2. **Dismisses the application as inadmissible with regard to the other issues;**

3. **Orders that the costs be reserved.**

Pescatore Due Chloros

Delivered in open court in Luxembourg on 14 July 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 18 JUNE 1981 [1]

Mr President,
Members of the Court,

1. The application originating this case is divided into a series of claims relating essentially to classification, payment of arrears of remuneration, recognition of pension rights and regularization of the position with regard to insurance, made by a servant against the Commission. For the moment, however, it is solely a question of deciding whether the objections of inadmissibility raised by the defendant are well founded; accordingly it is with that problem that I shall concern myself in this opinion.

It is appropriate to start by summarizing the facts of the case.

The applicant, Miss Maria Mascetti, who had been employed by the Ispra Joint Research Centre since 1961 as a member of the establishment staff, left the service on 18 November 1974 because criminal proceedings had been started against her by the Italian judicial authorities for an alleged political offence and she sought to evade execution of a warrant which had been issued for her arrest. The administration took the view that her absence was legitimate for the period from 18 November to 14 December 1974, in view of her remaining annual leave entitlement for 1974; but with respect to the period from 14 December 1974 onwards it regarded the absence as unjustified and therefore (by a letter of 9 January 1975) it suspended payment of remuneration. In a letter sent to the Establishment Directorate on 30 January

1 — Translated from the Italian.

1975 Miss Mascetti asked to be granted leave on personal grounds; the administration rejected her request and she contested that rejection first by means of a complaint and subsequently by means of a legal action. By its judgment of 16 December 1976 (Case 2/76, *Maria Mascetti* v *Commission of the European Communities* [1976] ECR 1975) the Court dismissed the action, declaring that the administration has wide discretionary powers regarding officials' requests for leave.

In a letter of 23 March 1977 the Establishment Directorate of Ispra invited Miss Mascetti to enter into a contract within a period of six months, whereby she would be engaged as a temporary servant assigned to Category C, Grade 1, Step 7, with effect from 30 October 1976 "to carry out the duties of principal secretary". This proposal was made pursuant to the transitional provisions contained in Council Regulation No 2615 of 21 October 1976, which provided *inter alia* that members of the establishment staff who were employed as at 30 October 1976 should be invited to enter into temporary servants' contracts. In a letter of 2 July 1977, Miss Mascetti informed the Establishment Directorate that she accepted the offer to enter into the contract; in a further letter of 5 August she informed the administration that she would not be going to Ispra personally to sign the contract since she did not have "freedom of movement on Italian territory". In a letter of 10 October the Establishment Directorate then notified her that the contract had to be signed at the place of employment and that she would have "to take up her duties at the same time".

The applicant replied by a letter of 14 November 1977 requesting "payment of the sums (due to her) for cancellation of her contract as a member of the establishment staff", that the new contract of employment be sent to her for signature and also the "application to the (her) case, by analogy, of Article 88" of the Staff Regulations of Officials (which deals with suspension of an official against whom criminal proceedings have been instituted) "together with payment of the sums accrued due to her ... on account of (her) total monthly remuneration from the time at which (her) salary was withheld until" the date of the request. The administration, in a letter of 15 February 1978, again invited Miss Mascetti to enter into the contract (as a temporary servant) as soon as she was "in a position to fulfil it properly"; it stated, with regard to her accrued severance grant in respect of her work as a member of the establishment staff until 10 December 1974, that it had taken the necessary steps for it to be paid. In a further letter of 15 November 1978 the administration also informed Miss Mascetti that "the insurance, social security and welfare contributions to the Istituto Nazionale della Previdenza Sociale [National Social Welfare Institute] and the Istituto Nazionale per l'Assicurazione contro le Malattie [National Sickness Insurance Institution] at Varese (had been) made until 31 December 1974".

In the meantime, in its judgment of 14 July 1978, the Corte di Assise, Rome, had acquitted the applicant on all the charges which had given rise to proceedings against her; thus she was able to resume her duties at the Ispra Centre on 6 November 1978. On 30 November 1978 at the head office of the establishment she signed a first temporary servant's contract which provided (Article 3) that she would be assigned to Category C, Grade 1, Step 6,

with seniority in her grade as from 1 December 1978 and in her step as from 1 September 1977. Miss Mascetti objected to this clause; the administration then agreed to enter into a second contract, which was signed on 24 April 1979, whereby Miss Mascetti was assigned to Step 7 as from 1 November 1977, with seniority in her grade being reckoned as from 30 October 1976.

To clarify the reasons for this classification, it should be pointed out that the said Council Regulation No 2615/76, in providing, as I have said, for engagement of members of the establishment staff (such as Miss Mascetti) as temporary servants, directed that the duration of service of a servant engaged on that basis should be calculated having regard to the years of service previously completed as a member of the establishment staff (Article 2 (4)).

