OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 18 September 2003 [1]

I — Introduction

1. This case concerns an appeal brought by the European Parliament (hereinafter 'the Parliament') against the judgment of the Court of First Instance (Third Chamber) of 23 January 2002 in Case T-237/00 *Reynolds* v *Parliament* [2] (hereinafter 'the contested judgment'). In that judgment, the Court of First Instance annulled the decision of 18 July 2000 of the Secretary-General of the Parliament terminating the secondment of Mr Reynolds, an official at the Parliament, which had given him the opportunity to serve for a period of one year in the post of secretary-general of the political group 'Europe of Democracies and Diversities' (hereinafter 'the EDD Group'). The Parliament was also ordered to pay compensation for the pecuniary harm and nominal damages for the non-pecuniary harm sustained by Mr Reynolds as a consequence of that decision. The Parliament now claims that the Court should set aside the judgment of the Court of First Instance.

2. Mr Reynolds claims that the Court should for the most part confirm the judgment of the Court of First Instance. In his response, however, he brings a cross-appeal against the judgment of the Court of First Instance in so far as his claim for compensation for the non-pecuniary harm sustained by him was not granted (in full).

II — Applicable Community provisions

3. Article 37 of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') provides, in so far as is relevant here:

'An official on secondment is an established official who, by decision of the appointing authority

(a) has been directed in the interests of the service:

1 — Original language: Dutch.
2 — ECR II-163.

— to serve temporarily in a post outside his institution; or

— to assist temporarily a person holding an office provided for in the Treaties establishing the Communities or the Treaty establishing a Single Council and a Single Commission of the Communities, or with an elected President of one of the institutions or organs of the Communities or the elected Chairman of one of the political groups in the European Parliament;

...'.

4. Under Article 38 of the Staff Regulations:

'[s]econdment in the interests of the service shall be governed by the following rules:

(a) the decision on secondment shall be taken by the appointing authority after hearing the official concerned;

(b) the duration of secondment shall be determined by the appointing authority;

(c) at the end of every six months, the official concerned may request that this secondment be terminated;

(d) an official on secondment pursuant to the first indent of Article 37(a) is entitled to receive a differential payment where the total remuneration carried by the post to which he is seconded is less than that carried by his grade and step in his parent institution; he shall likewise be entitled to reimbursement of all additional expenses entailed by his secondment;

(e) an official on secondment pursuant to the first indent of Article 37(a) shall continue to pay pension contributions based on the salary for active employment carried by his grade and step in his parent institution;

(f) an official on secondment shall retain his post, his right to advancement to a higher step and his eligibility for promotion;

(g) when his secondment ends an official shall at once be reinstated in the post formerly occupied by him'.

III — Facts and procedure at first instance

5. I shall confine myself to giving a brief summary of the most important facts underlying the judgment of the Court of First Instance. For a detailed account of those facts and of the procedure followed before the Court of First Instance, I would refer to paragraphs 3 to 30 of the contested judgment.

6. At the request of the EDD Group, the Secretary-General of the Parliament agreed, by decision of 11 January 2000, to the secondment of Mr Reynolds, an official in that institution's Directorate-General for Information and Public Relations, in order to give him the opportunity to serve for the period from 22 November 1999 to 30 November 2000 in the post of secretary-general of the EDD Group. After Mr Reynolds had served in that post for six months, he was informed by the chairman of the EDD Group that, at a meeting of the bureau of the group, a number of sub-groups had indicated that they no longer had confidence in him. Consequently, it had been decided that his secondment would not be extended beyond 30 November 2000. That decision was confirmed on 24 May 2000 in a second interview between Mr Reynolds and the chairman of the EDD Group. Mr Reynolds then reported sick and has not attended work since.

7. At the end of June 2000, Mr Reynolds lodged a complaint with the Secretary-General of the Parliament, in which he drew attention to various practices within the EDD Group which had impeded the performance of his duties, and requested that an end be put to those practices. He also requested the President of the Court of Auditors to examine the accounts of the EDD Group. In addition, in a memorandum of 1 July 2000, he set out a detailed account of his experiences while on secondment to the EDD Group. Following that, on 4 July 2000, the chairman of the EDD Group requested the Secretary-General of the Parliament to terminate the applicant's secondment as soon as possible. Then, by decision of 18 July 2000, the latter, in his capacity as appointing authority (hereinafter 'the appointing authority') terminated Mr Reynolds' secondment in the interests of the service with effect from 14 July and reinstated him in a post as principal translator in the Parliament's Directorate-General for Information and Public Relations at his original grade and step.

8. By application of 8 September 2000, Mr Reynolds brought an action before the Court of First Instance for annulment of the decision of the Secretary-General of the Parliament of 18 July 2000. He also sought compensation for the pecuniary and non-pecuniary harm which he had sustained as a consequence of the contested decision and the practices of the EDD Group and its members.

9. By judgment of 23 January 2002, the Court of First Instance annulled the decision of the Secretary-General of the Parliament and ordered the Parliament to pay

compensation for the pecuniary harm which Mr Reynolds sustained as a consequence of that decision. The Parliament was also ordered to pay the nominal sum of EUR 1 in damages for the non-pecuniary harm which Mr Reynolds sustained as a result of the adoption of the contested decision. His claim for compensation for the harm sustained as a consequence of the conduct of the (members of) the EDD Group was declared inadmissible.

IV — Appeal and cross-appeal

10. On 25 March 2002 the Parliament brought an appeal against the judgment of the Court of First Instance. In his response, Mr Reynolds brought a cross-appeal against the contested judgment with regard to the sum determined by the Court of First Instance by way of damages for the non-pecuniary harm sustained by him. The Parliament's appeal is examined in Part V. Mr Reynolds' cross-appeal is examined in Part VI.

