OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 18 SEPTEMBER 1980

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My Lords,

Introduction

This appears to be the first case ever to have come before the Court about Article 51 of the Staff Regulations, which is in these terms:

"1. An official who proves incompetent in the performance of his duties may be dismissed.

The appointing authority may, however, offer to classify the official in a lower grade.

2. Any proposal for the dismissal of an official shall set out the reasons on which it is based and shall be communicated to the official concerned. He shall be entitled to make any comments thereon which he considers relevant.

The appointing authority shall take a reasoned decision, after following the procedure laid down in Annex IX."

The procedure laid down in Annex IX is that to be followed in the case of disciplinary proceedings.

The applicant in the present case is Mr Franco Vecchioli who, having been an official of Grade A 5, was dismissed from the service of the Commission under Article 51 as from 1 November 1978, by a decision, dated 27 July 1978 and notified to him on 3 August 1978, of the Member of the Commission

responsible for matters of personnel and administration, Mr Tugendhat (Annex 32 to the Defence).

On 3 November 1978 Mr Vecchioli lodged a complaint under Article 90 (2) of the Staff Regulations against that decision. The Commission rejected the complaint by a letter addressed to Mr Vecchioli on 16 March 1979, i.e. a few days after the expiry of the four-month period prescribed by Article 90 (2) (Annex 1 to the Application). It appears that the decision to send that letter was taken by the Commission in accordance with its "written procedure" on a proposal by Mr Tugendhat (see Annex 37 to the Defence).

The essential facts leading to Mr Tugendhat's decision of 27 July 1978, which cover the whole period since Mr Vecchioli's recruitment into the service of the Euratom Commission on 16 November 1959, together with Mr Tugendhat's reasons for taking that decision, are set out in the preamble to the decision and I will not rehearse them, though I will have to quote from the preamble to the decision later.

In support of his claim that the decision should be declared void Mr Vecchioli put forward no fewer than eight contentions, some of them having more than one limb. I will say at once that in my opinion none of them was well-founded. I will deal with them seriatim.

The first contention

Mr Veccioli's first contention was that, on the facts, what he had been guilty of was not incompetence but indiscipline. He should accordingly, he submitted, have been dealt with, not under Article 51, but under Article 86 of the Staff Regulations, paragraph 1 of which provides:

"Any failure by an official or former official to comply with his obligations under these Staff Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action".

Mr Vecchioli put forward three reasons why he would have preferred to be dealt with under Article 86:

(1) He felt that dismissal on disciplinary grounds was less dishonourable than dismissal on grounds of incompetence and could more readily be explained to his family and to a prospective employer.

(2) Whereas Article 51 affords, as the only alternative to dismissal, an offer to classify the official in a lower grade, Article 86 (by paragraph 2) provides for a range of other possible alternatives: written warning, reprimand, deferment of advancement to a higher step and relegation in step, besides downgrading. It may be observed however that Article 86 (2) also provides for, where appropriate, reduction or withdrawal of entitlement to retirement pension, which Article 51 does not. (We were told indeed that Mr Vecchioli is now drawing a pension from the Commission, though there is a dispute between him and the Commission as to whether he is entitled also to family allowances).

(3) Article 11 of Annex IX, which enables disciplinary proceedings to be reopened where new facts are brought to light, does not apply in relation to Article 51.

There were undoubtedly during the course of Mr Vecchioli's career with the

Commission instances of indiscipline on his part. The preamble to Mr Tugendhat's decision refers to occasions in the Autumn of 1974 when he ignored summonses to meetings arranged to discuss his future. There was also, at one time, his persistent failure to sign his report for the period 1 July 1971 to 30 June 1973 (see Annexes 16, 25-16-d, 17 and 25-16-g to the Defence). There was his largely unexplained absence from his office between 10 March and 13 April 1976 (as to which see a note on his personal file dated 1 April 1976 and Annexes 7 and 25-22 to the Defence). Lastly there was his much stressed refusal, by way of "silent protest" against the decision of 25 July 1974 placing him at the disposal of the "Euratom Safeguards" Directorate (Directorate E) of the Directorate-General of Energy (DG XVII) in Luxembourg, to do any work at all after that absence (as to which see *inter alia* Annex 25-23 to the Defence).