However, even after the second contract Miss Mascetti lodged a request for rectification; in a letter of 26 May 1979 she submitted that her seniority in Step 7 should date from 1 October 1975 and not from 1 November 1977 and requested that the contract be amended to that effect. In a letter of 10 August 1979 the administration reiterated that Miss Mascetti was entitled to seniority in Step 7 as from 1 November 1977 and referred to the Legal Department's specific opinion on this point, given on 26 July 1979, which stated that "seniority in a step acquired as at 30 October 1976 could only start to run again from the effective resumption of ... duty, that is to say in December 1978" (a copy of this opinion was sent to the applicant by the administration on 2 October 1979).

Finally, on 7 November 1979 Miss Mascetti approached the administration once more and asked (a) that she should be fully reinstated in her career, without any break in continuity and with recognition of all the two-yearly steps; (b) that she should be paid all the emoluments which had accrued during the period of her absence from duty; (c) that all the insurance contributions, which had been suspended on 31 December 1974, should be paid; (d) that she should be paid the difference in respect of her severance grant for service as a member of the establishment staff, this difference being due to her because in the calculation of that grant no account had been taken of the period of service from 10 December 1974 to 30 October 1976. No reply was given to that note and therefore the applicant started her legal action on 13 June 1980 against the Commission (under the auspices of which the Ispra Joint Research Centre operates), claiming (a) annulment of "the decision whereby the Commission refused to regard the applicant's period of enforced absence as a period of service for all purposes" and (b) a declaration "that the Commission (is) bound to reinstate the applicant in (her) career and ... to restore her financial rights which have ... been specified" in the complaint of 7 November 1979.

As I have already said, when the Commission put its case it objected that the application was inadmissible and the Court decided to deal with this aspect separately from the substance of the case.

2. In support of its objection, the Commission relies on a number of arguments relating to the various heads

of the application. I shall therefore examine the admissibility of each head separately.

The applicant's main complaint is about her seniority in Step 7. We know that in this regard the administration adopted 1 November 1977 as the starting date and that it reflected this view in Article 3 of the draft contract sent to Miss Mascetti on 19 April 1979, which was actually signed on 24 April 1979.

The Commission treats the contract in question, as regards the part in which it determines the starting date for seniority in the step, as an act liable to have an adverse effect, on the basis of Article 90 of the Staff Regulations. According to this view, by sending the draft contract to the person concerned, the administration, it is maintained, took a decision regarding seniority in the step, liable to have an impact on the legal and financial position of the person concerned. As a result it was incumbent on Miss Mascetti, in order to protect her interests, to lodge a complaint against that decision in due time, in accordance with Article 90 of the Staff Regulations. On this aspect defence Counsel for the Commission points out that, even if it were to be admitted that the applicant's letter of 26 May 1979 constituted a complaint, the subsequent legal action — commenced on 13 June 1980 — would have to be regarded as having been instituted too late; in fact the administration gave a negative reply to the said letter of 26 May 1979 in its notes of 10 August and 2 October 1979, and the applicant allowed more than eight months to elapse after the latter date before starting her legal action.

In my opinion, however, the clause incorporated in the contract by the administration regarding the starting date for seniority in the step does not fulfil the necessary requirements to constitute an act liable to have an adverse effect, within the meaning of Article 90 of the Staff Regulations. This conclusion is arrived at by taking into account all the circumstances which preceded and followed signature of the contract.

I have already pointed out that the first invitation made by the administration to Miss Mascetti to enter into a new contract of employment as a temporary servant was made in the letter of 23 March 1977, proposing that she be assigned to Category C, Grade 1, Step 7 with effect from 30 October 1976. Even though seniority in the grade and in the step was not specified, the starting date for such seniority must have been 30 October or earlier, otherwise the phrase "with effect from 30 October 1976" would be meaningless. The first contract was signed on 30 November 1978, adopting 1 December 1978 as the starting date for seniority in the grade and 1 September 1977 for seniority in Step 6. Five months later after protests from Miss Mascetti, which I assume were made orally in the absence of any documentary record, the administration reviewed its position and accepted 30 October 1976 as the starting date for seniority in the grade (that is to say the date already specified in the letter of 23 March 1977) and 1 November 1977 as the starting date for seniority in the step. This position on the part of the administration therefore appears to have been adopted within the framework of a series of contracts with the person concerned and as an amendment to the two previous offers.

This uncertainty in the administration's conduct finds confirmation in the letter of 11 July 1979 in which the Ispra centre, instead of making a direct statement of its views as it had done in

the earlier stages, informed Miss Mascetti that it had entrusted assessment of her requests to the appropriate officers of the Commission. Only in its later note of 10 August did the administration finally give grounds for its method of calculating her seniority in her step, indicating that the seniority acquired as at 30 November 1976 (the reference date for the decision to assign to former members of the establishment staff the new status of temporary servants — see Article 2 of Regulation No 2615/76 referred to above) could only start to run again from the time of effective resumption of duty.

