that decision is annulled this makes it possible for him to enter an internal competition.

2. At the time when the appointing authority adopts the decision to fill a post by promoting or transferring an official it is not under the duty to compare the respective merits and abilities of officials eligible for promotion or transfer and of other servants, who though not eligible for promotion or transfer could enter the internal competition if it was organized.

3. It is not for the Court to evaluate the degree of specialization required by a post if neither the material in the file on the case nor the applicant's contentions advanced against the decision making the appointment to that post show that the Commission made a manifest error or misused its powers when assessing the merits and abilities of the official appointed.

4. Promises made to a temporary servant as to his establishment and an agreement to that effect between the employing institution and the administration from which that servant came cannot, even if proved, have the effect of placing the person concerned, duly warned of the temporary nature of his post, in a special position as regards the recruitment procedure to a vacant post.

In Case 265/81

ANTONIO GIANNINI, a temporary servant, residing at Céroux-Mousty, represented by Georges Vandersanden of the Brussels Bar, with an address for service in Luxembourg at the office of J. Biver, 2 Rue Goethe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Joseph Griesmar, Legal Adviser, acting as Agent and assisted by Robert Andersen of the Brussels Bar, with an address for service at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the appointment of Luigi Casella following internal Vacancy Notice No COM/663/79 and for the re-opening in the proper form of the procedure for recruitment to that post,

THE COURT (First Chamber)

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

Advocate General: S. Rozès
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

1. From 2 February 1976 Antonio Giannini, an official at the Ministry of Finance of the Italian Republic, was seconded by his government to a branch of the Commission, the Administration of the Customs Union [1], as a national expert. In that capacity he was assigned to Division CUS 1 which deals with the Common Customs Tariff and to Division CUS 4 which deals with tariff questions in connection with agreements. In July 1977 Mr Giannini was assigned to the "task force" headed by the Community's special representative for negotiations on textiles.

In 1978 the Customs Union Service obtained one of the temporary posts in Career Bracket A 5/A 4 provided for in Supplementary Budget No 1/78 in connection with crisis measures for steel and textiles. Mr Giannini was engaged in that post under a contract for an indefinite period dated 18 July 1978 as a temporary servant in Grade A 5 within

1 — This later became the specialized department known as the Customs Union Service.

the meaning of Article 2 (a) of the Conditions of Employment of Other Servants of the European Communities. In the letter which accompanied his contract, Mr. Giannini's attention was drawn to the fact that he had been engaged to fill a post which the budgetary authority had classified as temporary and that consequently no one could be appointed as an official to that post.

2. In 1979 Directorate General IX for Personnel and Administration received a request from the Customs Union Service to publish a vacancy notice, No COM/663/79, for a post in Career Bracket A 5/A 4 which, following a transfer of post, was vacant in the specialized division CUS 4 (Tariff Questions in connection with Agreements). That notice was published only after Directorate General IX has been given the assurance that the transfer was not intended to facilitate the establishment of a temporary servant engaged in work on crisis measures for steel and textiles.

The vacancy notice specified that the post to be filled involved administrative, advisory and supervisory duties relating to the tariff administration of textile agreements and under the heading "Qualifications required" were set out the following:

"University education, with degree or diploma, or equivalent practical experience;

Very good knowledge of the textile agreements in general and rules for the classification of textile products in particular;

Very good knowledge of the tariff nomenclature for textile products;

Wide experience relevant to the post."

Three officials, one of whom was Mr Casella, submitted applications under Article 29 (1) (a) of the Staff Regulations of Officials which requires the administration to consider first whether the post can be filled by promotion or transfer within the institution. Mr. Giannini, being a temporary servant, could not make an application at that stage of the procedure.

The three applications were put forward for consideration by the Director General at the head of the Customs Union Service, who, in a letter of 6 February 1980 addressed to the Director General for Personnel and Administration, decided to reject them on the ground that the applicants, whose merits he did not fail to stress, did not fulfil the "specific conditions of the vacancy notice". In Mr Casella's case he pointed out that:

"As far as the vacant post in question is concerned be does not seem to me to be the ideal applicant to accept in the interest of the service. Although he has worked for many years on tariff matters in Divisions CUS 1 there are grounds for believing that he does not have the specific qualifications required by the vacancy notice. The tariff administration of textile agreements, for which another division (CUS 4) was made responsible from the outset owing to the special nature of the work, is really a separate field created to meet the specific requirements of the most sensitive crisis sector in the Community. Its sensitivity makes it strongly advisable not to risk the slightest discontinuity in experience such as occurs, in the normal course of events, in the case of transfer."

