On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

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

Kutscher Pescatore Sørensen

Delivered in open court in Luxembourg on 14 July 1976.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 7 JULY 1976 [1]

Mr President,
Members of the Court,

The present case, brought by an official against the Commission, is basically the result of lack of information on the part of the applicant's immediate superior, which was partly due to unsatisfactory working of the liaison machinery between the internal departments of the institution and partly to poor contact between the two officials concerned, both of whom have given evidence of a certain inflexibility of attitude which, in my view, was a contributory cause of the dispute.

The applicant, who lives and works in Brussels, had been on sick leave for two weeks when, on 14 April 1975, some days prior to the date fixed for the performance of tests in a competition organized by the Commission in Luxembourg, the Central Staff Committee asked her to replace a member of the Selection Board who was unexpectedly prevented from attending. The illness which prevented the applicant from coming to the office consisted, apparently, of an allergy to smoke but did not prevent her from working and she was therefore expressly authorized to work at home on the tasks

1 — Translated from the Italian.

forming part of her normal official duties.

The applicant accepted the appointment and on the same day the Central Staff Committee informed the Directorate General for Personnel and Administration of the Commission. It is not clear whether the administration took steps to pass the information on to the applicant's immediate superior. In any case, he received no warning of the date of his subordinate's proposed visit to Luxembourg. When, therefore, during the afternoon of 22 April 1975, he was confronted with the travel order for the journey which Mrs Hirschberg had to make to Luxembourg on the following day in connexion with the competition, his reaction was to send a telegram to her at her home address expressing his surprise at receiving such a request since he had not received prior notice that there would be a meeting and could not overlook the fact that the applicant was absent from the office on sick leave. As he had not received notification of an immediate return to work by the applicant, he refused to approve the mission and asked the applicant not to go to Luxembourg.

After receiving this message and getting into touch with the chairman of the Selection Board, the applicant took it upon herself to disregard her superior's instructions rather than fail to appear and upset the arrangements for the competition, in which there were 450 candidates. The applicant's immediate superior did not know (and this is not said to criticize him, as the matter was covered by medical secrecy) that the illness which had prevented the applicant from coming to the office was not of such a kind as to prevent her from travelling to Luxembourg and taking part in the work of the competition any more than it had hitherto prevented her from regularly carrying out her duties at home.

The circumstances, however, made it necessary to take an immediate decision before all the details could be explained. Accordingly, on the following day, the applicant went to Luxembourg, while her immediate superior wrote a letter to her asking for information about the competition in question and the circumstances in which she had been appointed as a member of the Selection Board, and, in addition, the reasons for her participation notwithstanding the fact that she was on sick leave.

On 25 April the applicant replied to these questions, referring to the unexpected withdrawal of a colleague who had previously been appointed and the difficulties which would have been placed in the way of holding the competition if she too failed to attend at the last moment. She also recalled that her illness had not prevented her from carrying out her duties but she did not give a clear answer on the specific point concerning the compatibility in point of fact of her illness with her journey to Luxembourg and with her participation in the work of the Selection Board. It is also true, however, that this question was not raised in clear terms in the aforesaid request for information.

By note of 30 April, whose subject was indicated by the word 'warning' in the heading, her immediate superior described her reply as 'incomplete and tendentious'. I imagine that in defining it as incomplete he was referring to this latter point. The word 'tendentious' probably refers to the reference made in the reply to the objection which her immediate superior had raised in the previous year to the applicant's participation in the work of a competition as a member of the Selection Board concerned. At the end of the note, her immediate superior stated that he was sorry to have to send her 'this warning' because of her conduct, which was 'ambiguous and undisciplined and neither consonant with the elementary rules of our administration nor consistent with the responsibilities which attach to your office.'

On the following 9 June, the applicant submitted to the Commission a complaint under Article 90 of the Staff Regulations of Officials. After setting out the facts and the reasons for her behaviour, she requested the Commission to give her an assurance in writing that the statements contained in the note of her immediate superior, in particular, the note of 30 April 1975, had been withdrawn inasmuch as they constituted an unfair attack on her personal dignity and her position as an official.

On 22 October 1975 the Director General for Personnel and Administration replied to her stating that the difficulties with which she was faced were the result of a misunderstanding due to her absence from the office on the ground of ill health and assuring her that, despite this, the incident would have no effect on her career and that none of the correspondence on the case would be placed on her personal file. The reply concluded with the following statement 'Consequently it is no longer appropriate to submit your complaint to the Commission.'

This last statement appears to indicate that the complaint never reached the authority competent to take a decision on it. It was, therefore, actually the Director General who took a decision rejecting the complaint in the belief that the applicant had no longer any interest in pursuing her request.