In these circumstances, I am of the opinion that the contractual clause relating to seniority in the step, viewed individually and on its own merits, was not such as to express a decision by the administration at that stage. In view of the circumstances surrounding the formulation of the clause in question, it could not be seen by the applicant as a final and unequivocal decision. Only at a later stage, that is to say when in its letter of 10 August 1979 (subsequently confirmed by the letter of 2 October) the administration informed Miss Mascetti of its reasons for not back-dating her seniority in Step 7 to 1 November 1977, was it possible to regard a decision as having been taken, on the basis of which Miss Mascetti was in a position effectively to prepare her defence, initially by means of the complaint of 7 November and subsequently by means of a legal action.

Furthermore, even if the adverse decision were to be referred back to the date of the proposed contract, no grounds whatsoever for the decision had been given at that time. The grounds were only given in the letters of August and October 1979 which were, from this point of view, of essential importance. In fact, only those letters provided the employee with an exact idea of the significance of the position adopted by the administration and enabled her to assess the appropriateness of resorting to the means of defence provided for by the Staff Regulations. In this respect I would point out that a decision of the Court contains a statement that "the purpose of the duty to state the grounds on which a decision is based is both to permit the official concerned to determine whether the decision is defective making it possible for its legality to be challenged . . ." (judgment of 28 May 1980 in Joined Cases 33 and 75/79, *Kuhner* v *Commission of the European Communities* [1980] ECR 1677, in particular paragraph 15 of the decision); in this way it has been recognized that there exists a necessary correlation between the giving of grounds in which the act is based and the possibility of evaluating its effective scope, with a view to recourse to the appropriate means of defence. Moreover, in its judgment of 20 November 1980 in Case 806/79, *Gerin* v *Commission of the European Communities* [1980] ECR 3515, the Court recently expressed very clear views on the need for grounds to be given why a decision may be regarded as "an act adversely affecting" the person concerned in accordance with the Staff Regulation. In that case it was a question of determining whether a printed form, completed by hand, originating from the administration and bearing the phrase "your son (name of child) has not been regarded as a dependent child since 1 January 1978" could be regarded as an act adversely affecting an official. The Court decided that it could not, observing that the form of words used was laconic and devoid of any statement of reasons; in the same case, however, it acknowledged that a later decision, for which the grounds were given, was an

act liable adversely to affect the person concerned. This view is without doubt founded on the fact that the duty to state the grounds on which acts which may be prejudicial to the rights of officials and servants are based is imposed by the second paragraph of Article 25 of the Staff Regulations and confirmed in Article 90 (1) thereof, but the principal merit of the dicta referred to above is the fact that they attributed to the statement of grounds the function of enabling an informed assessment to be made of the scope of each act and of the appropriateness of contesting it.

If this argument is adopted, the letter sent by Miss Mascetti to the administration on 7 November 1979 — which, as we have seen, included *inter alia* a request for the commencement of her seniority in the step to be back-dated — must be regarded as a complaint, made within the relevant time-limit, against the administration's decision adversely affecting her contained in the letter of 10 August. The administration's letter of 2 October 1979 therefore does not alter this fact, even if it is treated as a mere confirmation of the letter of 10 August; the complaint was in fact lodged before the expiry of three months from 10 August.

3. The Commission, further seeking to prove inadmissibility of the head of claim relating to seniority in the step, also maintains that the applicant, by signing the contract of engagement, acquiesced in the starting date for seniority in the step indicated in it. The defendant stresses the fact that Miss Mascetti signed the contract (the second version) without making any objections or reservations; this is said to demonstrate that she agreed with and accepted the content of the contract in its entirety. Having thus acquiesced in the administrative decision incorporated in the contract she is, it is maintained, precluded from contesting it later by means of legal proceedings.

In my opinion this argument cannot be upheld, for two good reasons. In the first place, I refer to the statements I made when examining the other aspect of the objection of inadmissibility — the question of commencing legal proceedings outside the time-limit — to the effect that the position indicated by the administration in the contract cannot be described as an act liable adversely to affect the person concerned, within the meaning of Article 90 of the Staff Regulations, both because it was a position which was not yet well defined and because it failed to state any grounds. If those were the circumstances — and I believe they were — the fact of possible acceptance of the administration's position as it appeared from the contract would have no effect on the official's right of complaint. Such a problem could only arise if the alleged acquiescence had related to the decision of 10 August 1979; but we know that the latter was contested in due time by means of the complaint of 7 November 1979.