In my opinion it quite obviously is not the law that an official in whose case dismissal (or downgrading) under Article 51 would otherwise be justified is entitled to escape from that fate if he can show that, in addition to being incompetent, he was insubordinate.

The Commission referred us to authorities to that effect in other jurisdictions interpreting similar provisions, in particular a decision of the French Conseil d'État *(Kley,* 20. 6. 1962, Rec. p. 1007), but I hardly think that the proposition needs authority to support it.

So the real question is whether Mr Vecchioli could properly be held to have been "incompetent in the performance of his duties" within the meaning of that phrase in Article 51. A good deal of argument was submitted to us by Counsel for the parties as to the meaning of that phrase in that context.

As to that it is, in my opinion, helpful to look at all six texts of the first sentence of Article 51 (1). They are as follows:

Danish: "Den tjenestemand, hvis faglige indsats i tjenesten findes utilstraekkelig, kan afskediges".

German: "Ein Beamter, dessen fachliche Leistungen im Dienst nachweislich unzulänglich sind, kann entlassen werden".

English: "An official who proves incompetent in the performance of his duties may be dismissed".

French: "Le fonctionnaire qui fait preuve d'insuffisance professionnelle dans l'exercice de ses fonctions peut être licencié".

Italian: "Il funzionario che nell'esercizio delle sue funzioni dimostri insufficienza professionale può essere licenziato".

Dutch: "De ambtenaar die in de uitoefening van zijn werkzaamheden blijk geeft van onvoldoende geschiktheid voor het ambt, kan worden ontslagen".

Comparing those texts as best I can, it seems to me that the word "incompetent" in the English text is potentially misleading, because it could be taken to mean that Article 51 was concerned only with the official's ability. The English word that renders most accurately the meaning of the corresponding terms in the other languages is, I think "inadequate". The

use in the French text of the epithet "professionnelle" (and perhaps the use in the Italian text of "professionale") could be similarly misleading. I agree with the Commission that Article 51 must be concerned with all three of the factors mentioned in Article 43 on which periodical reports on officials are made, namely ability, efficiency and conduct in the service. It is unthinkable to my mind that an official whose ability was not in doubt but who was so persistently inefficient or so persistently quarrelsome as to render him useless, or worse, to his employing institution could not be dismissed from its service unless a disciplinary offence of sufficient gravity could be pinned upon him. In other words I think that Article 51 can be invoked if for any reason an official's performance of his duties is found, objectively, to be inadequate.

The findings in the preamble to Mr Tugendhat's decision, which are amply supported by the documentary evidence before us, are to the effect, if I may summarize them in one perhaps brutal sentence, that never since 1962 has Mr Vecchioli produced any work of any substance that anyone but he has considered to have any value. That being so it is, in my opinion, neither here nor there that Mr Vecchioli was also guilty of insubordination.

As to the evidence, a point was taken on behalf of Mr Vecchioli that only his periodical reports were admissible. That is manifestly wrong, but the fact is that, on the evidence of those reports alone, a finding that Mr Vecchioli's services had been inadequate would have been warranted.

As was said during the course of the argument, it may be that Mr Vecchioli is a wronged man (like Galileo, Pasteur and many others were before him) in the sense that the scorn poured on his work by his fellow scientists may eventually appear to have been unjustified. But, even if that is so, Mr Vecchioli was not entitled, in my opinion, to expect the Commission to employ him to prove it.

The second contention

Mr Vecchioli's second contention was that the proposal that Article 51 should be invoked in his case was initiated by the wrong person. It was in fact initiated by Mr. G. Schuster, the Commission's Director-General for Research, Science and Education (DG XII), by a note that he addressed on 17 December 1976 to Mr Baichère, the Director-General for Personnel and Administration (Annex 20 to the Defence). Mr Vecchioli was at the time on the staff of DG XII, although as a result of the Decision of 25 July 1974 he had been placed at the disposal of Directorate E of DG XVII (see the terms of that Decision, Annex 25-16-e to the Defence). Mr Vecchioli contends:

(1) that the proposal should have been made by Mr Tugendhat as the Member of the Commission responsible for personnel and administration;

(2) in the alternative that it should have been made by the Director-General of DG XVII; and

(3) that the circumstance that it was made by Mr Schuster was attributable to a misuse of powers in that it enabled his (Mr Vecchioli's) performance before 1974 to be taken into account.