11. The Parliament claims that the Court should:

— set aside the contested judgment, and in particular paragraphs 1, 2, 4 and 5 of the operative part;

— dispose of the case by dismissing the action for annulment of the contested decision and the claim for damages as unfounded;

— in the alternative, refer the case back to the Court of First Instance for a fresh ruling on Mr Reynolds' action for annulment of the contested decision and his claim for damages;

— dismiss Mr Reynolds' cross-appeal as manifestly unfounded;

— make an appropriate order as to the sharing of the costs of the appeal;

— order Mr Reynolds to pay all the costs of the proceedings on his cross-appeal;

— remove from the file the documents in Annexes 1 and 2 to the response.

12. Mr Reynolds contends that the Court should:

— confirm paragraphs 1, 2, 5 and 6 of the operative part of the contested judgment;

— set aside paragraph 4 of the operative part of the contested judgment;

— dispose of the case by granting the claim for damages for the non-pecuniary harm sustained by Mr Reynolds;

— in the alternative, refer the case back to the Court of First Instance for a fresh ruling on Mr Reynolds' claim for damages;

— make an appropriate order as to the sharing of the costs of the appeal;

— order the Parliament to pay the costs of the cross-appeal, or, in the alternative, order the parties to share the costs as required by equity;

— not remove from the file the documents in Annexes 1 and 2 to the response.

V — Appeal and Pleas in law

13. The Parliament puts forward the following pleas in law in support of its claim that the judgment of the Court of First Instance should be set aside. The judgment:

— is insufficiently reasoned with regard to the obligation of the appointing authority to satisfy minimum conditions;

— fails to have regard to the existing case-law on the competence of the appointing authority;

— contains contradictory grounds regarding the alleged discretion of the appointing authority;

— fails to have regard to the existing case-law on the rights of the defence;

— contains insufficient and contradictory grounds with regard to the significance of the effects of reinstatement on the material situation of the seconded official.

14. I shall confine myself below to giving an account of the most important arguments put forward in support of those pleas in law by the Parliament and against them by Mr Reynolds.

A — *Insufficient grounds with regard to the obligation of the appointing authority to satisfy minimum conditions and failure to have regard to the existing case-law on the competence of the appointing authority*

15. The first two pleas in law relate to the grounds in the contested judgment relating to the extent of the appointing authority's competence in a situation such as that at issue in this case and, in particular, the question whether the appointing authority has any discretion in the matter. They can therefore be examined together.

16. In paragraph 81 of the contested judgment the Court of First Instance held:

'that the decisive nature of the request by the service to which or the person to whom an official has been seconded that his secondment be terminated in the interests of the service does not mean that the appointing authority has no discretion in the matter and is required to comply with the request. When it receives such a request, the appointing authority is required at the very least to ascertain, neutrally and objectively, whether the request is beyond all doubt the valid expression of the service to which or the person to whom the official was seconded and also that it is not based on manifestly illegal grounds. The appointing authority cannot terminate a secondment if those minimum conditions are not satisfied.'

17. The Parliament points out that the Court of First Instance does not substantiate in any way its view that the appointing authority is obliged to satisfy minimum conditions. That poses difficulties, primarily because that finding represents a major innovation in relation to the existing case-law and at the same time forms the cornerstone of the reasoning of the Court of First Instance with regard to the observance by the appointing authority of the rights of the defence. The Parliament submits that fulfilling those minimum conditions would mean that the appointing authority would have to follow an inquisitorial procedure aimed at gathering evidence in order to ascertain the genuineness and legality of the request. Since the decision to terminate a secondment in the interests of the service is not disciplinary in nature, the Parliament is of the opinion that it would be inappropriate for such investigative measures to be required.

18. With regard to the first minimum condition: that the appointing authority must ascertain that the request is beyond all doubt the valid expression of the service to which or the person to whom the official is seconded, the Parliament observes that it is unclear why that should be necessary in a case where the appointing authority had no reason to doubt the genuineness of the request concerned. Moreover, the Parliament raises the question of how it could carry out such an ascertainment objectively and neutrally.

19. The second condition, relating to ascertainment of the legality of the request, assumes, according to the Parliament, that the appointing authority would be competent to scrutinise the motives of the service to which the official concerned is seconded, where it finds that the mutual confidence between the parties concerned has disappeared. First, it is clear from the judgment in *B* v *Parliament* [3] that only the service to which the official is seconded has authority to determine the circumstances which are necessary for the continued existence of confidence. Second, it is settled case-law that a political group may dismiss an official unilaterally without needing to give reasons for the dismissal. [4] Finally, it is settled case-law that dismissal on political grounds is legitimate and cannot be regarded as discrimination. [5] In the light of that, the appointing authority would be unable to satisfy the minimum conditions without infringing the prerogatives of the political group to which the official was seconded.

20. Moreover, the appointing authority would inevitably be forced to deliver a subjective political judgment on the service in question. That would be incompatible with the office of the Secretary-General of the Parliament who, pursuant to Rule 182 of the Rules of Procedure of the Parliament, is obliged to perform his duties conscientiously and with absolute impartiality.

21. Mr Reynolds argues in his response that it is not for the appointing authority to ascertain the authenticity of the letter from the chairman of the EDD Group, but rather to examine whether the procedure for terminating the secondment has been observed. The appointing authority must also draw the attention of the service concerned to the need to have a reasoned decision as the basis for the request to terminate the secondment.

22. In Mr Reynolds' opinion, the case-law cited by the Parliament is irrelevant to the assessment of the situation in this case because the cases to which it relates were quite different. That applies in the first place to the case-law concerning dismissal on political grounds, since no such consideration arises in the appointing authority's decision or in the letter from the chairman of the EDD Group. It is also true of the case-law concerning the proper functioning of the service, of which there

3 — Case T-123/95 [1997] ECR-SC I-A-245 and II-697, paragraph 73.

4 — Case 25/68 *Schertzer* v *Parliament* [1977] ECR 1729 and Case T-45/90 *Speybrouck* v *Parliament* [1992] ECR II-33.