In the second place it should not be forgotten that acquiescence consists of acceptance of the effects of the act against which the application should be directed; such acquiescence, since it amounts to a waiver, is detrimental to the situation which it is sought to establish and for the protection of which the interested party could have taken valid action. However, if an individual's behaviour is to be treated as amounting to a waiver of particular legal situations, that behaviour must unambiguously

indicate the clear and incontestable intention of the individual in question to abandon a right. In the present case the fact that Miss Mascetti signed the contract of engagement containing a clause governing the starting date of the step did not unambiguously indicate her intention to waive the right to any claim regarding that starting date based on her earlier relationship with the administration.

In effect it is quite clear that when Miss Mascetti signed the temporary servant's contract she was motivated above all by a desire to regularize the basis of her employment with the Ispra Research Centre after an absence of some years and after finding herself unable to conclude a similar contract immediately after the entry into force of Regulation No 2615 of 1976. The view must therefore be discounted that by signing the contract she wished, in full knowledge of her rights, to waive entitlement to greater seniority in the step. It seems to me much more reasonable to conclude that she did not hesitate to enter into the contract because she was motivated by a concern to regularize the terms of her employment and that, with regard to the detail of seniority in the step, she took the view that the possibility of having her classification rectified in her favour was unaffected. This conclusion is borne out by the series of contacts which took place between the Centre and the applicant before and after 24 April 1979 for the purpose of reviewing the clause included by the administration regarding seniority in the step; the fact that signature took place while those contacts were in progress should be seen as indicating that it in no way amounted to a waiver.

4. I shall now consider the admissibility of the heads of claim regarding the payment of remuneration, pension rights, insurance contributions and the severance grant for her work as a member of the establishment staff. All those heads have a common basis, namely the applicant's claim that the defendant should regard as years of service the period during which she absented herself from her work to evade execution of the warrant of arrest.

With regard to the request for payment of the emoluments which had accrued during her four years' absence, I should mention that the administration of the Ispra Centre notified Miss Mascetti, in a letter of 9 January 1975, that it would block payment of her remuneration immediately since her absence was unjustified. The administration arrived at this decision by applying, by analogy, to the case of Miss Mascetti, a member of the establishment staff, Article 60 of the Staff Regulations of Officials, according to which "any unauthorized absence" (that is to say, any absence for which there is no justification or permission) which is "duly established" shall be deducted from annual leave, with the implication that "if he has used up his annual leave" the official "shall forfeit his remuneration for an equivalent period". The applicant did not lodge a complaint against the administration's decision at the appropriate time but I do not consider that from such failure to take action there should automatically follow the inadmissibility of her application. It should in fact be taken into account that almost four years after that decison a new circumstance arose,

which cannot be disregarded; I refer to Miss Mascetti's acquittal on all charges by the Corte di Assise, Rome (judgment of 14 July 1978 referred to above).

This fact radically changed the applicant's position; her absence from duty dating back to 1974 now appeared in a new light, as absence justified by the need to escape unjust detention. It would therefore be understandable and reasonable that the applicant should again submit her request for payment of her remuneration, inviting the administration to re-examine her case on the basis of the new situation. The applicant did indeed submit such requests but did so too late. In fact, if it is considered that a supervening circumstance causes the period in which a claim must be lodged to start running again, it must be concluded that in this case the new time-limit fell three months after the resumption of duty and therefore on 6 February 1979 at the latest. However, the complaint concerning, *inter alia*, the remuneration which had accrued during her absence was not submitted until 7 November 1979 and therefore well beyond the time-limit; and accordingly the subsequent legal action was also rendered inadmissible.

Analogous reasoning may be followed regarding the claims in relation to pension rights and insurance contributions. It should be considered that the suspension of the payment of remuneration, pursuant to Article 60 of the Staff Regulations, also suspended entitlement to the said contributions and accordingly Miss Mascetti should have put forward the above-mentioned claims within the same prescribed period, which started running again in view of her acquittal, as the one within which she should, as we have seen, have submitted the requests regarding remuneration. I am aware, however, that the complaint referring to all the claims which were later taken up in the legal action was not submitted until 7 November 1979, when the new period had long since expired. The subsequent legal action is therefore regarded as inadmissible because of the failure to lodge a complaint through official channels in due time.

Finally, with regard to the request for an increase in the severance grant paid to the applicant in 1978 for her service as a member of the establishment staff (see letter from the Establishment Directorate of Ispra of 15 February 1978) I should point out that, for the same reasons as those set out above, Miss Mascetti should have made an objection about the payment no later than three months after her resumption of duty. The complaint of 7 November 1979 was therefore too late in this respect and the subsequent legal action suffered from the same defect.

5. In view of the above considerations I propose that the action brought by Miss Maria Mascetti against the Commission, by means of the instrument lodged on 13 June 1980, be declared admissible with regard to the head relating to the back-dating of seniority in Step 7 and inadmissible on the remaining heads. The decision on costs should be reserved until final judgment.