates and have an interview with them but it is illegal to transform this interview into a verification of knowledge, marked 0 to 10 points, in relation to these two criteria.

The applicant arrives at the conclusion that he could have received at least between 12 and 15 points more and on the basis of these he would very probably have been promoted. It is regrettable that the Selection Board did not take into consideration the most logical criterion in the matter: professional experience acquired in the post to be filled. One is forced to conclude that the selection of the candidates constitutes a misuse of powers rendering void all the Selection Board's activities.

Finally, the applicant affirms that the Selection Board was not appointed by the appointing authority. Under Article 30 of the Staff Regulations the Selection Board shall be appointed by the appointing authority. It follows from the decision of 12 December 1962 of the Bureau of Parliament that in relation to officials in Category A the powers under Article 30 of the Staff Regulations are reserved to the President of Parliament. According to its report the Selection Board had been appointed by the Secretary-General of Parliament, i.e. in violation of the decision of 12 December 1962 and accordingly of Article 30 of the Staff Regulations. Since the appointment of the Selection Board was made by an authority lacking competence, it must therefore be considered null and void. The results of the Selection Board's labours are therefore of no value.

The *defendant* repeats its observations on the inadmissibility of the second head of claim. On the merits, the defendant states that it is not in a position to produce the documents the production of which is requested by the applicant. As regards the alleged failure to observe Article 29 (1) (a) of the Staff Regulations it is pointed out that this provision only obliges the administration to consider whether the post can be filled by promotion or transfer without there being any legal requirement that a document on this subject has to be drawn up.

As regards the detailed discussion which the applicant undertook in his reply of the factors of assessment which appear in the Selection Board's report, the defendant points out that the Court cannot be called upon either to repeat the Selection Board's work or to substitute its own assessment for that of the Selection Board. The Court's power amounts to no more than verification of the legality of the competition procedure. It is denied that the Selection Board, in its competition based on qualifications, conducted oral tests. It interviewed the candidates with a view to verifying the qualifications put forward by the candidates. Such verification is perfectly permissible and is not sufficient to characterize the competition as a competition based on tests.

The appointment of the Selection Board by the Secretary-General of Parliament is correct since it follows from the decision relating to the determination of appointing authorities taken by the Bureau of the European Parliament in the course of its meeting of 7/8 October 1971.

IV — Oral procedure

Subsequent to the request for the hearing thus reproduced the hearing of the witness and oral argument took place at the hearing of 23 January 1975.

The applicant was represented by Victor Biel and the European Parliament by Alex Bonn.

The Advocate-General delivered his opinion on 19 February 1975.

Law

1 The action is for the annulment of the decisions by which the appointing authority refused to grant to the applicant as from 1 September 1973 a temporary posting under Article 7 (2) of the Staff Regulations, for the payment to him as from 1 December 1973 of the differential allowance under the said Article and finally for the annulment of the appointments made by Parliament consequent upon the vacancies advertised under No 875, subsequently replaced by Notice of Vacancy No A/43.

On the admissibility of the action

2 The defendant alleges that the action is, as regards the two first heads of claim, inadmissible on the ground that it has not been the subject-matter of the prior complaint requird by Article 90 and 91 of the Staff Regulations.

3 By letter of 26 November 1973 the applicant made a request to the appointing authority with a view to obtaining the temporary posting as head of division, Secretary of a Committee of the European Parliament.

4 This application was rejected by decision of 4 March 1974, which also meant, in an implied but certain fashion, a refusal to grant him the differential allowance under Article 7 (2) of the Staff Regulations.

5 As a result of this refusal the applicant brought the present action, to which there was joined an application for interim measures with a view to obtaining a suspension of any steps to fill the abovementioned vacant post.

6 Whilst the applicant did not, prior to the action, make a fresh complaint, he had on 22 february 1974 supplemented his previous request by a complaint against the failure to take steps to grant him a temporary posting as secretary.

7 In view of this fact the applicant was correct in treating the letter of 4 March 1974 as rejecting both.

8 In any event, the fact that he had joined an application for interim measures to his action for annulment rendered the latter admissible under the provisions of Article 91 (4) of the Staff Regulations without the need to wait for a ruling on that complaint.

9 Whilst it is true that the legal proceedings were not suspended as in the case where recourse is had to the special procedure under Article 91 (4), this fact, subsequent to the bringing of the claim, cannot render the latter inadmissible.

10 According to the defendant the action is also inadmissible as regards its third head because, in his complaint of 7 March 1974 against the appointments criticized, the applicant did not put forward the grounds of annulment on which he subsequently based his action.