5 — *Speybrouck* v *Parliament*, cited in footnote 4, paragraphs 94 and 95.

is likewise no mention in the decision at issue. Mr Reynolds is, moreover, of the opinion that both the case-law on the basis of which a political group is allowed to terminate a contract unilaterally without giving reasons for the termination (*Schertzer* and *Speybrouck*) and the judgment in *B* v *Parliament* are contrary to fundamental rights. He requests that the Court review them in the light of the principles of the rule of law on which the European Union is founded, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of fundamental rights of the European Union.

Assessment of the first two pleas in law

23. I would observe first of all that the question regarding the extent of the appointing authority's competence was raised before the Court of First Instance in order to determine whether scope existed for a finding that the appointing authority was under an obligation to hear Mr Reynolds before deciding to terminate his secondment. If that was a mandatory duty, Mr Reynolds would have no interest, in the light of the existing case-law, in a finding that an essential procedural requirement had been infringed by the fact that the appointing authority had failed to hear him. That is also the reason why the Parliament regards the answer to this question as the cornerstone of the reasoning of the Court of First Instance.

24. With regard to this part of the contested judgment, the Parliament objects primarily to the fact that the Court of First Instance accepted, without reference to the existing case-law and without further substantiation, that the appointing authority had what it described in paragraph 114 of the contested judgment as 'a margin of discretion, limited, admittedly, but not non-existent, as regards the exercise of the power to terminate the applicant's secondment before expiry of the period initially envisaged'. Paragraph 81 of the contested judgment describes in further detail the content of that margin of discretion. According to the Court of First Instance, in a case such as the present one, the appointing authority must, when confronted with a request to terminate a secondment, ascertain, 'neutrally and objectively', whether the request 'is beyond all doubt the valid expression of the service to which or the person to whom the official was seconded' and that it 'is not based on manifestly illegal grounds'. If those two minimum conditions are not satisfied, the appointing authority cannot terminate the secondment.

25. In its appeal, the Parliament adds that that constitutes a 'major innovation', implementation of which would be very problematical. It further submits that complying with the judgment of the Court of First Instance would mean that the appointing authority would acquire a right of supervision over the political group concerned, with the result that its role would become politicised. That would also be incompatible with the mandate of the Secretary-General of the Parliament to perform his duties with absolute impartiality.

26. There is no dispute that, as the Court of First Instance held in paragraph 49 of the contested judgment (and confirmed in paragraph 78 of that judgment), the power of the appointing authority, provided for in Article 38(b) of the Staff Regulations, to determine the duration of the secondment also implies the possibility of altering that duration. The question of shortening the duration of a secondment arises where the secondment is manifestly no longer serving its purpose.

27. Whether that is the case is a matter for the appointing authority to assess and can in no circumstance be regarded as a matter of routine. The appointing authority must form an opinion as to the usefulness of continuing the secondment in the interests of the service. The point of view of the service to which or the person to whom the official concerned is seconded is of course of decisive significance in that regard. However, that does not take away the fact that the appointing authority has a responsibility of its own when adopting measures which affect the legal situation of the officials under its jurisdiction. Moreover, the appointing authority must also make sure that such measures are adopted in the interests of the service. As the Court of First Instance held in paragraph 50 of the contested judgment, the interests of the service form part of the very essence of secondment provided for in subparagraph (a) of the first paragraph of Article 37 of the Staff Regulations.

28. That responsibility of the appointing authority implies that a decision to terminate a secondment must be taken with due care. That due care requires in general that the appointing authority gather sufficient information, from whatever source, to enable it properly to weigh the interests involved. It must therefore at least satisfy itself as to the reasons which prompted the service to which or the person to whom the official concerned is seconded to terminate prematurely or otherwise alter the secondment. That includes the information described as minimum conditions by the Court of First Instance, such as ascertaining that the request is beyond all doubt the valid expression of the service to which or the person to whom the official is seconded and also that it is not based on manifestly illegal grounds.

29. The appointing authority's obligation described above, which arises from its responsibility for its staff on the one hand and from the duty of care on the other, applies in general and regardless of whether it has been complied with in the present case. The important point is that, even where one particular solution to a given conflict situation involving an official on secondment is inevitable, the appointing authority must form its own opinion on the matter and to that extent necessarily also has a margin of discretion of its own.

30. As proof that it has no discretion in a case such as this, the Parliament refers to the case-law of the Court of First Instance and the Court of Justice concerning situations in which a political grouping terminated an employment relationship with a temporary official.[6] It is clear from that

6 — See point 19 of this Opinion.

case-law that political groups have exclusive jurisdiction to determine what is necessary for the continuation of a relationship based on confidence with an employee, that a political group can terminate a contract of employment with an employee unilaterally without stating the reasons, and that dismissal on political grounds is legitimate.

31. In my opinion, however, that case-law is not relevant for the purpose of settling the point of law at issue here. The contested judgment relates to the appointing authority's decision to terminate Mr Reynolds' secondment and not to the EDD Group's decision. Although the appointing authority's decision is consequent upon the EDD Group's decision to sever the working relationship with Mr Reynolds, it must be distinguished from the latter decision in a legal sense. The fact that, according to the case-law cited, the EDD Group was entitled to decide unilaterally to discontinue the working relationship with Mr Reynolds and then to request the appointing authority to terminate his secondment does not mean, as stated above, that the appointing authority was released from the obligation to form its own opinion on the matter. In short, that case-law does not affect the discretion of the appointing authority.

32. The concern expressed by the Parliament that it would be obliged, in the light of the judgment of the Court of First Instance, to conduct an inquisitorial investigation and find it necessary to substitute its own opinion for that of the political grouping concerned, leading to a politicisation of the role of the appointing authority, is also unfounded, in my opinion. The view of the Court of First Instance is merely that the appointing authority is required to 'ascertain' ('vérifier') whether the request to terminate the secondment is genuinely a request to that effect. As stated above, that is simply a consequence of the duty of care to be exercised towards the official under its jurisdiction by the appointing authority.