The first limb of the contention rests on the wording of Article 3 of a Decision of the Commission dated 25 July 1974 determining, among other things, under Article 2 of the Staff Regulations, who within the institution should exercise the powers conferred on the appointing authority. That Decision replaced a previous one dated 26 February 1971 and was itself replaced, without any alteration having a bearing on the present case, by one dated 5 October 1977. The text of the 1974 Decision being, seemingly, unobtainable in English, my citations will be from the 1977 Decision, which was published in a Special Edition of the Staff Courier dated 17 November 1977.

Article 1 of the Decision is introductory.

Article 2 lists those powers conferred by the Staff Regulations on the appointing authority that are to be exercised by the Commission itself. They include "in respect of officials in Grades A 1, A 2 and A 3/LA 3" the powers conferred by Article 51, which are described as "Dismissal for incompetence or proposal for classification in a lower grade".

Article 3 lists the powers that are to be exercised by the Member of the Commission responsible for matters of personnel and administration. They include "in respect of officials in Grades A 4/LA 4-8" the powers under Article 51, there described as "Proposal for dismissal for incompetence or for classification in a lower grade".

Article 4 lists the powers to be exercised by the Director-General for Personnel and Administration. It contains no reference to Article 51.

Article 5 lists the powers to be exercised by "the Director for Personnel and Administration responsible for officials employed in Luxembourg and paid from the operating appropriations and the Director for Personnel responsible for other officials". They include "in respect of officials in Category B" the powers conferred by Article 51, which are there, as in Article 2, described as "Dismissal for incompetence or proposal for classification in a lower grade".

Article 6 lists the powers to be exercised by "Heads of Division or Heads of Specialized Departments in the Directorate-General for Personnel and Administration ... within the limits of their authority".

They include "in respect of officials in categories C and D" the powers under Article 51 described, as in Article 3, as "Proposal for dismissal for incompetence or for classification in a lower grade".

Article 7 lists the powers to be exercised by the Director of the Office for Official Publications "in respect of officials employed in this Department". They include "in respect of officials in Categories C and D" the powers under Article 51, described, as in Articles 2 and 5, as "Dismissal for incompetence or proposal for classification in a lower grade".

Articles 8 to 12 are irrelevant for present purposes.

Article 13, which, for some reason, was not referred to by Counsel for either party, provides among other things that "the measures referred to in" Article 51 "shall be decided as follows:

— where they come under the jurisdiction of the appointing authority referred to in Article 3, on a proposal from the Member of the Commission responsible for the directorate-general or department to which the official ... is attached;

— where they come under the jurisdiction of the appointing authority referred to in Articles 4-6, on a proposal from the director-general or head of department to whose service the official ... is attached".

Article 14 provides that "Powers conferred by the Staff Regulations on the appointing authority and not stipulated in the foregoing Articles shall be exercised by the Commission".

Annexed to the Decision is a table which appears to be intended to summarize its effect. That table contains a line relating to Article 51, which, in one column, describes its "subject" as being "Proposal for dismissal for incompetence or for classification in a lower grade", and in further columns describes the appropriate authorities as being the "Commission" for "A 1-A 2-A/LA 3", the "Member P & A" for "A/LA 4 to 8", the "DG P & A" for no-one, the "Dir. P & A Lux" for "B", the "Head of Division/ Specialized Department (DG IX)" for "C-D" and the "Dir. Pub. Off." also for "C-D".

Counsel for Mr Vecchioli fastened on the phrase "Proposal for dismissal, etc." in Article 3 and submitted that the Commission must be held to its literal meaning, so that the person to propose Mr Vecchioli's dismissal must have been Mr Tugendhat. Counsel for the Commission submitted that the use of that phrase in Article 3 was due to an obvious slip of the draftsman's pen ("une erreur matérielle manifeste") and that the phrase must be interpreted in the same sense as the corresponding phrases in Articles 2 and 5. He did not refer to Article 6 or to Article 7, or to the table annexed to the Decision.