From this point of view the decision can be regarded as vitiated by lack of powers. According to the Commission's decision of 24 February 1974, the 'appointing authority' which is competent to take a decision on the complaint of an official in the applicant's grade is the member of the Commission responsible for adminstrative questions and not an official of the administration even of the highest grade.

The applicant did not, however, make her submission from this point of view. Moreover, the attitude maintained by the Commission during the course of these proceedings gives the impression that it nevertheless wished to adopt the decision of the Director General Administration as its own, regularizing it as necessary.

Before going on to consider, in turn, the various heads of claim in the application, we should bear in mind that one of the conditions for the admissibility of an action brought by an official against a decision rejecting his complaint through official channels is that the conclusions of the application and the object of the complaint must be the same. Despite this, I do not take the view that there is need to insist on strict formality to the point of requiring that each single head of the conclusions in the application must in every respect be identical with each and every specific request made in the complaint as though it were giving rise to proceedings of first instance and an appeal to a higher court.

Since, moreover, the complaint does no more than set in motion a procedure of a purely administrative character prior to the commencement of proceedings, it is sufficient if the essential subject-matter of the appeal against the decision rejecting the complaint is the same as that of the complaint; nor can formal or, at any rate, marginal differences make it inadmissible.

In my view this condition is fulfilled in the present case.

I therefore turn to the specific claims made by the applicant. She first of all asks the Court to declare that her immediate superior's refusal, in the telegram of 22 April 1975, to approve her mission to Luxembourg is contrary to the final paragraph of Article 1 of Annex II to the Staff Regulations. Under this provision, the duties undertaken by members of the Staff Committee and by officials appointed by the Committee to organs set up under the Staff Regulations or by the institution are to be deemed to

be part of their normal service in their institution.

I am not, however, aware of any evidence tending to show that there was any intention contrary to the provision of that article. The simple explanation of the telegram is the ignorance in which the head of the department remained concerning the applicant's actual state of health and the doubts which he might reasonably entertain concerning the propriety of an official who was still on sick leave taking part in work which meant her going to another city. And all this was based on a travel order which assumes that its recipient is at work and which is normally incompatible with his remaining on sick leave.

Again, this view expressed concerning the instructions in the telegram from the standpoint of Community law would be of significance only if, because the applicant had not followed them, there had been a refusal to recognize the mission completed in defiance of the order. But there appears to have been no such refusal. The applicant has therefore no legal interest as regards the first head of the conclusions taken on its own and the claim in question is accordingly inadmissible.

Secondly, the applicant seeks the annulment on grounds of lack of powers of the note of 30 April described by its author as a 'warning'.

Article 87 of the Staff Regulations provides that the appointing authority shall have the right to issue a written warning or a reprimand without consulting the Disciplinary Board, on a proposal from the official's immediate superior or on its own initiative. The official concerned is to be heard before such action is taken. In the present case what was involved was an admonition to which its author certainly meant to give a certain formality, as indicated by the description 'warning' placed at the head of it. This fact does not, however, justifiy the conclusion that the latter intended to give the note the character of a genuine disciplinary measure within the meaning of Article 87 of the Staff Regulations. It contained mere observations addressed to a subordinate by her superior which, not having in themselves any legal effect, and constituting a purely internal measure cannot, according to the case-law of the Court, be the subject of proceedings (see judgment in Case 16/67 *Labeyrie* [1968] ECR 293.

While I am bound to deplore the improper use of terms to which the Staff Regulations have given a very precise and restricted meaning, the greater importance which one must attach to the real substance of instruments, as distinct from their form, convinces me that the application for annulment of the note in question is inadmissible.

Thirdly, the applicant seeks the annulment of the implied refusal of the Commission to accept the complaint in which she sought the withdrawal of the aforementioned criticisms made about her by her immediate superior. This claim is based on the alleged infringement by the Commission of the duty, placed upon it by Article 24 of the Staff Regulations, to assist officials in its service.

This is the principal issue in the case. Since, as I have said, the notes of her immediate senior about which the applicant complains did not result in any measures of a disciplinary nature and are, of themselves, without legal effect, the only question which arises on this point is whether the words used in these notes to criticize the applicant's conduct are capable of unfairly reflecting on her integrity as an official or, in any event, of causing her non-material damage, for there can be no question, so far as her career is concerned, of these criticisms' being capable of harming the applicant because, according to the assurances given by the Director General for Personnel and Administration the

comments in question never appeared on her personal file.