33. In the light of the foregoing, the pleas in law put forward by the Parliament alleging insufficient grounds and failure to have regard to the existing case-law on the extent of the competence of the appointing authority cannot be accepted. The Court of First Instance was entitled, on the basis of the considerations set forth in paragraphs 50 to 52 and 78 to 82 of its judgment, to conclude that, in a case such as this, the appointing authority has a margin of discretion of its own and that it is required to use that discretion in order to ascertain whether the minimum conditions mentioned in the judgment have been satisfied.

B — *Contradictory grounds with regard to the alleged discretion of the appointing authority*

34. In the Parliament's view, the considerations set forth in paragraph 81 of the contested judgment, namely that the appointing authority is required to ascertain neutrally and objectively the validity of the reasons on which the request is based, are in contradiction with paragraphs 106, 109 and 114 of the judgment. In paragraph 114 of the judgment, the Court of First

Instance states, in reference to paragraph 81, that in the present case the appointing authority had a 'margin of discretion, limited, admittedly, but not non-existent', as regards the power to terminate Mr Reynolds' secondment. However, paragraph 114 is not referring to the margin of discretion referred to in paragraph 81, but to the appointing authority's obligation to consult Mr Reynolds beforehand in order to be able to take his point of view into account. Paragraphs 106 and 109 of the judgment, which are confirmed in paragraph 114, refer to that obligation. In the Parliament's view, it is clear that consulting Mr Reynolds before taking the decision to terminate his secondment, as required by the Court of First Instance in paragraphs 106, 109 and 114 of the contested judgment, is completely unconnected with the alleged margin of discretion as referred to in paragraph 81. It is therefore of the opinion that the grounds of the contested judgment contain a contradiction in that respect.

35. Mr Reynolds disputes the claim that the grounds of the contested judgment are contradictory. He points out that a preliminary consultation with him would have enabled the appointing authority to have his version of the facts at its disposal and thus to avoid basing its assessment solely on the letter from the chairman of the EDD Group. According to Mr Reynolds, objectivity specifically implies that the points of view of all the parties be heard on an equal basis.

Assessment of the third plea in law

36. The Parliament argues that the considerations set forth by the Court of First Instance in regard to the discretion of the appointing authority in paragraph 81 of the contested judgment on the one hand and paragraphs 106, 109 and 114 of the contested judgment on the other refer to different obligations of the appointing authority. Whereas the subject-matter of paragraph 81 is ascertainment of the genuineness of the request, paragraphs 106, 109 and 114 concern the obligation to hear the official concerned before a decision is taken. The Parliament infers from this that the grounds of the judgment are inherently contradictory.

37. I do not share that view of the Parliament. As I observed when discussing the first two pleas in law, the existence of a margin of discretion for the appointing authority when adopting a measure in respect of an official at the request of a third party arises from the appointing authority's responsibility for that official. In particular, the duty of care to be observed by the appointing authority means that it must satisfy itself that the information which serves as the basis for the decision to be taken by it is correct and as complete as possible. Thus the Court of First Instance was entitled, without coming into conflict with any rule of law, to take the view that the appointing authority must ascertain, neutrally and objectively, whether the request is beyond all doubt the valid expression of the service to which or the person to whom the official was seconded and also that that request is not based on manifestly illegal grounds. That does not preclude the appointing authority, depending on the circumstances of the case, from also deeming it necessary or appropriate to hear the views of the official concerned. As Mr Reynolds observes, hearing his point of view as well specifically enables the appointing authority to form an objective opinion.

38. Since there is no contradiction between what the Court of First Instance stated by way of grounds in paragraph 81 of the contested judgment on the one hand and in paragraphs 106, 109 and 114 on the other, the third plea in law put forward by the Parliament must also be rejected.

C — *Failure to have regard to the case-law on the rights of the defence*

39. The Parliament points out that the grounds of the judgment of the Court of First Instance in *Gaspari* v *Parliament* [7] bear great resemblance to those of the judgments in *Quijano* v *Commission* [8] and *F* v *Commission*, [9] on which the Court partly bases its view in the contested judgment concerning observance of the rights of the defence. In the two first-mentioned cases, the Court of First Instance held that an official must be given the opportunity to make known his views with regard to the report of a medical officer before a decision adversely affecting him is adopted. However, the judgment in *Gaspari* was set aside by the Court of Justice to the extent that the contested decision had been annulled by that judgment on the grounds of breach of the obligation to state reasons and breach of the rights of the defence. [10] In the Parliament's view, in so doing the Court of First Instance failed to have regard to the case-law of the Court of Justice.

40. The Parliament observes that, generally speaking, the case-law of the Court of First Instance and the Court of Justice makes clear that the question whether there has been a breach of the rights of the defence must be assessed in the light of the specific circumstances of each case and that the answer depends essentially on the evidence which the institution concerned takes as the basis for its decision. According to settled case-law, 'observance of the right to be heard requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on the basis of which the Commission imposes the penalty'. [11] However, in the contested judgment the Court of First Instance assumes that there is an obligation to hear the person concerned solely on the basis of the fact that the intended decision adversely affects him, without examining the evidence which the appointing authority took as the basis for its decision.

41. In the present case the central question is whether the appointing authority was required to hear Mr Reynolds' view of the evidence on which the decision was based, namely, the disappearance of the mutual confidence between the EDD Group and Mr Reynolds. If that was the case, the Parliament argues that it had to adopt a position on the purely subjective decision of the EDD Group. According to settled case-law, [12] however, the appointing authority is in no circumstances entitled to substitute its own opinion for that of a political grouping such as the EDD Group and was therefore not obliged to hear Mr Reynolds on the matter.

7 — Case T-36/96 [1997] ECR-SC II-595.

8 — Case T-169/95 [1997] ECR-SC II-273.

9 — Case T-211/98 [2000] ECR-SC II-471.

10 — Case C-316/97 P *Parliament* v *Gaspari* [1998] ECR I-7597.

11 — Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 40.

