THE COURT (First Chamber)

hereby:

1. **Dismisses the action in Case 75/72 as inadmissible;**
2. **Dismisses the action in Case 58/72 as unfounded;**
3. **Orders each party to bear its own costs.**

Monaco Donner Ó Dálaigh

Delivered in open court in Luxembourg on 17 May 1973.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 5 APRIL 1973

Mr President,

Members of the Court,

Signorina Letizia Perinciolo, the applicant in both these actions, first became an established official of the Communities on 16 July 1964, by a decision of the Secretariat General of the then Councils dated 7 July 1964. She was appointed by that decision to Grade C 4 and was assigned, as a typist, to the Italian section of the Secretariat General's typing pool, where she had served her probationary period pursuant to Article 34 of the Staff Regualtions.

On 3 May 1965 she underwent a routine medical check-up, pursuant to Article 59 (4) of the same Regulations, as a result of which she was found fit to perform her duties, as she had been, needless to say, at the initial medical examination required by Article 33.

On 6 November 1965, she had a riding accident following which she received extensive sick leave.

At her next annual medical check-up on 13 June 1966, she was found fit to perform her duties subject to these reservations: 'Fit for half-time work in June 1966. Further, is to avoid lengthy periods of typing for three months.' (My Lords, the originals of all the documents in these proceedings are either in French or in Italian. For the sake of simplicity my quotations from them will be throughout English translations).

My Lords, at the applicant's annual medical check-up on 11 July 1967 she was found fit subject to a reservation expressed as follows: 'Fit for full-time work but avoiding lengthy periods of typing and overtime for one month.'

On 13 July 1967 she was tranferred to the records department, Directorate General A, as a typist, but with an oral promise that in that department she would be given typing only occasionally.

I should perhaps mention at this point that the applicant had 100 days sick leave in 1965, 187 in 1966 and 115 in 1967.

By a decision of the Secretariat General of the Council dated 28 March 1968, which was to take effect on 1 October 1968, the applicant was promoted to Grade C 3 and assigned to a post of secretary/shorthand-typist, still, as I understand it, in the records department.

On 28 October 1968, she was, for the purposes of the statutory insurance scheme, found to be suffering from a 15 % permanent disability and she was paid an appropriate lump sum under that scheme.

At her annual medical check-up on 13 December 1968 there was no reservation as to her fitness, but the doctor added the comment: 'The half-hour allowed at the bar could usefully be spent walking.'

At her following annual medical check-up, on 12 February 1970, there was no reservation about her fitness or comment of any kind in the doctor's certificate.

On 20 August 1970 she asked to be transferred from the records department where she had found, perhaps not unnaturally, that she was increasingly being given typing work. As a result of this she worked for a time in the accounts department. The accounts department having however informed the Secretary General that it was no longer in a position to use her services, she was transferred back to the records department on 24 January 1972.

Subsequently the records department too informed the Secretary General that it was no longer able to use her services and, by a decision of 24 May 1972, she was posted to the Italian section of the typing pool, Directorate General A, as a secretary/shorthand-typist. This decision, which is the first decison that she challenges in these proceedings, had been preceded by what I may perhaps call 'the battle of the medical certificates.'

Dr Pol Fosset, a physiotherapist consulted by the applicant, certified on 7 February 1972 that she could not do heavy work for a period of one year from that date.

Dr van Bever, an orthopaedic surgeon also consulted by the applicant, certified on 23 March 1972 that she was suffering from post traumatic symptoms, mainly at the level of the cervical column; that this had led to postural fatigue reducing her working capacity; and that she should not do any typing work.

These certificates were referred to the Council's medical adviser, Dr Boussart, at whose instance the applicant was examined by Dr Castiaux, the head of the Belgian 'Institut d'Orthopédie et de Traumatologie'. In his report, dated 3 April 1972, Dr Castiaux concluded that she was able to do a typist's work. In a note of 8 May 1972 the Council's medical adviser expressed his agreement with that opinion.

On 17 May 1972 Dr Pol Fosset certified that the applicant 'could not do typing work'.

