OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 4 February 1987 *

Mr President,
Members of the Court,

1. The dispute between Sandro Gherardi Dandolo and the Commission concerns the type of invalidity pension which he is paid. The applicant seeks to obtain the benefit of the second paragraph of Article 78 of the Staff Regulations of Officials, and not the third paragraph, which has been applied to him by the Commission.

2. A Community official normally works until he retires, at the latest when he reaches the age-limit of 65. Early retirement may occur for a number of reasons, one of them being that provided for by Article 78.

That article provides that in the event of total permanent invalidity preventing the official from performing the duties corresponding to a post in his career bracket he is entitled to an invalidity pension (first paragraph) equal to the pension to which he would have been entitled if he had remained in the service until the age of 65 (third paragraph).

If, however, the invalidity arises from *inter alia* an accident at work or an occupational disease, the pension is fixed at 70% of his basic salary (second paragraph).

A finding of invalidity as defined above is a matter for the Invalidity Committee (Annex VIII to the Staff Regulations, Article 13) composed of three doctors (Annex II, Article 7) appointed, respectively, by the official concerned, by the institution to which he belongs and by agreement of the first two doctors.

In its recent judgment in the *Rienzi* case [1] the Court held that the committee

'has exclusive powers regarding medical assessment'

and that its powers do not extend

'to any cases in which a legal classification is called for' (paragraph 9)

since the determination of such consequences

'is for the administration alone . . . subject to review by the Court' (paragraph 11)

and the Court rejected Mr Rienzi's first two submissions

'in so far as they presuppose that the Invalidity Committee is also empowered to give a legal definition of the concept of occupational disease' (paragraph 12).

Although it has no power to decide whether an illness giving rise to invalidity is occupa-

* Translated from the French.

1 — Judgment of 21 January 1987 in Case 76/84 *Rienzi* v *Commission* [1987] ECR 315.

tional in nature, the committee does act within its powers where it finds that

'there is a causal connection between the applicant's invalidity and an illness ... which it was not, however, empowered to classify for legal purposes' (paragraph 12).

In other words, the committee has the sole power to determine the existence, level and consequences of an invalidity and to decide whether there is a connection between such invalidity and an accident or illness, but not to decide whether the accident or illness are work-related.

3. Since it is for the administration to determine whether or not the accident or illness is work-related, how can the Invalidity Committee properly make a finding with a view to the possible application by the administration of the second paragraph of Article 78?

In that regard the letter of 23 March 1982 sent by the appointing authority to Dr Thomas, the doctor appointed by the applicant to the Invalidity Committee, with copy to Dr Nijs, the doctor appointed by the administration, embodying the terms of reference of the committee is helpful. It states that

'if the members of the Invalidity Committee or the official himself consider it appropriate to find that an occupational illness or the sequelae of an accident at work have given rise to the invalidity procedure, the matter must first be referred to the department responsible for determining whether illnesses are occupational in nature ....

The Invalidity Committee may make a finding on this aspect only after the procedure in question has been completed and in accordance with the results of such procedure'.

Consequently, if the accidents or illnesses which, according to the committee, have given rise to total invalidity have already been declared occupational by the administration, there is no difficulty in applying the provisions of the second paragraph of Article 78. If not, the committee must refer the matter to the administration.

That was the case of Mr Gherardi. By letter of 6 May 1982 Dr Thomas asked the administration for information on 'the accidents suffered in 1978 and 1968'; the administration replied that these were not accidents at work and that therefore 'there is nothing to stop the invalidity procedure from taking its normal course'.

In the circumstances set out in the Report for the Hearing, by a decision of 21 June 1982 the Commission retired Mr Gherardi and granted him an invalidity pension fixed in accordance with the provisions of the third paragraph of Article 78.

That decision led the official concerned to write two letters.

In the first, dated 28 June 1982, he requested the reconsideration of the decision 'in accordance with the document of the medical committee' which had found that his invalidity resulted 'in part from an accident in the course of his duties'; that letter must be regarded as a complaint for the purposes of Article 90 (2) of the Staff Regulations, seeking to obtain the benefit of the second paragraph of Article 78;

In the second, dated 10 August 1982, he asked the appointing authority 'to initiate the procedure for determining the existence of an occupational illness'; the official thus requested the initiation of the procedure provided for in Article 16 *et seq.* of the Rules on the Insurance of Officials of the European Communities against the risk of

accident and of occupational disease adopted in implementation of Article 73 of the Staff Regulations. It should be noted that that request, which was held admissible by the administration, is in the course of examination.

4. At this stage only the reply to the first of those letters need concern us.

No reply was received to that letter within the prescribed period. Mr Gherardi's complaint must therefore prima facie be regarded as having been the object of an implied rejection. No appeal was brought against that rejection within the applicable time-limit, and it can therefore no longer be challenged. That, indeed, is what the Commission argues. In order to circumvent that objection of inadmissibility, however, the applicant asserts that the decision adversely affecting him is not that of 21 June 1982, which is not contested, but that of 20 July 1984, the nature and effect of which will be described; it is the latter decision that he seeks to have reviewed by the Court.