12 — *B* v *Parliament*, cited above in footnote 3.

42. The Parliament further takes the view that it follows from the case-law that, in the absence of any express provision in the Staff Regulations for an *inter partes* procedure in which any official must be heard by the appointing authority before a measure concerning him is adopted, in principle no such obligation exists for the administration. The complaint procedure provided for in Article 90 of the Staff Regulations must be deemed to afford sufficient protection for the official's lawful interests. In paragraph 94 of the contested judgment, however, the Court of First Instance considers that the fact that Article 90 of the Staff Regulations provides for a preliminary complaint procedure does not as such suffice to preclude the existence of an obligation for the appointing authority to hear the official concerned before adopting a decision adversely affecting him. Although the Court of First Instance recognises that it is true that that procedure allows the official concerned to rely on his interests before the administration, he is given that opportunity only after the contested decision has been adopted. The Court of First Instance goes on to state that it is an absolute requirement of the principle of respect for the rights of the defence that the person concerned be heard before the decision adversely affecting him is adopted. In the Parliament's view, that inflexible approach goes beyond what is required by the existing case-law. It is therefore of the opinion that the Court of First Instance failed to have regard to the case-law concerning the legal significance of the pre-litigation procedure provided for in Article 90 of the Staff Regulations.

43. A further objection raised by the Parliament to the contested judgment is that the Court of First Instance held that the mere fact that the appointing authority had a margin of discretion — limited, admittedly, but not non-existent — is in principle sufficient as a basis for considering that it cannot be entirely precluded that a preliminary consultation could have had a particular impact on the content of the contested decision. However, the Court of First Instance did not examine, as is required by settled case-law, the evidence which it had available to it in order to consider whether such a consultation of Mr Reynolds would actually have had a particular, and not merely a hypothetical, impact in the specific circumstances of the case. The Parliament is of the opinion that, in view of the tensions surrounding the secondment of Mr Reynolds, the failure of the EDD Group's attempts to reach an amicable settlement and Mr Reynolds' reaction to that in his memorandum of 1 July 2000, it is obvious that a preliminary consultation could not have had a particular impact on the contested decision.

44. In his response, Mr Reynolds observes that, even though the Court of Justice set aside the judgment of the Court of First Instance in *Gaspari*, that is irrelevant here since the facts and the point of law in that case were in no way comparable with those in the present case. Thus, in contrast to the present situation, there was no question of lack of preliminary consultation of an official who was the addressee of a decision adversely affecting him.

45. With regard to the alleged failure of the Court of First Instance to have regard to the case-law, Mr Reynolds contends that the arguments put forward by the Parliament are rather unconvincing since they are based on an inaccurate account of the facts

(which Mr Reynolds also brought to the attention of the President of the Parliament in two letters of 23 January 2002 and 5 February 2002 respectively) and to errors in the citation or interpretation of the contested judgment. Mr Reynolds also disputes the Parliament's assertion that the Court of First Instance did not cite any case-law to support its view that the person concerned must be consulted beforehand. He refers in this connection to paragraph 91 of the contested judgment.

46. Mr Reynolds likewise disputes the Parliament's assertion that the Court of First Instance concluded that in principle it could not be entirely precluded that a preliminary consultation could have had a particular impact on the content of the contested decision. It is clear from paragraph 114 of the contested judgment that the Court of First Instance assessed that impact in concrete terms and not merely in principle. Mr Reynolds further disputes that there was an attempt on the part of the EDD Group to reach an amicable settlement, as claimed by the Parliament.

47. Finally, to substantiate his argument further, Mr Reynolds relies on the first indent of Article 41(2) of the Charter of fundamental rights of the European Union, under which every person has the right to be heard before any individual measure which would affect him or her adversely is taken.

48. In its reply, the Parliament requests the removal from the file of the two letters from Mr Reynolds to the President of the Parliament, mentioned in point 45 of this Opinion, since those letters were drafted after the contested judgment was delivered. They can therefore have no relevance to the consideration of this appeal. Moreover, they could also be damaging to third parties who are not involved in this dispute and not in a position to defend themselves.

49. In his rejoinder, Mr Reynolds explains that he produced the letters in the proceedings in order better to enable the Court of Justice to understand on what basis the Court of First Instance came to its conclusion in its analysis of the context and origins of the dispute.

Assessment of the fourth plea in law

50. The fourth plea in law relates to failure by the Court of First Instance to have regard to the case-law on the rights of the defence in so far as it held that the appointing authority was obliged to hear Mr Reynolds before deciding to terminate his secondment.

51. The Parliament points out, first, that the Court of First Instance based that part of the contested judgment on its judgments in *Quijano* v *Commission* and *F* v *Commission* [13] without taking into account the fact

13 — Cited above in footnotes 8 and 9 respectively.

that the Court of Justice, in its judgment in *Gaspari*,[14] set aside the judgment of the Court of First Instance in that case[15] in which a line of reasoning comparable to that used in the two first-mentioned judgments of the Court of First Instance had been followed.

52. I agree with Mr Reynolds that that argument cannot succeed. The *Quijano* and *Gaspari* cases concerned situations in which certificates issued by a medical officer were required to be brought to the notice of the person concerned before a decision adversely affecting him was adopted, as well as the question whether that requirement had been met having regard to the factual situation. *F* v *Commission* concerned a case of fraudulent conduct by an official, which was followed by suspension. Those situations cannot be compared with the situation of an official whose secondment to a political group in the Parliament is terminated and who wishes to be heard before the consequent measures to be taken by the appointing authority are adopted. Moreover, the Court of First Instance cited its own case-law purely in order to substantiate the principle that respect for the rights of the defence in any procedure against a person which could lead to a decision adversely affecting him is to be regarded as a fundamental principle of Community law, which must be observed even in the absence of any express provision to that effect in the rules governing the procedure in question. It follows that it cannot be maintained that the case-law of the Court of Justice was disregarded merely because a judgment in a comparable case was set aside for reasons which were specific to that case.