The applicant protested at once against the decision of 24 May 1972. In a note of the same date, addressed to the Director of Administration of the Secretariat General of the Council, she said that she could not accept any posting as secretary/shorthand-typist because of her state of health, as to which she had already furnished medical certificates. It is common ground that she did not present herself at her new post, or indeed at her old one. She went to sit in what seems to have been a spare, or at all events little-used, office in the Council building. In a note in her own hand dated 21 June 1972 (to which I shall revert) she said that she did so 'awaiting a decision assigning me, be it temporarily, to a post in my grade in which I would be given work compatible with my present state of health and consistent with the interests of the service.'

To her note of 24 May 1972 the

Director of Administration replied in writing on 2 June 1972 stating that he could not accept her attitude and confirming her instructions to take up at once her duties at the Italian section of the typing pool.

On 5 June 1972 the applicant was interviewed by two officials of the Council. At that interview she was informed that her absence from the typing pool would thenceforth be regarded as unauthorized absence. But in a note of the same date she maintained her previous attitude. With this note she enclosed a certificate signed by her own doctor, Dr D'Avanzo, to the effect that, as a result of her accident, she was not fit to do typing work. She contested the view that it was open to the Council's medical adviser to arbitrate in the conflict of medical opinion that had arisen over her case.

On 20 June 1972 the Director of Administration sent to the applicant a further note the terms of which were as follows:

'Despite confirmation by my note dated 2 June 1972 of your posting to the Italian section of the typing pool, I am informed that you have not taken up your duties in that department.

Consequently, in application of Article 60 of the Staff Regulations, this unauthorized absence will be deducted from your annual leave.

I must further inform you that, taking account of your outstanding balance of leave on 2 June 1972, namely 20½ days, and of your 12 days of unauthorized absence to that date, there are 8½ days of annual leave left available to you.

If your unauthorized absence should continue, you will forfeit your remuneration with effect from 3 July 1972 at 14.30 hours.'

The decision embodied in that note is the second of the decisions which are challenged by the applicant in these proceedings.

The applicant responded to it with the note dated 21 June 1972 to which I have already referred. In this note she reiterated the reasons which had led her not to accept her posting to the typing pool and contended that Article 60 was not applicable since she had continuously been available on the premises of the Secreatriat General of the Council.

From 9 to 29 July 1972 the applicant was on sick leave in Italy to undergo a cure. She received her remuneration for this period of leave, which had been authorized on 3 May 1972. The Secretary-General himself wrote to her at Padua on 20 July 1972 as follows:

'Following the conversation which I had with you on 6 July 1972 about your unauthorized absence from the department to which you were posted by note dated 24 May 1972, I had invited you to inform me the next day of your attitude. You have not responded to this invitation. Meanwhile, you are on sick leave outside your place of employment in accordance with the permission which has been given you. I am at all events prepared to receive you in September.

Your remuneration will be paid to you for the period of your sick leave, from 9 to 29 July 1972, it being understood that payment of your remuneration will continue to be suspended after this period of leave, so long as you do not take up your duties in the Italian section of the typing pool.'

The decision or alleged decision embodied in that letter is the third of those challenged by the applicant in these proceedings. I say 'or alleged decision' because it is contended on behalf of the Council that that letter, being in substance merely confirmatory of the decision of 20 June, did not itself convey any decision capable of being the subject of an action in this Court.

The first of these two actions was begun by an application which was lodged at the Registry of the Court on 16 August 1972. The applicant thereby prayed for

an order annulling the three decisions (or alleged decisions) I have mentioned, namely those of 24 May, 20 June and 20 July 1972.

The applicant herself was then still in Italy. Indeed she remained there until the beginning of September 1972.

On 28 August 1972 a registered letter was addressed to her in Turin on behalf of the Director of Administration in the following terms:

'After the end of the sick leave which you were authorized to take, from 9 to 29 July 1972, in a place other than your place of employment, you have not submitted sufficient reasons to justify your absence.

Futhermore, without the slightest explanation on your part, you have failed to comply with the letter of 8 August 1972, in which you were invited to present yourself to the Institution's medical adviser.

Your absence is, therefore, still irregular, and consequently, without prejudice to any other action which may be taken in your case on the basis of the Staff Regulations, payment of your remuneration is suspended in accordance with the warning given in the letter from the Secretary-General dated 20 July 1972.'