In my opinion it is manifest that the Decision is carelessly drafted but equally manifest what its authors meant. They meant, by Articles 2 to 7, to distribute exhaustively among various authorities within the institution the powers exercisable by the appointing authority under Article 51 (1), i.e. the power to dismiss an official and the power to offer him, instead of dismissal, classification in a lower grade. Those powers were to be exercisable, in the case of officials of Grades A 1, A 2, A 3 and LA 3, by the Commission itself; in the case of officials of Grades A or LA 4 to 8, by the Member of the Commission responsible for matters of personnel and administration; in the case of officials of Category B by the authorities designated in Article 5; and in the case of officials of Categories C and D by those designated in Articles 6 and 7. Then by Articles 13 and 14 the authors of the Decision determined who should make, under Article 51 (2), a proposal for dismissing an official, i.e. the proposal triggering off the procedure under Annex IX, which must precede any

decision under Article 51 (1). They decided that, in cases within Article 2 (i.e. in cases affecting officials of Grades A 1, A 2, A 3 or LA 3), it should be the Commission itself; that in cases within Article 3 (i.e. in cases affecting officials of Grades A or LA 4 to 8) it should be the Member of the Commission responsible for the directorate-general or department to which the official concerned was attached; that in cases within Articles 4 to 6 it should be the director-general or head of department to whose service the official concerned was attached; and that in cases covered by Article 7 (i.e. in cases affecting officials of Grade C or D employed in the Office for Official Publications) it should be the Director of that Office.

Thus on the face of it, by virtue of Article 13 of the Decision, the right person to make the proposal under Article 51 (2) in the case of Mr Vecchioli was the Member of the Commission responsible for DG XII, whom I believe to have been Mr Brunner. That point, however, was not taken on behalf of Mr Vecchioli, and there may be any number of reasons why it was not taken. It clearly is not a point that the Court should take of its own motion. We have heard no argument on it and I say no more about it. I confine myself to saying that, in my opinion, the submission that Mr Vecchioli's dismissal should have been proposed by Mr Tugendhat is ill-founded.

I do not propose to take up Your Lordships' time examining all the imperfections in the draftsmanship of the Decision. The most patent is the use in some of its provisions of the phrase "Dismissal for incompetence or proposal for classification in a lower grade" and in others of the phrase "Proposal for dismissal for incompetence or for classification in a lower grade" to mean the same thing. Another is the indiscriminate use in the English text of the word "proposal" to cover both what Article 51 (1) calls an "offer" and what Article 51 (2) calls a "proposal". Those imperfections, and there are others, are unfortunate. One must hope that they will be corrected in a future edition of the Decision. This Court should not however, in my opinion, hold it against the Commission that it has been let down in such obvious ways by its scribes.

The alternative submission, that Mr Vecchioli's dismissal should have been proposed by the Director-General of DG XVII, was put forward, as I understood it, on the footing that, if his dismissal could be proposed by a director-general, it ought to have been by the director-general under which he was actually serving rather than by a director-general from whose staff he had been detached. Counsel for the Commission pointed out, for what it was worth, that Mr Schuster's proposal was countersigned by Mr Schleicher, the Director of Directorate E of DG XVII. I believe, for what this is worth, that Mr Brunner was also the Member of the Commission responsible for DG XVII. The submission rests, however, on no discernible legal foundation and it should, in my opinion, be rejected.

There remains the third limb of this second contention, namely that the fact that the proposal was made by Mr Schuster was attributable to a misuse of powers in that it enabled Mr Vecchioli's performance before 1974 to be taken into account. There cannot in my opinion be anything in that. An appointing authority, charged with the duty under Article 51 (1) of deciding whether or not an official has proved inadequate in the performance of his duties, must be entitled to look at the whole period of his service with the institution.

The third contention

Mr Vecchioli's third contention is that the decision to dismiss him should have been taken, if at all, by the Commission itself and not by Mr Tugendhat. The contention is founded on the wording of Article 3 of the Decision of 5 October 1977. With that I have already amply dealt. I would add only that, if the argument put forward on Mr Vecchioli's behalf were right, the Commission would find itself, owing to the verbal imperfections in the Decision, responsible for exercising the powers under Article 51 (1), not only in relation to officials in Grades A 1, A 2, A 3 and LA 3 (in relation to whom they are expressly reserved to it by Article 2 of the Decision) and in relation to officials of Grades A or LA 4 to 8 (Article 3), but also in relation to officials of Categories C and D unless employed by the Office of Publications (cf. Articles 6 and 7). It would then be only in relation to officials of Category B and to those of Categories C and D employed in the Office of Official Publications that the powers could be exercised by anyone other than the Commission. The language of the Decision may be imperfect but it is not such, in my opinion, as to compel one to reach so absurd a result, a result which, moreover, would largely make nonsense of Article 13.

The fourth contention

Mr Vecchioli's fourth contention is to the effect that the Decision of 5 October 1977 contained "general provisions for giving effect to" the Staff Regulations and so, by virtue of Article 110 of those Regulations, could have been validly adopted by the Commission only after consulting its Staff Committee and the Staff Regulations Committee.

It seems to be common ground that in fact neither the Commission's Staff Committee nor the Staff Regulations Committee was consulted.

In my opinion, however, it would be wrong to regard the Decision of 5 October 1977 as laying down provisions of the kind to which Article 110 applies. That Decision was adopted, as it was bound to be, under the specific and distinct power, or to be exact duty, in Article 2 of the Staff Regulations, which does not require such consultation.

The fifth contention

Mr Vecchioli's fifth contention was expressly abandoned by his Counsel at the hearing. So I need say nothing about it.

The sixth contention

His sixth contention was that the rules of natural justice ("les droits de la défense") were infringed both by the Disciplinary Board and by Mr Tugendhat.

As Your Lordships will remember, the preamble to Mr Tugendhat's decision records as follows:

"— que les travaux personnels de M. Vecchioli avaient été soumis, en 1972, à sa demande, à l'expertise de personnalités scientifiques indépendantes, telles le Professeur Pfirsch et le Docteur Tasso, du Max-Planck-Institut für Plasmaphysik, lesquelles ont estimé que lesdits travaux ne présentaient d'intérêt ni pour le programme Fusion, ni pour la physique en général;

— que M. Vecchioli ayant contesté le bien fondé des avis rendus à l'époque au motif qu'il n'avait pu en discuter avec ces personnalités, les mêmes travaux (2 mémoires), ainsi qu'un travail additionnel remis le 15 janvier 1978, ont été soumis par le Conseil de Discipline, dans le cadre d'une enquête contradictoire, à trois autres personnalités scientifiques, professeurs à l'Université libre de Bruxelles, dont ni le choix ni la qualification n'ont été contestées par M. Vecchioli au moment de leur désignation: M. Pierre Baudoux, M. Robert Vanhauwermeiren et M. Paul Janssens;

— que M. Vecchioli a pu faire valoir auprès de ces dernières personnalités ses observations, oralement et par écrit;

— que les conclusions de ces experts sur les 3 mémoires se résument respectivement de la façon suivante:

  — Premier mémoire: "Construit sur une base dénuée de sens, le travail est sans valeur",

  — Deuxième mémoire: "Le niveau et l'originalité scientifiques ne dépassant guère celui d'un exercice de cours universitaire", le mémoire ne présente "aucun intérêt tant pour la physique en général, que la fusion thermonucléaire en particulier",

  — Troisième mémoire: "ne présente aucun caractère d'originalité"; "ce niveau général est, de nos jours, celui d'un exercice de licence universitaire"; "son intérêt est certainement nul en ce qui concerne la fusion thermonucléaire";

— que M. Vecchioli a contesté devant le Conseil de Discipline, après production desdits avis, la compétence des experts consultés et a demandé de produire l'avis d'un expert de son choix, qu'il n'a cependant pas usé de cette possibilité dans le délai d'environ sept semaines qui lui avait été laissé et qu'il s'est réservé de soumettre un tel avis à l'Autorité Investie du Pouvoir de Nomination;

— que lors de l'audition par l'Autorité investie du Pouvoir de Nomination le 17 juillet 1978, M. Vecchioli a fait valoir la difficulté pour un particulier d'obtenir un tel avis et a demandé que la Commission sollicite elle-même l'avis de M. Cabane, professeur à l'Université de Paris VI, qui se serait déclaré prêt à rendre un avis sur les travaux de M. Vecchioli dans un délai de plusieurs mois à condition que la Commission elle-même le demande".