53. The Parliament's next objection is that the Court of First Instance based its view concerning disregard by the appointing authority of the rights of the defence solely on the fact that the decision to terminate Mr Reynolds' secondment must be regarded as a decision adversely affecting him, without investigating further the factors which the appointing authority took into account as the basis for its decision.

54. With regard to that point, I consider it important first to clarify the nature of the decision taken by the appointing authority. In particular, it seems to me relevant to note that, although that decision is a legally independent decision of the appointing authority, it cannot be seen in isolation from the circumstances in which it was taken. The contested decision of the appointing authority followed as a consequence of the decision of the EDD Group to terminate Mr Reynolds' secondment to that group. The appointing authority could only take note of that decision. As the Court of First Instance also held in paragraph 80 of the contested judgment, that decision was a decisive factor for the exercise of the appointing authority's competence in this case, even though, as has already been discussed, in the light of its own responsibility towards Mr Reynolds the appointing authority was certainly obliged, for the purpose of forming its own opinion, to ascertain that the request by the chairman of the EDD Group did actually reflect the intention of that group.

55. In other words, the appointing authority's decision had a facilitating and subsidiary function in relation to the decision-making process within the EDD Group, both at the beginning and at the end of the secondment. After the EDD Group had

14 — Cited above in footnote 10.

15 — Cited above in footnote 7.

made known its intention to engage Mr Reynolds for a specific period, the appointing authority made that possible by means of a decision pursuant to Article 38(a) of the Staff Regulations. The termination of the secondment was also a measure taken in response to the request of the chairman of the EDD Group. In the situation which had arisen, where the confidence required for the secondment had been lost, a fact which the appointing authority was certainly required to verify before attaching consequences to it, it was for the appointing authority, in the interests of the official concerned, to take those measures which would ensure the continuation of the activities to which he had been assigned before his secondment. In those circumstances, the decision reinstating Mr Reynolds in his original post and grade must, in my view, be regarded merely as a measure of internal organisation.

56. I would further observe that, although Mr Reynolds incontrovertibly sustained harm from the whole course of events, that harm arose in the first instance from the decision of the EDD Group to terminate the employment relationship with Mr Reynolds, and not from the appointing authority's decision to terminate the secondment, which, as stated, had a facilitating and subsidiary function in relation to that decision. It should also be pointed out that the post which Mr Reynolds occupied on secondment was of an expressly political nature. With regard to such posts, the persons concerned should be aware, as the Court has stated on a number of occasions, of the political factors and risks which were decisive regarding both their recruitment and their subsequent dismissal. [16] In applying for the post of secretary-general, therefore, Mr Reynolds took a risk which, in the event of a loss of confidence, could result in his having to discontinue his activities for the EDD Group and return to his original post.

57. That is the context in which the Parliament's plea in law concerning respect for the rights of the defence and the arguments put forward in support of that plea must be examined.

58. It will be clear from the outset that the finding by the Court of First Instance in paragraphs 42 and 86 of the contested judgment that the contested decision was of an adverse nature was decisive for the view that in this case Mr Reynolds should have been heard before the appointing authority was entitled to take the decision to terminate his secondment. As I have just demonstrated, however, that finding is incorrect and the contested decision was rather merely in the nature of a measure of internal organisation consequent upon the decision-making process within the EDD Group.

59. Moreover, the course of action to be taken by the appointing authority in a case such as this must be related to the amount of discretion which it enjoys in these matters. In points 27 to 29 of this Opinion, I have already argued, along the lines of the considerations set forth by the Court of First Instance in that regard, that the purpose of that discretion is to ascertain the factors which the appointing authority will take into account when adopting the

16 — *Schertzer*, paragraph 45 and *Speybrouck*, paragraph 94, both judgments cited above in footnote 4.

decision in question. Those factors can be ascertained in various ways, either by hearing the persons directly concerned, or by consulting third parties, or by the use of information from other sources. However, at that stage it is the responsibility of the appointing authority itself to form an independent opinion, on the basis of the information gathered by it, as to the factual basis of the decision to be taken by it.

60. In this connection, I would refer to the *Ojha* case in which, after it had become apparent that the conduct of an official attached to a Commission delegation in a third country had led to tensions, the appointing authority took a transfer decision unilaterally. In its judgment in that case, the Court took the view that, as it had repeatedly held, where they cause tensions prejudicial to the proper functioning of the service, internal relationship difficulties may justify the transfer of an official in the interests of the service. Such a measure may even be taken irrespective of the question of responsibility for the incidents in question. Since that case also concerned a post in which mutual confidence was absolutely necessary, the Court held that '[o]nce that is shaken, for whatever reason, the official in question is no longer able to carry out the functions. So that the criticisms made against him do not extend to the whole of the department concerned, sound administration requires that the institution should distance him from the situation as soon as possible'. [17] Although the two cases are not entirely comparable, the *Ojha* case makes clear how the appointing authority is to act in the interests of the service if tensions arise in connection with an official's conduct, and the basic idea underlying those views of the Court applies *mutatis mutandis* to the present case.

61. Under Article 90 of the Staff Regulations, the person concerned is entitled to lodge a complaint with the appointing authority against such a decision. The Parliament has drawn attention to the case-law from which it is clear that, in the absence of an express provision on the matter in the Staff Regulations, there is no duty on the part of the appointing authority to consult every official before a measure which concerns him is adopted. The safeguards prescribed by Article 90 of the Staff Regulations for protecting the interests of staff must, in principle, be regarded as sufficient. [18] In paragraph 94 of the contested judgment, the Court of First Instance nevertheless held that, in the case of a decision adversely affecting him, it is an absolute requirement of the principle of respect for the rights of the defence that the person concerned be heard before the decision adversely affecting him is adopted. In view of my assessment regarding the nature of the contested decision as an internal measure of organisation and the fact that, with regard to such measures, the complaints procedure affords, in the first instance, adequate protection for the interests of the official concerned, I share the Parliament's view that, by its finding contained in paragraph 94 of the contested judgment, the Court of First Instance failed to have regard to the existing case-law on that point.