To this letter the applicant replied on 6 September 1972, by which time she was back in Brussels. She explained that she had not received the letter of 8 August 1972 until she returned to Turin on 30 August, as she had left Turin for the seaside on her doctor's instructions. She also said that she had sent medical certificates to justify her absence, so that it was not unauthorized. She had in fact sent several medical certificates to justify her absence after 29 July 1972 but, as I understand the pleadings and the submissions made at the hearing, the question whether she was entitled to sick leave for that period is not in issue in these proceedings. She had, seemingly as an alternative, requested ordinary leave for the same period; this request was refused having regard to the application of Article 60 of the Staff Regulations.

On 7 or 9 October 1972 (it is not quite clear which) the applicant submitted to the appointing authority in the Council, the Secretary-General, a complaint against the suspension of the payment of her remuneration. This the Secretary-General in effect rejected by letter dated 9 November 1972.

By an application lodged on 20 October 1972 the applicant brought the second of these actions. In this application she reiterated her prayer for an order annulling the decisions or alleged decisions of 20 June and 20 July 1972, and, in addition, asked for the annulment of what she referred to as the 'notification' of 28 August 1972. It is contended by the Council that this 'notification' too was purely confirmatory and therefore not, in itself, actionable.

At the same time as she brought the second action, the applicant made an interim application in that action for the suspension of the operation of the decision about the payment of her remuneration. Indeed the inference is strong that the only real purpose of the second action was to pave the way for this interim application. It was rejected by the President of this Chamber on 30 November 1972.

On 12 December 1972 the Chamber ordered that the two actions be joined.

Undoubtedly, my Lords, the central question in the case is whether the decision of 24 May 1972 assigning the applicant to the typing pool was valid.

It is contended on her behalf that, in view of the medical certificates she had produced, that decision was unlawful. The argument put forward in support of that contention may be summed up as follows. There being a conflict of medical opinion about the applicant's case, it should have been referred to the 'Invalidity Committee' provided for by the Staff Regulations. It was not open to the appointing authority simply to decide to prefer the opinion of its own medical advisers, for that authority was not qualified to decide a medical question. In purporting, in effect, to do

so, the authority was guilty of an abuse or of a misuse of power, or at all events of an irregularity. Had the matter been referred to the 'Invalidity Committee', that Committee would have held either that the applicant was or that she was not able to do a typist's work. In the former case, the applicant, and I quote from her Counsel's oral submissions 'n'avait plus qu'à s'incliner, ou bien demander à être pensionnée ou que sais-je?' In the latter case, I quote him again, 'il fallait lui donner un autre emploi'.

My Lords, underlying that argument is the assumption that an established official of the Communities has an inherent right to a posting compatible with his state of health. But that is not so. The Staff Regulations require officials at the time of their recruitment to be physically fit to perform their duties — see Articles 28 (e) and 33. The only provisions dealing with supervening illhealth are Articles 59 and 78. Article 59 entitles an official who is temporarily incapable of performing his duties because of sickness or accident to sick leave and, in certain circumstances, makes it compulsory for an official to take leave. Article 78 confers the right to an 'invalidity pension' on an official who suffers from total permanent invalidity rendering him incapable of performing the duties corresponding to a post in his career bracket. There is nothing in the Staff Regulations to suggest the existence of a third possibility, namely that of an official with a partial disability, entitling him neither to sick leave nor to a pension, but to a posting in his career bracket compatible with his state of health. Moreover, to imply the possible existence of such a right would be inconsistent with a basic theme which runs all the way through the Staff Regulations. This is that the governing consideration in the deployment of the staff of any of the Community Institutions is the needs of that Institution itself. This is sometimes explicit, as for instance in Article 4, which precludes any appointment or promotion being made for any purpose other than that of filling a vacant post; Article 7, which requires the appointing authority to act solely in the interests of the service in appointing or transferring officials; and Article 27, which provides that recruitment shall be directed to securing for the Institution the services of officials of the highest standard of ability, efficiency and integrity. In many other Articles it is implicit. I will not weary Your Lordships with a recital of them: I instance only Article 41, dealing with redundancy.