11 Whilst the request or the complaint under Articles 90 and 91 of the Staff Regulations must set out, in a manner sufficient to enable the authority involved to decide with full knowledge of the facts, the subject-matter of the complaint and the grounds underlying it, it is not necessary that they should already at this pre-litigation stage set out the grounds of possible illegality.

12 The complaint of 7 March 1974, which also refers to prior correspondence, complied with these conditions.

13 Accordingly the action is admissible.

On the temporary posting

14 The applicant argues that the grant of a temporary posting within the meaning of Article 7 (2) of the Staff Regulations occurs automatically in a case where an official, consequent on the departure of his superior who is promoted to another post, is instructed to replace him *de facto*.

15 Under the provisions of Article 7 (2) an official 'may be called upon to occupy temporarily a post in a career bracket in his category which is higher than his substantive career bracket'.

16 The application of this provision requires an express decision on the part of the appointing authority, since it involves in relation to the official an entitlement to specific benefits from the administration.

17 Since the decision to call upon an official to occupy temporarily a post arises from an assessment of the interests of the service, the party involved cannot, by reason only of the fact that he is performing the functions of the post in question, claim a right to obtain the benefit of this temporary posting.

18 Accordingly, the applicant's argument is not well-founded.

19 Consequently, the applicant's argument that he is as from 1 December 1973 entitled to the differential allowance under the same Article 7 (2) must also be rejected.

On the appointments criticized

20 In contesting the legality of internal competition A/43 the applicant submits in the first place that it could not have been initiated without proof that the

formalities provided for under Article 29 (1) (a) of the Staff Regulations had been carried out.

21 It is claimed that under this article the appointing authority can only proceed to organize a competition internal to the institution, such as is referred to under (b) of the paragraph in question, if it seems impossible to fill the post by promotion or transfer within the institution.

22 From his bi-annual reports it appears that the applicant is capable of filling the vacant post, and since he had submitted his candidature in respect thereof, such proof could not be adduced, so that the decision to organize an internal competition is illegal.

23 This argument cannot be accepted.

24 In fact, the presence of several persons having the qualifications for promotion or transfer within the institution may lead the appointing authority to conclude that the interests of the service and the impartiality of recruitment render an internal competition desirable.

25 The applicant's argument amounts to granting the deputy of an official whose post has become vacant the right to succeed him as soon as it appears from his personal file that he has the necessary qualifications to fill that post.

26 Both the interests of the service and the rights of other officials militate against acceptance of such a claim.

27 Accordingly this ground must be rejected.

28 In the second place the applicant criticizes the activities of the Selection Board in internal competition A/43 in relation to the criteria adopted for the list of suitable candidates and the marks awarded to the various candidates.

29 Whilst by reason of the necessarily relative character of the data on which it must rely the procedure of a competition based on qualifications must necessarily involve disadvantages for certain participants, Article 29 nevertheless expressly provides for it.

30 Accordingly the applicant's arguments, to the extent that they involve a criticism of imperfections inherent in this procedure, cannot be upheld.

31 On the contrary, it must be stated that in the present case the criteria which the Selection Board adopted for the competition appear to have been chosen in a spirit of impartiality and to have been inspired by a desire as far as possible to take account of the different factors which in the present case ought to be taken into consideration.

32 In any case it does not appear that by reason of the choice of criteria the applicant was arbitrarily placed at a disadvantage so that the adoption of these criteria amounted in his case to a misuse of powers or a violation of his rights under the Staff Regulations.

33 As regards the attribution of points under different criteria, the applicant rightly criticizes the decision of the Selection Board concerned with this competition to grant under the heading 'General reports and professional assessments within the Community institutions', 7 out of 10 points to two candidates in respect of whom no periodic reports existed.

34 This refers to two candidates who had for several years been temporary officials of the secretariats of political groups, who by reason of the fact that they were temporary servants had not been the subject of periodic reports.

35 Whilst there is nothing to prevent the admission of temporary staff to internal competitions it is not correct to attribute to them fictitious marks when by reason of their legal position they do not comply with the criteria applied.

36 This irregularity nevertheless caused no disadvantage to the applicant since the two persons involved were not appointed to the vacant posts.

37 Accordingly, the claim for annulment of the appointments must be dismissed as unfounded.

Costs

38 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

39 However, under the terms of Article 70 of the said Rules, the costs incurred by the institutions in actions brought by employees of the Community are to be borne by such institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the action**
2. **Orders each party to bear its own costs.**

Mertens de Wilmars Donner O'Keeffe

Delivered in open court in Luxembourg on 12 March 1975.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber