OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 9 March 1988 *

Mr President,
Members of the Court,

A — Facts

1. In this case an official is challenging a decision requiring her to resign after a lengthy period of leave on personal grounds. In addition she is claiming compensation for the damage she suffered by not being reinstated in good time as a member of the defendant's staff.

2. Since 1961 the applicant had been an official at the Joint Research Centre at Ispra. Her last grade was C 1. In December 1975 she applied for leave on personal grounds, which she gave as being her health, and leave was granted for the year 1976. After twice being extended, her leave was due to expire on 5 January 1979. In the letter in which she applied for the second extension (4 November 1977) she stated that on expiry of her leave she would be available for employment by the defendant. Upon receiving an enquiry from the Head of Administration at Ispra, Mr Hannaert (letter of 19 January 1979), she answered (by letter dated 19 February 1979) that she wished to be reinstated.

3. Some two years later (18 March 1981) a standard letter from the administration informed the applicant that so far no post in her grade had fallen vacant and she was asked whether she wished immediate or delayed reinstatement. She replied by letter dated 14 April 1981 that she was interested in delayed reinstatement but only at Ispra. A year later, by letter dated 4 February 1982, the applicant was offered a post at Ispra. Thereupon the applicant informed the Commission that she had married a Luxembourger and therefore preferred to be reinstated in Luxembourg. She also stated that she worked only part-time. In reply to her enquiry whether a transfer to Luxembourg would be possible and whether the offer of the post would still be made if she intended to transfer as soon as possible to Luxembourg, Mr Hannaert stated that it was not possible to reserve the vacancy for a transfer to Luxembourg and she would be better advised to apply directly to the Commission in Luxembourg.

4. In April 1982 a telephone conversation took place between the applicant and a representative of the Personnel Department in Luxembourg as a result of which the applicant informed the defendant in writing (5 April 1982) that because of her husband's employment it would be impossible for her to enter the defendant's employment in Luxembourg in the immediate future. She therefore requested that her application be

* Translated from the German.

postponed to a later date but stated that she herself would make contact.

5. Almost two years later, on 28 May 1984, she was asked by the Commission in Ispra whether she wished to be reinstated in Ispra or somewhere else. She replied that reinstatement in Ispra was no longer possible for her. On 15 October 1984 the second offer of employment (at Ispra) was made to her to which she replied, on 28 October 1984, that she no longer wished to be employed at Ispra and that she was in direct contact with the Personnel Department in Luxembourg. In the course of animated correspondence about the validity of the two offers, the applicant stated in December 1984 (16 December) that because of her health it had become doubtful whether she would be fit for employment.

6. By letter dated 4 June 1986 the applicant was informed that the procedure for compulsory resignation was to be initiated. By letters dated 1 July and 6 September 1985 she objected to that step. On 25 March 1986, after hearing the views of the Joint Committee (14 November 1986), the appointing authority required the applicant to resign. On 18 June 1986 she lodged a complaint alleging *inter alia* that she had never refused the second offer and also that she had never been heard in the proceedings relating to her compulsory resignation.

7. The applicant claims that the Court should:

(1) annul the decision of the appointing authority of 25 March 1986 and the implied rejection of her complaint;

(2) order the defendant to reinstate her in the first post corresponding to her grade which falls vacant in her category or service with effect from 5 January 1979 both in regard to seniority and grade and step and in regard to the pension scheme;

(3) order the defendant to pay her sums equivalent to the remuneration which she would have received between 5 January 1979 and the actual date of her reinstatement less her net earned income during that period, with interest at 8% calculated from the day on which she should have been reinstated;

(4) order the defendant to pay the costs.

8. The defendant contends that the Court should dismiss the application.

9. Reference is made to the Report for the Hearing for the rest of the facts and the arguments of the parties.

B — Assessment

1. *The application for annulment*

10. It is necessary first of all to consider the lawfulness of the contested compulsory resignation of 25 March 1986. The conditions for such resignation are set out

in Article 40 (4) (d) of the Staff Regulations:

'On the expiry of his leave an official must be reinstated in the first post corresponding to his grade which falls vacant in his category or service, provided that he satisfies the requirements for that post. If he declines the post offered to him, he shall retain his right to reinstatement when the next vacancy corresponding to his grade occurs in his category or service, subject to the same proviso; if he declines a second time, he may be required to resign after the Joint Committee has been consulted'.

11. The appointing authority thus has a discretion to require an official to resign if two valid offers of employment have been made to him and he rejects both of them. The second paragraph of Article 49 of the Staff Regulations, which governs compulsory resignation, requires the appointing authority, in addition to consulting the Joint Committee, to hear the views of the official:

'Reasoned decisions requiring officials to resign shall be taken by the appointing authority after consulting the Joint Committee and hearing the official concerned'.

The question therefore arises whether the defendant made two valid offers to the applicant, whether she rejected them, and whether the procedure was duly observed.

12. It is not denied that the first offer of employment was made to the applicant on 4 February 1982. It was a post in the applicant's career bracket and grade at Ispra. Until that time the applicant had never expressed a wish to be reinstated at any other place. For the first time in a letter dated 15 February 1982 (the answer to the offer of a post) she stated her preference for Luxembourg. The offer of 4 February 1982 may well have been belated. However, in the circumstances that point can remain unresolved since the specific offer does not lose its validity owing to any previous wrongful conduct on the part of the administration. The question may, however, in another context relate to the legal consequences of a delay in making an offer. The offer was therefore valid.

13. The question therefore arises whether the offer was 'declined' by the applicant, within the meaning of Article 40 (4) (d) of the Staff Regulations. Since the applicant did not expressly indicate her acceptance or refusal, her answer must be deduced from her conduct and in particular from the correspondence produced.

14. First of all, it is necessary to ascertain the legal position from the applicant's point of view. In the letter in which she was offered the post she was given a period of two weeks from receipt of the letter to state whether she wished to accept or refuse the post. At the same time she was told that a failure to reply within the said period would be treated as a refusal. It is true that the applicant did reply within the period allowed but only to ask for information about whether a transfer to Luxembourg would be possible in the near future and whether the offer would be maintained if

she intended to transfer to Luxembourg as soon as possible. She did not reply to the letter from the Head of the Administration, Mr Hannaert, informing her that there could be no question of reserving the post for a transfer to Luxembourg. It is clear that she did not accept the offer either immediately or subsequently.

15. Consequently, the administration rightly interpreted the applicant's silence as a refusal on her part. From the purely theoretical point of view, it is indeed possible, as a matter of law, to accept an offer even without expressly declaring acceptance. However, that does not release the acceptor from the obligation to make his acceptance known in some way to the outside world. A decision not to declare one's acceptance cannot have the effect of dispensing with the need to express one's intention to accept. For if one wished to renounce the expression, in any form whatever, of one's intention to be legally bound, there would be attributed to legally indifferent conduct legal consequences which, in certain circumstances, would create legal relationships against the potential acceptor's will.

16. Now, the applicant maintains that after Mr Hannaert's letter the offer was no longer valid and so she could not have accepted it. Even if it is assumed that even without accepting the offer immediately the applicant must still have had the possibility of accepting it at a later date, that might still have been possible on the conditions laid down by the administration, since the administration's letter simply made it clear that there could be no question of 'reserving' the post for a transfer to Luxembourg. However, the applicant never stated her willingness to accept the post in Ispra in any event. Since the applicant was out of contact with the administration for a lengthy period, it is not possible to presume acceptance from the circumstances. If, however, an offer is not accepted either expressly or by implication, it must be treated as 'declined' within the meaning of Article 40 (4) (d) of the Staff Regulations, especially since the defendant stated in writing that that was how it interpreted such conduct.

17. On 15 October 1984 a second offer of employment was made to the applicant and was again for a post at Ispra. The validity of that offer, however, is open to challenge in two respects. First, there is the question whether the post offered corresponded to the applicant's career bracket and grade. Secondly, it is questionable whether an offer of employment at Ispra could have been validly made at that time and whether the Commission was not bound by its duty to have regard to the applicant's interest and by the legitimate expectation which its own previous conduct had created to offer a post in Luxembourg. Finally, the applicant objects that the post had already been advertised for 17 months before it was offered to her.

18. It is true that the post offered to the applicant was advertised as C 5/C 4. It was, however, clear from the letter containing the offer to the applicant that she would be reinstated in her C 1 grade. The defendant's representative expressly stated at the hearing that it was quite clear that the applicant would have to be reinstated in her grade. The discrepancy between the C 5/C 4 classification in the notice of vacancy and the possible filling of the vacancy in C 1 accorded with the

defendant's practice of classifying posts as low as possible in so far as they were to be filled by outside applicants. The situation was different, however, if there was priority for filling the post, as in the applicant's case. That practice is not likely to have adverse legal effects for the applicant. There can therefore be no objection to it in the present case. To that extent, therefore, the offer was not defective.

19. The offer of employment at Ispra made in October 1984 could, however, be regarded as having been made in bad faith because it was known to the defendant since February 1982 that the applicant wished to be reinstated in Luxembourg. In principle, an official has a right to be reinstated only in the place of his or her employment and in the directorate-general to which he was attached. That does not, however, mean that every possibility of being reinstated in another place of employment is excluded. Through its conduct the defendant made it appear that the legal position was that the applicant was free to choose the place of her reinstatement. For example, already in its letter of 3 April 1979 (Annex 8 to the application) it volunteered the advice that because of the limited number of vacancies at other research centres the applicant should apply to the competent departments in Brussels and Luxembourg. In the standard letter of 18 March 1981 (Annex 9 to the application) it enquires whether the application for reinstatement relates only to Ispra or to other places of employment and whether notices of vacancies in other places of employment of the Commission should be sent. In the letter of 8 March 1982 (Annex 13 to the application) the applicant was requested by the defendant to apply directly to the Commission in Luxembourg. Even in the letter of 28 May 1984 (Annex 16 to the application) the applicant was again asked whether her application applied to reinstatement only in Ispra or to another place of employment. All those letters may at least be misunderstood. If we examine the statements made by the defendant's representative at the hearing, to the effect that there was never any serious possibility for an official at Ispra to be reinstated in Luxembourg, then the said letters, including the personal as well as the standard letters, give an untrue picture of the actual possibilities.

20. The applicant gave her marriage to a Luxembourger as a reason for reinstatement in Luxembourg. From that point of view as well, the defendant's duty to have regard to her interests obliged it to consider reinstatement in Luxembourg.

21. Such requirements can, however, be considered only to the extent that they can in fact be met. According to the undisputed statements of the defendant's representative, no C 1 posts were available for staff in the period from 1982 to 1984 originally from other places of employment. The defendant cannot therefore be criticized for not having offered a C 1 post in Luxembourg.

22. Moreover, any legal obligation arising out of the employer's duty to have regard to the interests of its staff cannot be considered separately from the official's conduct. As the Court has often held, [1] that duty reflects the

1 — See the judgment of 23 October 1986 in Case 321/85 *Hartmut Schwiering* v *Court of Auditors* [1986] ECR 3199, paragraph 18; judgment of 28 May 1980 in Joined Cases 33 and 75/79 *Richard Kuhner* v *Commission* [1980] ECR 1677, paragraph 22, and the judgment of 9 December 1982 in Case 191/81 *Onno Plug* v *Commission* [1982] ECR 4229, paragraph 21.

balance between the mutual rights and duties which the Staff Regulations have created between the authorities and civil servants.

23. The applicant first expressed her wish to be reinstated in Luxembourg in February 1982. The defendant's personnel department in Luxembourg contacted the applicant by telegram on 1 April 1982 to discuss an offer of a post. In a telephone conversation of 2 April 1982 the applicant stated that reinstatement in Luxembourg was impossible in the immediate future because of her husband's employment. She expressed her interest in eventually being reinstated at the beginning of 1983, but said she would contact the Commission herself. In fact she did not do so, so that the situation for the administration was as follows; the relevant place of employment was Ispra. It was however known there that the applicant wished to be transferred to Luxembourg. In Luxembourg, on the other hand, the information was that resumption of employment was not to be considered until further notice so the matter was left in abeyance just as the applicant wished. When after two years the defendant took the initiative to obtain clarification as to whether the applicant still wished to be reinstated no objection could be raised to that step. Although the applicant replied that she no longer wished to be reinstated in Ispra, she did not state definitely that she wished to be reinstated in Luxembourg. In those circumstances, it was quite legitimate to put an end to the uncertainty by making a second offer. The second offer of 15 October 1984 was therefore properly made.

24. The applicant contends that she never refused the second offer. Here too, it must be assumed that she should have accepted the offer within a period of two weeks. In the mean time she had been informed several times, in particular in the first offer and in the letter of 15 October 1984, of the possible consequences of a refusal. By the time she received the offer it must have been clear to the applicant that she no longer had a choice about the place of employment. In spite of that, she did not accept the offer within the stipulated period. She simply stated in her letter of 28 October 1984 '... je n'envisage plus d'être réintégrée à Ispra'. There followed correspondence about the validity of the offers in which the defendant repeatedly pointed out that it regarded them as valid and as having been definitely declined. In none of the letters did the applicant state that she was willing definitely to accept the offers.

25. In Case 108/79 [2] the Court held that a purely formal acceptance of a post which is not subsequently put into effect is to be treated as a refusal of the offer under Article 40 (4) of the Staff Regulations. When a vacant post is filled, regard must be had to the exigencies of the public service rather than to the personal convenience of officials.

26. The applicant considered that the second offer could not be valid since it was made to her 17 months after the notice of vacancy was published. That argument might support her case if she had accepted the offer without delay. As is known,

2 — See the judgment of 5 June 1980 in Case 108/79 *Salvatore Belfiore* v *Commission* [1980] ECR 1769, paragraph 15 at p. 1783.

however, the applicant was no longer interested in returning to Ispra when the vacancy was published on 29 April 1983.[3] The date when the offer was published cannot therefore create rights in favour of the applicant.

27. The applicant's reaction to the second offer is quite clear and unambiguous: she did not wish to be reinstated at Ispra. Subsequent efforts to challenge the validity of the offers do not alter that position. It may therefore be assumed that the applicant declined both offers within the meaning of Article 40 (4) of the Staff Regulations. The conditions for the defendant to initiate the procedure for compulsory retirement were thus satisfied.

28. By letter dated 4 June 1986 the applicant was informed that the administration would initiate the procedure for compulsory retirement. The applicant contended that the time chosen was in bad faith. It is true that she had informed the administration that she would be absent from home from April until August 1985. Nevertheless, there can be no objection to the time when the procedure was initiated. For several years the applicant had left the defendant in doubt as to whether she wished to be reinstated in the defendant's employment and, if so, whether on a part-time or full-time basis and at which place of employment. It can be assumed that it was in the applicant's obvious interests to leave the legal position in abeyance and not to make the offers earlier. Once both offers were declined and thus the legal conditions for compulsory resignation were satisfied, the applicant's lengthy absence from home could not prevent the defendant from pursuing the procedure.

29. Although the applicant had challenged the validity of the offers after the second offer was made, even at that stage, in which she apparently assumed that it was still possible for her to be reinstated, she informed the administration that it was doubtful on account of her health, whether she could take up even part-time employment (letter of 16 December 1984, Annex 23 to the application). The fact that she had given advance notice of her absence for four months without leaving an address where she could be reached cannot have an adverse effect for the defendant. In the event of lengthy absence it was the applicant's responsibility to ensure that her mail was forwarded to her. Since even after the second offer the applicant continued her ambiguous and contradictory conduct, the initiation of the procedure for compulsory resignation was not irregular.

30. In Joined Cases 126/75, 34 and 92/76,[4] in which the Court had to rule upon the alleged misconduct of the appointing authority owing to its delay in reinstating the applicant, the Court held that the defendant had not acted wrongly since the applicant's conduct had contributed to the uncertainty and therefore there was doubt as to whether he really wished to be reinstated.

31. Thus, in so far as there can be no objection to the time when the procedure

3 — See paragraph 22 above.

4 — See the judgment of 27 October 1977 in Joined Cases 126/75, 34 and 92/76 *Robert Giry* v *Commission* [1977] ECR 1937.

was initiated, all that remains to consider is the applicants' submission that she was not given a hearing. As is apparent from the documents which the applicant herself produced, she submitted observations on the procedure for compulsory resignation by letter dated 1 July 1985 as well as by letter dated 6 September 1985. The requirement to hear the views of the person concerned is an expression of the legal principle of the right to be heard. In the defendant's letter of 4 June 1985 the defendant was told all the essential facts and she was expressly requested to submit her observations under Article 49 (2) of the Staff Regulations. Only the fact that she was not once again given an opportunity to submit her observations after the Joint Committee had given its opinion could be considered an infringement of Article 49 (2) of the Staff Regulations. However, the order in which parties must be heard is not laid down. The purpose of the provision is that the official concerned must have an opportunity to submit observations at the vital stages of the procedure. The applicant did have that possibility and used it.

32. It does not matter that the request to submit observations did not originate from the appointing authority, that is Mr Dinkespieler, the Director-General, but from the Head of the Administration. Her objections were on the file and could be taken into account when the decision was taken. Thus, since none of the applicant's procedural rights were infringed, the decision of 25 October 1986 was lawful. That the defendant's conduct was not contrary to its duty to have regard to officials' interests is apparent from the fact that even during the proceedings it offered the plaintiff an amicable settlement and even now would re-employ the applicant, provided that she was actually prepared to work.

2. *The claim for damages*

33. Besides the application for annulment, the applicant has also brought a claim for damages, the admissibility of which is open to doubt. As the Court is aware, a staff action must be preceded by an administrative complaint under Articles 90 and 91 of the Staff Regulations, which is intended on the one hand to facilitate an amicable settlement and on the other hand to define the issue. Even though a wide interpretation of the administrative complaint is necessary in the official's interests, no new issue can be raised in the proceedings before the Court.

34. In her complaint the applicant challenged only the compulsory resignation. The defendant's conduct is at issue only in relation to the examination of the lawfulness of that decision. A wide interpretation of the issue as defined by the complaint, as applied for example in the *Sergy* case,[5] does not contradict that view. In that case the Court was required to rule on the validity of a decision to reinstate an official and to make good the damage arising from the irregularity of the decision. The claim for damages had already been made in the complaint, although not in all its details.[6] Since that was not the case in this instance, the claim for damages is, in my view, inadmissible because it was not preceded by a complaint.

35. Even if it were considered admissible, it could not succeed on its merits since there is

5 — See the judgment of 1 July 1976 in Case 58/75 *Jacques Henri Sergy* v *Commission* [1976] ECR 1139, paragraphs 31 to 34 at pp. 1152 and 1153.

6 — *Ibidem*, p. 1153.

no unlawful conduct on the defendant's part. The defendant's first offer to the applicant in February 1982 may well have been belated since the defendant announced her readiness to be reinstated on the expiry of her leave on personal grounds. However, it must be concluded in this regard, from the statements made by the defendant's representative at the hearing, that there was no C 1 post available at Ispra in the period from 1979 to 1981. Moreover, the conduct of the applicant herself cannot be disregarded. The Court has held, in the *Sergy* and *Pizziolo* cases[7] for example, that the official's conduct is relevant in judging the duties of the administrative authorities. For two years the applicant did not appear to be concerned about obtaining a post. Only at the defendant's initiative in 1981 did she state that she was interested in *delayed* reinstatement. The applicant's representative admitted at the hearing that the parties were *ad idem* in their conduct up to 1984. It therefore appears prima facie — and this impression was not rebutted by the applicant — that when there was no post available immediately after the expiry of her leave on personal grounds, the delay in making an offer was entirely in the applicant's interests since it prevented her legal position from being prejudiced by a definite offer.

36. The lawfulness of the defendant's subsequent conduct has already been considered and established in connection with the claim for annulment, so that it must finally be concluded that the claim for damages must also be rejected in the absence of unlawful conduct on the part of the defendant.

37. 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 the Rules of Procedure, the institutions have to bear their own costs in staff cases.

C. — Opinion

I therefore propose that:

(1) The action be dismissed;

(2) The parties bear their own costs.

7 — See the judgment of 5 May 1983 in Case 785/79 *Adriano Pizziolo* v *Commission* [1983] ECR 1343.