Counsel for the applicant, in his oral submissions, drew attention to the fact that Grade C 3 comprises not only secretary/shortand-typists but also clerical officers. He argued from this that his client could have been appointed a clerical officer. He put this argument forward in answer to a rather specious one advanced on behalf of the Council to the effect that transfer to the typing pool did not necessarily mean that the appointee would have to type. Unfortunately he had not included the point in his pleadings, so that one does not know how the Council would have met it, had it had proper notice of it. But one may surmise. It is conceivable that the answer would have been that there was at the material time no vancacy for a clerical officer on the Council's staff. This possibility illustrates, I think, the fallacy underlying the applicant's contentions. For, if it were right that an official is inherently entitled to a posting compatible with his state of health, it would follow that, if need be, a vacancy in such a post must be created for him. But to hold that this was so would run counter to provisions such as those of Article 4, which I have already mentioned, and Article 6 which limits the number of available posts in each Institution by reference to its budget.

That is not to say, of course, that a Community Institution may not, like any good employer, make allowances, within the exigencies of its service, for any physical disabilities of members of its staff. The Council in fact claims (and

there is no reason to doubt it) to have been generous to the present applicant in this respect, in particular by allowing her a great deal of sick leave and of time off for treatment, and also by seeking, for a lengthy period, to find work that suited her in the records and accounts departments.

But in law, it seems to me, the position was simply this. There was a vacancy to be filled in the Italian section of the typing pool, that vacancy fitted the applicant's grade, and the applicant was available, in the sense that her services were no longer required in the records department. It was therefore perfectly proper for her to be posted to fill that vacancy. The conflict of medical opinion over her case was not germane to that decision. It would have been germane only if the question had been whether she should have sick leave or whether she should receive an invalidity pension.

My Lords, it is argued on behalf of the Council that, on the true construction of the Staff Regulations, the only functions of the Invalidity Committee are in relation first to compulsory leave under Article 59 (2) and secondly to the award of invalidity pensions. On the view I take, it is not necessary to come to a conclusion on that matter. It is sufficient to say that the Invalidity Committee has no function to perform in relation to postings.

If I am right in thinking that the decision of 24 May 1972 was valid, it must follow, as night follows day, that so was the decision of 20 June 1972. The terms of Article 60 of the Staff Regulations are clear and imperative. It was suggested on the applicant's behalf that she was not 'absent' within the meaning of the word in that Article because she was in fact in the Council building. But, my Lords, what matters is that she was absent from her post. Her presence elsewhere in the building was irrelevant. Officials are not paid for being in a building, but for doing their appointed work.

That is sufficient to dispose of the case, for, if the decisions of 24 May and 20 June 1972 were valid, no criticism can attach to the contents of the letters of 20 July and 28 August 1972; nor is it necessary to determine whether the letter of 20 July was merely confirmatory of the earlier decisions or conveyed a fresh decision itself capable of being the subject of an action.

But the Council raised and developed in its pleadings, though it did not press at the hearing, a number of objections to the admissibility of the second action; and with this question of admissibility I must briefly deal.

My Lords, in my view, the Council was right in saying that the second action was inadmissible because:

(a) The first and second claims in it, relating to the note of 20 June 1972 and to the letter of 20 July 1972, duplicated the second and third claims in the first action. They were therefore open to the objection of 'lis pendens' — see cases 45 and 49/70 *Bode* v *Commission* (Rec. 1971, p. 465 to p. 475).

(b) The third claim in the second action related to the letter of 28 August 1972, which, in substance and so far as relevant, was no more than confirmatory of earlier decisions and which therefore, in accordance with a principle that is, I think, well established in this Court, could not itself be the subject of an action.

If that be right, it is unnecessary to examine the other objections raised by the Council to the admissibility of the second action and I refrain from doing so, except to say that in my opinion the Council's reliance on the principle of 'Non bis in idem' was misconceived: that principle belongs to penal law and has no relevance in circumstances such as those of this case.

As regards costs, the position is governed by Article 70 of the Rules of Procedure. The Council does not suggest, and I do not think, that this is a case for the application of the second sub-paragraph of Article 69 (3) of those Rules.

I am therefore of the opinion that both these actions should be dismissed with no order as to costs.