17 — Case C-294/95 P *Ojha* [1996] ECR I-5863, paragraphs 41 to 43.

18 — Case T-50/92 *Fiorani* v *Parliament* [1993] ECR II-555, paragraph 36.

62. Purely for the sake of completeness, I would observe that Mr Reynolds' reliance on Article 41 of the Charter of fundamental rights of the European Union must also fail. Not only is that document not legally binding in its present form, the rights enshrined in it reflect the rights which already apply as general principles of law within the Community legal order and, as I have just concluded, there is no question in this case of a breach of the rights of the defence. Yet even according to the wording of that provision, no infringement of the right to be heard can be found, since Article 41 of the Charter of fundamental rights of the European Union applies only where an individual measure which would affect the person concerned adversely is found to have been taken. There is no question of any such measure in this case, as is explained in point 56 above as well as points 69 and 70 below.

63. Since I have concluded that in this case the appointing authority was not obliged to hear or consult Mr Reynolds before taking the contested decision, the questions concerning the subject-matter of that consultation and whether such a consultation might or might not have had a particular impact on the eventual decision are no longer relevant. Nor is there any need to consider further the other arguments advanced in support of this plea in law.

64. The plea in law alleging failure to have regard to the case-law concerning the rights of the defence, which is raised by the Parliament, is justified in the light of the foregoing, and that part of the judgment of the Court of First Instance must therefore be set aside.

D — *Insufficient and contradictory grounds with regard to the significance of the effects of reinstatement on the material situation of the seconded official*

65. The Parliament submits that in paragraph 96 of the contested judgment the Court of First Instance rejected its argument based on the judgments in *Arning*,[19] *Fiorani*[20] and *Ojha*[21] in connection with the fact that those judgments concerned circumstances which were different from the present case. In those cases, the contested decision was described as being merely a measure for the internal organisation of the service, which did not adversely affect either the grade or the material situation of the official. According to the Parliament, the approach adopted by the Court of First Instance leads to a somewhat unsatisfactory situation from the point of view of equal treatment of officials. Under that approach, the obligation to hear the person concerned before deciding to terminate the secondment is made dependent solely on whether he had the same grade during his secondment as he had originally. The Parliament points out that the appointing authority's decision to reinstate Mr Reynolds in his former post at a lower grade than he had during his secondment follows necessarily from Article 38(g) of the Staff Regulations. According to the Parliament, compliance by the appointing authority with a mandatory provision of the Staff Regulations should not lead to variable application of the principle of respect for the rights of the defence.

19 — Case 125/80 *Arning* v *Commission* [1981] ECR 2539.
20 — Cited above in footnote 18.
21 — Cited above in footnote 17.

66. The Parliament further points out that in paragraph 116 of the contested judgment the Court of First Instance confirmed that Article 38(g) relates solely to the consequences of termination of the secondment in the interests of the service and that that is irrelevant to the determination of whether, in this case, preliminary consultation of the person concerned would have had a particular impact on the decision to terminate his secondment. The Court of First Instance therefore expressly acknowledged that the decision to terminate the secondment must in fact be seen in isolation from the decision to reinstate the applicant to his original post at a lower grade. The Parliament is of the opinion that the fact that Mr Reynolds was reinstated in his former post at a lower grade than that which he had during his secondment should be of no account in determining whether the appointing authority was obliged to consult him before terminating his secondment in the interests of the service.

67. Mr Reynolds observes in his response that the Parliament consistently tries to avoid dealing with the question whether the right of an official to be heard before a decision adversely affecting him is adopted can be dependent on the grade at which he is reinstated. He claims that in so acting the appointing authority infringed the principle of sound administration.

Assessment of the fifth plea in law

68. I have already drawn attention in point 56 of this Opinion to the exceptional nature of a secondment of an official to a political group and have pointed out that, in that context, as the Court has held, the person concerned may be expected to be aware of the factors and political uncertainties which were decisive regarding both his recruitment and his dismissal.[22]

69. The sense of reality which may therefore be expected of someone in Mr Reynolds' situation implies that he take account of the possibility that in what is, by definition, an unstable work environment, he will never enjoy security with regard to his appointment. The remuneration carried by the post is also a reflection of that fact. That means that a person who is seconded to fill the post of secretary-general of a political group in the Parliament must take into account in advance the fact that premature termination of his secondment is always a possibility. As a consequence, account should equally be taken of the fact that termination of the secondment pursuant to Article 38(g) of the Staff Regulations implies that the person concerned return to the post formerly occupied by him, with the remuneration carried by it.

70. As I concluded in point 55 of this Opinion, I am of the opinion that the contested decision must be regarded as being merely a measure of internal organisation, notwithstanding the fact that the person concerned experienced an appreciable decline in his income. As stated above,

22 — *Schertzer*, paragraph 45, and *Speybrouck*, paragraph 94, both cited above in footnote 4.

that is a consequence which should have been foreseeable by him and it would appear artificial to characterise the contested decision otherwise solely on the basis of that fact. Moreover, as the Parliament correctly argues, that could also lead to differential treatment of seconded officials, depending on whether their grade during secondment was the same as their original grade or not.

71. In the light of the foregoing, I am therefore of the opinion that the Parliament's plea in law alleging insufficient and contradictory grounds in paragraph 96 of the contested judgment with regard to the significance of the effects of reinstatement on the material situation of the seconded official is well founded. The contested judgment should therefore be set aside in that respect also.

E — *Claim for compensation*

72. The Parliament submits that, since it did not act unlawfully in any way by adopting the contested decision, there is no reason to conclude that the Community incurs non-contractual liability in the present case. The Parliament therefore claims that the Court should set aside the judgment of the Court of First Instance in so far as it granted the claim for compensation.