Considering that in view of the requirements of the vacancy notice there

was no longer any reason for recruiting an official in the basic grade, the Head of the Customs Union Service proposed to fill the post by external recruitment. At the end of his letter he suggested the following solution:

"Bearing in mind the nature of the post I am convinced that the solution which we choose ought as far as possible to maintain continuity in the tariff administration of textile agreements. What matters most of all in this highly operational sector . . . is to retain beyond 1981 the experience acquired through the negotiation and administration of scores of voluntary restraint agreements for even now it is clear that this policy will be continued for a long time to come. The official who is best qualified for this work and whose abilities in this field have been put to the test since 1977 is Mr Antonio Giannini.

Mr Giannini has been working under me for four years and has had a contract as a temporary servant since 16 July 1978. His curriculum vitae is attached. I should be glad to be able to appoint Mr Giannini to the post advertised in the vacancy notice and therefore request you to take the necessary measures for this purpose."

In his reply of 25 February 1980 the Director General for Personnel and Administration said that not only did the letter of 6 February 1980 contradict the assurances which had been given but also the reasons advanced for the rejection of Mr Casella's application were hardly justifiable given the policy of providing mobility for staff advocated by the Commission. He went on to say that if the Head of the Customs Union Service was still convinced that none of the candidates was suitable for the post he proposed to stop advertising the post and advertise it afresh in Career Bracket A 6/A 7 in order to enable the winner of a competition for customs specialists to be appointed. It was quite clear to the Directorate of Personnel that, contrary to the assurances which had been given, the post in Grade A 5 which had become vacant in Division CUS 3 had been transferred to the specialized Division CUS 4 simply in order to have Mr Giannini established. A letter of 8 April 1980 from Directorate General I (External Relations) put the matter thus:

"At present Mr Giannini is with the Customs Union Service as a temporary servant. His contract expires on 30 June 1981. He has a chance of being established in a post in Grade A 5 which is vacant in the Customs Union Service. To make that possible it is essential that the other applications for that post be rejected during the first stage of the procedure . . ."

3. After Commissioner Davignon, who wished Mr Giannini to be established as a official in vacant post COM/663/79, and Commissioner Tugendhat, who was opposed to this, had written to each other and after the Commission, having found that temporary servants in the steel and textile sector had been recruited under temporary contracts, had decided at its meeting on 14 May 1980

not to alter that situation, various representations, particularly from Mr Davignon's cabinet, were again made in support of Mr Giannini's establishment in vacant post COM/663/79.

Finally, by letter of 16 December 1980, the Customs Union Service informed the Directorate General for Personnel and Administration that as regards Vacancy Notice No COM/663/79 it had been decided to withdraw the request to fill the post in question by external recruitment and that the best-placed internal candidate was therefore Luigi Casella who had many years' experience of working on tariff matters. Directorate General IX was accordingly asked to initiate the appointment procedure for that purpose. So on 22 December 1980 the Commission promoted Mr Casella to the post of principal administrator in Grade A 5 in the specialized Division for Tariff Questions in connection with Agreements at the Customs Union Service.

Mr Giannini was informed of Mr Casella's promotion at the beginning of January 1981. On 3 March 1981 he lodged a complaint under Article 90 (2) of the Staff Regulations seeking to have Mr Casella's appointment to post COM/663/79 annulled. When he did not receive a reply to his complaint Mr Giannini made this application to the Court on 5 October 1981.

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

II — Conclusions of the parties

The *applicant* claims that the Court should:

Annul the appointment of Mr Casella following internal Vacancy Notice No COM/663/79 and order the re-opening in the proper form of the procedure for recruitment to the post advertised in that notice;

Order the defendant to pay the costs.

The *defendant* contends that the Court should:

Dismiss the application as inadmissible and in any event as unfounded;

Make an order as to costs in accordance with the law.

III — Submissions and arguments of the parties

(a) Admissibility

The *defendant* contends that the applicant has no interest in bringing proceedings. The sole intention of the Customs Union Service was to have the applicant established. If the Directorate General for Personnel and Administration had turned a blind eye to this it would have been a party to a misuse of powers (judgment of 29 September 1976 in Case 105/75 *Giuffrida* [1976] ECR 1402). What is more, the applicant has no interest in bringing proceedings because he was not and could not be a candidate for promotion or transfer (Article 29 (1) of the Staff Regulations).