What happened between those two dates?

After the decision of 21 June 1982 had become final, the Commission nevertheless considered that the opinion of the Invalidity Committee called for more detailed examination; it therefore asked the committee for further information on Mr Gherardi's case on two occasions.

First, by letter of 26 January 1984 it asked the committee which accident was referred to in the report of 28 May 1982 by the word 'partly', and whether that accident was 'a constitutive or determining factor' in the invalidity found to exist. On 30 March 1984 the committee replied that it was necessary to take into account two accidents at work, which occurred on 17 November 1964 and 3 January 1968, to be regarded as such because they took place 'on the official's way to work'; in its view the consequences of those accidents gave rise to the invalidity and, 'together with the other complaints' were the determining factors in that invalidity.

Secondly, in a letter of 21 May 1984 it pointed out that the 1968 accident was not an accident at work, and asked 'whether the accident of 17 November 1964 alone was a determining or constitutive factor in the invalidity', that is to say whether it was its 'substantial and primary cause'.

Taking due note of the fact that the accident of 3 January 1968 had not been held to be an accident at work, the Invalidity Committee found, by a majority decision,

'that the accident of 17 November 1964 alone [did] not, in [its] view, constitute a determining or constitutive factor, that is to say the substantial and primary cause of the invalidity'.

By a letter of 20 July 1984 the appointing authority therefore informed counsel for Mr Gherardi that in those circumstances it would not alter its decision of 21 June 1982.

5. May it be considered, as Mr Gherardi submits, that by deciding to re-examine his case the administration withdrew its

decision of 21 June 1982 and that, contrary to the Commission's position, the decision of 20 July 1984 does not merely confirm the previous decision but is an entirely new decision inasmuch as it was arrived at in the light of new elements — the two reports prepared in 1984 by the Invalidity Committee?

I do not think so, for the following reasons.

A — An administrative decision may be *withdrawn* by an act issued by the same authority or its superior which either expressly withdraws the previous decision or contains a new decision which implicitly but necessarily takes the place of the previous one.

Contrary to the applicant's assertions, the letter sent to his counsel on 20 June 1983 by the appointing authority cannot be regarded as a decision withdrawing the previous one. After recalling that

'it appears that no reply was made to Mr Gherardi's letter so that it must be concluded that there was an implied rejection of his complaint for the purposes of Article 90 (2) of the Staff Regulations',

the signatory simply refers to 'the continuing uncertainty with regard to the cause of Mr Gherardi's invalidity' and states that he has asked Dr Nijs for further information regarding the cause of the invalidity in the light of which he will consider whether or not it is appropriate to revise the amount of the pension received by the applicant.

The letter thus contains a confirmation of the definitive nature of the decision of 21 June 1982 and a promise to reconsider it if the medical evidence justifies such reconsideration.

B — That information was provided by the Invalidity Committee and includes no new *element of fact.* It is true that the committee made two statements.

Its report of 19 June 1984 simply rectifies an error (the issue whether or not the accident of 3 January 1968 was an accident at work) and draws the appropriate conclusion with regard to the question whether the accident of 17 November 1964 alone was the determining or constitutive factor in the applicant's invalidity. By stating that that accident was not 'the substantial and primary cause of the invalidity', the committee provided the appointing authority with the information considered necessary for the letter of 20 June 1983 in order to put an end to the 'uncertainty' which might have resulted from its earlier report. According to the committee, although the accident of 17 November 1964 was a partial cause of the invalidity (report of 28 May 1982) it was not its substantial and primary cause (report of 19 June 1984).

6. Inasmuch as the decision of 21 June 1982 was not withdrawn, and in the absence of any new element of fact which would make it possible, notwithstanding the expiry of the strict time-limits, to call that decision in question, it must be regarded as the act adversely affecting the applicant for the purposes of these proceedings.

It should be pointed out in that regard that the Commission has stated that it will refer

the matter again to the Invalidity Committee if the administrative procedure initiated by Mr Gherardi on the basis of Article 73 results in a finding that the illnesses submitted by him for the examination of the medical committee are occupational in nature.

According to a consistent line of cases of the Court,[2] the letter of 20 July 1984, confirming the decision of 21 June 1982, could not have the effect of reopening the mandatory limitation periods for the submission of a complaint and the initiation of proceedings.

7. It is not necessary, therefore, to consider the objection of inadmissibility based on the late submission, on 22 October 1984, of the complaint concerning the 'decision' of 20 July 1984 or the substance of the case. I propose that the Court should declare Mr Gherardi Dandolo's application inadmissible and order the applicant to pay the costs, subject to the provisions of Article 70 of the Rules of Procedure.

2 — Case 1/76 *Wack* v *Commission* [1976] ECR 1017, paragraph 7; Case 17/71 *Tontodonati* v *Commission* [1971] ECR 1059, paragraph 3.