Assessment

73. As a consequence of the fact that the appointing authority did not act unlawfully by adopting the contested decision without hearing Mr Reynolds, there is no basis for the finding in the contested judgment that the Parliament is liable for the pecuniary and non-pecuniary harm sustained by him.

74. The contested judgment must therefore be set aside in so far as the Parliament is ordered, in paragraphs 2 and 4 of the operative part, to pay damages for the pecuniary and non-pecuniary harm sustained by Mr Reynolds.

VI — Cross-appeal — grounds

75. Mr Reynolds claims that the Court should set aside the part of the judgment of the Court of First Instance concerning the assessment of the non-pecuniary harm sustained by him on account of insufficient grounds, contradictory grounds and misrepresentation of the facts. He points out that the judgment in *De Nil and Impens*[23] establishes the fact that the Court of Justice has jurisdiction to review whether

23 — Case C-259/96 P *Council* v *De Nil and Impens* [1998] ECR I-2915.

the criteria used to determine the amount of the compensation are set out sufficiently clearly. However, those criteria are not clear from the contested judgment, which in paragraph 154 merely states that it was 'inevitable that the adoption of the contested decision aggravated the non-pecuniary harm which the applicant was already suffering' and '[t]he fact of being reinstated in his former post, with retroactive effect and without even having been given a preliminary hearing by the appointing authority, cannot have failed to affect the applicant's dignity and self-respect'. Mr Reynolds therefore claims that the Court should, firstly, set aside the judgment of the Court of First Instance in so far as it failed to award him at first instance sufficient compensation for the non-pecuniary harm sustained by him and, secondly, on the basis of the application brought by him at first instance, determine fair compensation for that harm.

76. The Parliament argues that the judgment in *De Nil and Impens* provides no basis for Mr Reynolds' cross-appeal. That judgment was concerned exclusively with the review by the Court of the grounds stated by the Court of First Instance with regard to the criteria taken into account in determining the amount of the material damage and not the criteria used in determining the amount of the non-material damage. According to the Parliament, it is obvious that there is no reason to specify the criteria used to determine compensation of only EUR 1. Consequently, the grounds stated by the Court of First Instance have clearly enabled the Court to carry out its judicial review of the assessment of the non-pecuniary harm in the present case.

77. The Parliament points out that under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As regards Article 122 of the Rules of Procedure, which provides that, by way of derogation from Article 69(2), the Court may, in appeals brought by officials or other servants of an institution, order the parties to share the costs where equity so requires, the Parliament claims that the Court should find that there is no reason to apply that provision in this case. According to the Parliament, the case-law cited by Mr Reynolds himself in support of his cross-appeal shows that the pleas in law put forward by him are clearly unfounded. For that reason, the Parliament submits that Mr Reynolds should be ordered to pay the costs of the cross-appeal. [24]

78. By contrast, Mr Reynolds claims that, if his cross-appeal is not granted, and taking into account the arguments which demonstrate the validity of the pleas in law put forward by him in support of the cross-appeal, the Court should apply Article 122 of the Rules of Procedure and order the parties to share the costs in so far as equity so requires.

24 — By way of example, the Parliament refers to Case C-62/01 P *Campogrande* [2002] ECR I-3793.

Assessment

79. By his cross-appeal, Mr Reynolds seeks to have the contested judgment set aside in so far as the Court of First Instance failed to state sufficient grounds for the rejection of his claim for compensation for the non-pecuniary harm sustained by him. He also asks the Court to determine the amount to which, in his view, he is entitled in that connection.

80. In points 64 and 71 above, I concluded that the fourth and fifth pleas in law put forward by the Parliament are well founded. I further concluded, in point 73, that the Court of First Instance was wrong to hold that the appointing authority acted unlawfully in not hearing Mr Reynolds before adopting the decision to terminate his secondment to the EDD Group and that he was therefore entitled to compensation. The contested judgment must be set aside for those reasons. It follows that the cross-appeal brought by Mr Reynolds — which seeks to have the assessment by the Court of First Instance of his claim for compensation for the non-pecuniary harm sustained by him set aside — must be dismissed since it has become devoid of purpose.

VII — Costs

81. Under Article 122 in conjunction with Article 70 of the Rules of Procedure, the costs incurred by the Community institutions in an appeal brought by them in a dispute with a member of staff must be borne by them. Since the appeal brought by the Parliament must result in the contested judgment being set aside, each party must bear its own costs incurred in connection with the appeal.

82. With regard to the cross-appeal brought by Mr Reynolds, the Parliament has drawn attention to the possibility under Article 122 of the Rules of Procedure, in the case of an appeal brought by a member of staff of an institution, by way of derogation from Article 69(2) of the Rules of Procedure, of ordering the parties to share the costs where equity so requires. However, the Parliament has claimed that the Court should refrain from applying that provision and order Mr Reynolds to pay the costs of his cross-appeal in their entirety since the pleas in law put forward by him were manifestly unfounded. Since I have concluded that, as a consequence of the well-founded nature of the appeal brought by the Parliament, the cross-appeal brought by Mr Reynolds has become devoid of purpose and there is no need to examine its merits, I see no reason to derogate from the basic rule that an institution should in principle bear its own costs incurred by it in a dispute with a member of its staff. The parties must therefore also bear their own costs in connection with the cross-appeal.

VIII — Conclusion

83. In the light of the foregoing, I propose that the Court should:

(a) set aside the judgment of the Court of First Instance of 23 January 2002 in Case T-237/00 *Reynolds* v *Parliament*

— in so far as the Court of First Instance held that the appointing authority was obliged to hear Mr Reynolds before terminating his secondment and

— in so far as the Court of First Instance ordered the Parliament to pay compensation for the pecuniary and non-pecuniary harm sustained by Mr Reynolds;

(b) declare that Mr Reynolds is not entitled to compensation for the pecuniary and non-pecuniary harm sustained by him;

(c) dismiss the cross-appeal brought by Mr Reynolds;

(d) declare that each of the parties must bear its own costs with regard both to the appeal and to the cross-appeal.