In reply the *applicant* submits that the sole basis if that argument is a premature and wrong evaluation of the outcome of the action judged on its substance. He claims to have a legitimate interest in bringing proceedings because Mr

Casella's appointment was made at the end of a procedure which, for the reasons given in the submissions on the substance of the case, is vitiated by illegality.

(b) The substance of the case

The *applicant* contends that not one candidate fulfilled the specific conditions for the post as set out in Vacancy Notice No COM/663/79. The appointing authority ought therefore to have initiated the second stage of the appointment procedure laid down in Article 29 (1) (b) of the Staff Regulations, that is to say, it should have considered whether to hold an internal competition.

That procedure was especially necessary because the appointing authority could not have been unaware of the fact that the applicant possessed the appropriate abilities and experience needed to fill the vacant post and therefore it was proper, in the interest of the service, to organize an internal competition to enable the applicant to take part in it. The words "competitions internal to the institution" appearing in Article 29 (1) (b) of the Staff Regulations have been widely construed by the Court as covering any person employed by the institution, in whatever capacity (Case 16/64 *Rauch* [1965] 135).

Furthermore, the Commission misdirected itself on the facts and the law. It was not a matter of transforming a temporary post into a permanent one but of allowing the applicant to apply for a vacant post.

The applicant states that he was recruited as a national expert in February 1976, before the measures to deal with the textile crisis were adopted, with a view to his being established at the Commission in a permanent post. The Italian authorities were given assurances to that effect and these were a determinant factor in their decision to second Mr Giannini to Brussels.

The applicant knew that owing to the temporary nature of his employment he could not later be appointed as an official to that temporary post. However, that did not mean that he could not eventually apply to enter a competition for an established post matching his abilities and experience. The Conditions of Employment of Other Servants of the Communities nowhere state that a temporary servant may not take part in an internal competition set up with the object of his recruitment as an official.

The applicant stresses that the statements made in support of his application were based on the quality and specific nature of his work compared with the nature and description of the duties attaching to the post to be filled. They are wholly in accordance with the interest of the service and not intended to give preference to the applicant or to harm other candidates. In this regard the Director General of the Customs Union Service has always been anxious to achieve a fair allocation of the posts available in his department according to everyone's abilities and duties, although he was still keen to acquire the applicant's services on a permanent basis precisely on account of his abilities and working experience. There was thus no "manoeuvre" on the part of the Customs Union Service whilst Directorate General IX and the appointing authority acting on its proposal obviously wished to avoid

any such manoeuvre by compelling the Customs Union Service to agree to the appointment of Mr Casella. The result of all this is absurd because the applicant still does the same work as before whilst remaining a temporary servant and in actual fact does the work relating to the post occupied by Mr Casella whereas the latter, now promoted to the post in question allocated to Division CUS 4, still only deals with exemptions from, customs duties, a matter handled by the division to which he was previously assigned.

With reference to Vacancy Notice No COM/663/79 the applicant states that he has thirteen years' experience of the tariff administration of textile agreements. Mr Casella, on the other hand, has never taken part in the administration of such agreements. He is unknown in the directorates general which deal with such agreements and in the quarters concerned with them. The conclusion which the applicant draws from those facts is that the contested appointment was not made in the interest of the service (Article 7 of the Staff Regulations).

The applicant further considers that by not taking into account all the relevant factors, including those relating to the applicant's personal situation, the Commission failed in its duty to look after his well-being.

Finally the applicant contends that the Commission misused its powers. The sole reason for not initiating an internal competition enabling the applicant to submit his application was that he had been appointed as a temporary servant "in connection with the textile agreements" and the Commission did not wish to establish such servants. That reason is not valid and cannot be relied upon as against the applicant because it is contrary to the Conditions of Employment of Other Servants inasmuch as it discriminates against those servants in relation to other temporary servants.

Therefore it was not in order to appoint the best candidate to the post in question but to prevent Mr Giannini from submitting his application that the appointing authority so arranged matters that Mr Casella was appointed to the vacant post and an internal competition was not organized, in spite of the requests from the competent authorities.

The *defendant* submits that the appointing authority's first duty is to examine whether the vacant post can be filled by promotion or transfer within the institution. When comparing candidates' merits the appointing authority has a wide discretion. In this case it was not necessary to compare the applicant's qualifications with those of Mr Casella; the question was whether the appointing authority could reasonably consider that Mr Casella was sufficiently qualified to be appointed to the post in question. The applicant was not in fact a candidate at that stage of the procedure.

The defendant observes however that the Customs Union Service had vacant post COM/633/79 transferred in the hope or even with the intention of appointing the applicant to that post by way of an internal competition. The appointing authority and Directorate General IX refused to be a party to such a manoeuvre which would have amounted to a misuse of powers. After the

manoeuvre had been frustrated the Director General at the head of the Customs Union Service went back on his letter of 6 February 1980 and proposed, in his letter of 16 December 1980, the promotion of Mr Casella who had many years' experience in the tariff field. In considering on the basis of his personal record and periodic reports that Mr Casella possessed the specific qualifications required by the vacancy notice and, on the proposal of the department concerned, promoting him to the post advertised in that vacancy notice, the appointing authority exercised its powers of assessment reasonably even if at the outset the vacancy notice in question had been drawn up with the applicant in mind.

Therefore the defendant was not under a duty to begin the second stage of the recruitment procedure laid down in Article 29 (1) (b) of the Staff Regulations.

As regards the allegations that the Commission misdirected itself on the facts and the law the Commission points out that the applicant could not have been unaware of the fact that he had been engaged to fill a post which the budgetary authority had classified as temporary and that no one could therefore be appointed as an official to that post. It denies that the applicant was recruited in February 1976 with a view to his establishment in a permanent post. No assurance to that effect was given to the Italian authorities at that time. Moreover, such assurances would have no legal effect because the establishment of servants may only be effected in accordance with the requirements and procedures laid down by the Staff Regulations (judgment of 13 May 1970 in Case 18/69 *Fournier* [1970] ECR 249).

It was precisely the interest of the service which prohibited the defendant from assisting in the organization of an internal competition tailor-made to ensure that the applicant was established as an official.

The Commission denies that it neglected its duty to look after the applicant's well-being. The risk mentioned by him that his employment might come to an end is inherent in the temporary nature of the post which he occupies. When signing his contract of service he could not have been unaware of the fact that as a temporary servant he did not have the same guaranteed employment as an established official. The defendant is surprised to be accused of misusing its powers. There was nothing irregular about Mr Casella's appointment. Having been assured by the Customs Union Service that the transfer of the vacant post met a genuine and permanent need of the specialized Division CUS 4 the appointing authority put its trust in the Customs Union Service and on its proposal promoted Mr Casella to supplementary permanent post COM/663/79.

It is therefore wrong to claim that in promoting Mr Casella the Commission used its powers of appointment for a purpose which was not in the interest of the service, namely to prevent the applicant from taking part in an internal competition.

The fact that after his promotion Mr Casella continued to do the same work as before would appear to belie the repeated assurances given by the Customs Union Service to the effect that in addition to the temporary post occupied by the applicant it was necessary to create in the specialized Division CUS 4 a supplementary permanent post in Career Bracket A 5/A 4 whose occupant would have administrative, advisory and supervisory duties relating to the tariff administration of textile agreements, and seems to confirm that in transferring a post vacant in Division CUS 3 to the specialized Division CUS 4 the sole objective of the Customs Union Service was to "facilitate" the applicant's establishment as an official. It may also be the case that after Mr Casella's promotion an increase in work or other circumstances have led those in charge of the Customs Union Service to ask him for the time being to continue to do the same work as before.

IV — Oral procedure

The parties presented oral argument at the sitting on 3 June 1982.

The Advocate General delivered her opinion at the sitting on 15 July 1982.

Decision

1 By application lodged at the Court Registry on 5 October 1981 Antonio Giannini, a temporary servant in Grade A 5 at the Commission of the European Communities, brought an action seeking the annulment of the Commission's decision of 22 December 1980 promoting Luigi Casella to the post advertised in Vacancy Notice No COM/663/79 and the re-opening of the procedure for recruitment to that post.

2 Vacancy Notice No COM/663/79 was for a post of principal administrator in Career Bracket A 5/A 4 at the Customs Union Service in the specialized section dealing with tariff questions in connection with agreements. Amongst the qualifications required mentioned in the vacancy notice were very good knowledge of the tariff nomenclature for tariff products and wide experience relevant to the post.

3 In order to fill the vacancy in question the Commission, acting in accordance with Article 29 (1) (a) of the Staff Regulations of Officials, first examined whether it could be filled by promotion or transfer within the institution. From the three officials who applied for promotion or transfer to that post the Commission appointed Mr Casella who in the opinion of the Customs Union Service deserved promotion on account of his maturity as well as his considerable abilities and working experience in general.

4 The applicant, being a temporary servant, could not be a candidate for promotion or transfer. However, as he argued in his complaint and application, he considers that he alone met in full all the conditions set out in the vacancy notice whereas Mr Casella, whose merits he does not dispute, did not have either specialized knowledge of the tariff classification of textile products or relevant experience in that field.

Admissibility

5 In its defence the Commission expressed doubts as to the admissibility of the application on the ground that the applicant had no interest in bringing proceedings. Those doubts, which apparently the Commission to some extent entertained throughout the proceedings, call for the following clarification.

6 Article 29 (1) of the Staff Regulations provides that before filling a vacant post the appointing authority must follow the procedure for competitions on the basis either of qualifications or of tests or of both qualifications and tests (known as an "open" or "external" competition) having first considered in turn whether the post can be filled by promotion or transfer within the institution, whether to hold competitions internal to the institution and the applications for transfer made by officials of other institutions.

7 As the Court held in its judgment of 31 March 1965 in Case 16/64 *Rauch* [1965] ECR 135 competitions internal to the institution are open to all persons employed by the institution, in whatever capacity, whereas opportunities for promotion and transfer are reserved to officials alone.

8 It follows that the applicant, as the Commission moreover expressly admitted at the hearing, could enter an internal competition if the contested decision were annulled. Therefore the applicant has an interest in bringing proceedings.

The substance of the case

9 The applicant's submissions may be reduced to two sets of complaints. First of all he alleges that Mr Casella's appointment is vitiated by manifest errors in the assessement of the facts and application of the law and by disregard of the interest of the service inasmuch as the person appointed did not fulfil the specific requirements of the vacancy notice. Next, he contends that in appointing Mr Casella the Commission ignored the particular circumstances in which the applicant had been engaged inasmuch as the purpose of his engagement was precisely to provide the Customs Union Service with a servant qualified in the specialized work of the tariff classification of textile products referred to in Vacancy Notice No COM/663/79.

10 In support of the first set of complaints the applicant contends in particular that because of his particular qualifications the Customs Union Service would have preferred him to be appointed rather than Mr Casella, that in any case he is better qualified than Mr Casella to carry out the duties involved in the vacant post and that therefore the Commission could not have appointed Mr Casella without infringing the Staff Regulations.

11 However, that line of argument fails to take account of the fact that at the time when the appointing authority adopted the contested decision it was not under the duty to compare the respective merits and abilities of Mr Casella and the applicant because the latter was not a candidate for promotion or transfer. Therefore Mr Casella's appointment to the vacant post must be judged on its own.

12 In this regard the applicant's sole contention is that Mr Casella was not sufficiently specialized in the tariff classification of textile products for his qualifications and experience to match the vacant post.

13 However, it is not for the Court to evaluate the degree of specialization required to fill a post of the kind in question because neither the material in the file on the case nor the applicant's contentions show that the Commission made a manifest error of misused its powers when assessing Mr Casella's merits and abilities.

14 In support of the second set of complaints the applicant contends in particular that when he was recruited in 1976 as a national expert on secondment from the Italian Ministry of Finance promises were made as to his establishment. Vacancy Notice No COM/663/79 was intended to honour those promises and this is evident from the wording of the notice as well as from the declared intentions of the Customs Union Service.

15 The Commission denies that it gave an undertaking to establish the applicant. It refers here in particular to the letter dated 20 July 1978 from the Director of Personnel which accompanied the contract engaging the applicant as a temporary servant and which stated that his post was a temporary post and could not therefore lead to establishment as an official.

16 Although that letter contains an error inasmuch as it refers to open competitions as being the only way in which the applicant may become established and fails to mention internal competitions, it bears out the Commission's view that no promises to establish the applicant were given to him.

17 It is true that letters internal to the Customs Union Service, which are aming the papers before the Court, hint at its intention to establish the applicant and refer to the "understanding" of the Italian customs authorities, the administration from which the applicant came, as regards that intention. However, it should be pointed out that even and if an agreement to that effect between the Customs Union Service and the Italian customs administration were proved, it cannot have the effect of placing the applicant, who was duly warned of the temporary nature of his post, in a special position as regards the recruitment procedure at issue.

18 It follows that the recruitment procedure followed in order to fill the vacancy at issue has not been proved to be irregular and that the application must be dismissed.

Costs

19 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of those rules costs incurred by the institutions in proceedings by servants of the Communities are to be borne by the institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 28 October 1982.

For the Registrar

H. A. Rühl
Principal Administrator

A. O'Keeffe
President of the First Chamber