On the general question of the feasibility in principle, under Article 91 of the Staff Regulations of Officials, of applications for compensation for even purely non-material damage which an official claims to have suffered in the course of his service and for which the institution employing him can be rendered liable, even independently of any application for annulment, I set out my views in the opinions delivered on 12 March 1975, and later on 26 June, in Joined Cases 4 and 30/74 *(Suppa* v *Commission,* [1975] ECR 939 et seq. and 942 et seq.). Although that judgment appears by implication to have accepted the procedural and jurisdictional principles set out in those opinions, the Chamber did not on that occasion need to take an express decision on them. In case it regards this as necessary now, I take the liberty of referring to the views I expressed on that occasion.

As regards the alleged aspersion on her integrity as an official, the existence of injury must rest on the publicity given to the comments in question, which are of an internal and personal character. Although one can understand that the applicant had to mention the telegram of 22 April to the chairman of the Selection Board, there was no need for her to communicate to all and sundry the contents of the subsequent notes, in particular that of 30 April. The question of non-material damage remains, accordingly, the main one and compensation for it is the subject of the fourth head of the conclusions.

The Commission has acknowledged the value of the applicant's qualifications and of her services in her work. This is clear from the comments made by her superiors. The two-yearly periodic report on the applicant's conduct in the service, which was made subsequent to the occurrence of the incident in question after consultation with the applicant's immediate superior, contains no reference, direct or indirect, to the incident. It refers to the official concerned in complimentary terms.

It is understandable that an official who, for reasons involving the interests of the service, undertakes a special task, as the applicant did in agreeing to go to Luxembourg in order to replace at the last moment an absent member of the Selection Board and to avoid upsetting the arrangements for a competition involving several hundreds of individuals, might take offence on subsequently finding herself criticized in terms which, one must agree, were somewhat harsh, and the offence must be even greater in the case of an official who is particularly conscientious and dedicated to her work.

Nevertheless the applicant would have been well-advised to keep her immediate superior better informed about the proposed journey to Luxembourg. If the latter had been aware of this a little earlier there would have been time for explanations and there would probably have been no reason for either party to adopt the inflexible attitude which was subsequently produced by the *fait accompli.*

Thus too, the applicant could, in fact, have gone into greater detail in explaining how it was possible for her participation in the work of the Selection Board to be compatible with the indisposition which prevented her from going to the office, although, as I have said, the letter of 23 April was not at all clear in asking for an explanation on this point. In fact it did no more than ask for the reason why the applicant was taking part in the work of the Selection Board despite the fact that she was on sick leave. The applicant claimed to have fully answered the question by stating that, if she had not gone to Luxembourg, this might have upset the arrangements for the competition. It is therefore understandable that, even after receiving the explanation, her immediate superior continued to feel justified in regarding as

contradictory the behaviour of a person who, on the one hand, was prepared to travel to another city to take part in the competition procedure while, on the other hand, she refrained from taking part in meetings of working groups, directly involving her official duties in the city where she lived.

It is clear from all this that poor contact between the two officials concerned and the resultant misunderstandings led the applicant's superior to react in a way which, as we have seen, was certainly, on an objective view, excessive, but in view of all the circumstances is, on a subjective view, understandable.

Although the decision of Director General for Personnel and Administration not to place this exchange of notes in the applicant's personal file does not in itself constitute an intimation that the criticisms expressed by the applicant's immediate superior have no basis in fact, it at least suggests the view that they are irrelevant. Bearing in mind the circumstances mentioned earlier and, in particular, the extent to which the conduct of the applicant may have contributed to the creation of the misunderstanding which gave rise to this incident, I cannot accept that the person concerned can now claim that the Commission should be ordered to pay even token damages for the non-material damage which she claims to have suffered as a result of the criticisms made of her, as the result of the defendant's failure to grant the requests set out in the complaint through official channels and, in particular, as a result of its failure to ensure that the criticisms were formally withdrawn.

One can understand the reluctance of the Commission officially to disown a head of department who, in discharging his responsibilities in his capacity as a senior official, and acting in perfect good faith, voiced criticisms which, although excessive, were nevertheless at first sight justified in view of the circumstances and of the uncertainties for which the applicant herself was in part responsible.

In these circumstances, the applicant might have been satisfied with the assurance received from the Director General for Personnel and Administration that all reference to the incident had been excluded from her file. In any case even if this were insufficient, the acknowledgment made by the Agent of the Commission during the hearing of the excellence, from every point of view, of the official concerned, and the resultant publicity given to such recognition, constitute in themselves a sufficient means of redress for the applicant since they remove any doubt which might have been created about her within the service by the exchange of notes to which I have referred.

In view of the particular circumstances which have given rise to the present proceedings I am of the opinion that, although I recommend that the application be dismissed, it would be proper for the defendant who, under the rule applicable to proceedings by officials, will in any case have to bear its own costs, also to bear half the costs of the applicant in accordance with the first subparagraph of Article 69 (3) of the Rules of Procedure.