It was denied on behalf of Mr Vecchioli that Professor Pfirsch or Doctor Tasso had been consulted at his request. It was said on his behalf that what he had agreed to was that his work should be submitted to Professor Schlüter, because Professor Schlüter was a man in whom he had faith. The Commission retorted that it was on Professor Schlüter's advice

that Professor Pfirsch and Doctor Tasso had been consulted. Be that as it may, it does not constitute the foundation of Mr Vecchioli's sixth contention.

That contention amounted to this:

(1) that the Disciplinary Board had infringed Mr Vecchioli's rights in that, having received the adverse reports of Messrs Baudoux, Vanhauwermeiren and Janssens, it did not accede to Mr Vecchioli's request that it should appoint yet another expert (a mathematician) to judge his work; and

(2) that Mr Tugendhat had infringed Mr Vecchioli's rights in that, having been told that Professor Cabane declined to give an opinion unless requested to do so by the Commission itself, he (Mr Tugendhat) did not issue such a request to Professor Cabane.

Those are in my opinion unsustainable propositions.

The Disciplinary Board gave Mr Vecchioli five weeks, from 18 April to 23 May 1978, to produce any further expert evidence he might wish (see the minutes of the Board's meeting of 18 April 1978, Annex 2 thereto, and the Board's report — Annexes 29, 29-2 and 31 to the Defence). After that Mr Vecchioli had a further eight weeks, until the hearing before Mr Tugendhat on 17 July 1978, in which to produce such evidence. Nor does it appear that he ever asked for any adjournment in order to enable him to do so. In those circumstances there was, in my opinion, no denial of Mr Vecchioli's right fully to put forward his case, which is all that the rules of natural justice (so far as here relevant) require.

The seventh contention

By his seventh contention Mr Vecchioli invoked another of the rules of natural justice, the rule that no-one shall be judge in his own cause. As we know, that rule is, in the field of administrative law, subject to many exceptions and qualifications.

The contention is, in a nutshell, that Mr Tugendhat, as the author of the decision by which Mr Vecchioli was dismissed, ought not to have been a party to the decision on the complaint that Mr Vecchioli subsequently submitted under Article 90 (2) of the Staff Regulations.

In my opinion that contention misapprehends the nature of a complaint under Article 90 (2). It is not an appeal from a lower to a higher authority. As often as not the authority charged with the duty of deciding upon the complaint is exactly the same as the authority that took the decision against which the complaint is submitted. That would have been so here, for instance, if Mr Vecchioli had been an official of Grade A 1, A 2, A 3 or LA 3. In essence what Article 90 (2) does is to afford to an official an opportunity to require that a decision affecting him should be reconsidered in the light of his representations. It is neither here nor there whether, as a result of what the institution has determined under Article 2, the authority that is to reconsider the

decision is or is not the same as the authority that took it.

The eighth contention

Mr Vecchioli's eighth and last contention is that Mr Tugendhat's decision was founded on facts that were irrelevant, inaccurate or inaccurately interpreted, and that he failed to take into account facts that he should have taken into account.

First it is said that Mr Tugendhat's findings as regards the period when Mr Vecchioli was at Saclay were erroneous. Those findings were, Your Lordships remember:

"que M. Vecchioli s'étant trouvé en désaccord avec les objectifs et les méthodes de l'équipe à laquelle il était attaché s'est mis à poursuivre des travaux théoriques personnels qui ont amené ses supérieurs hiérarchiques à le mettre en garde à ce sujet, puis à constater et à lui faire savoir que les prestations fournies dans le cadre de son affectation ne correspondaient pas à ce qu'ils étaient en droit d'attendre de lui;

qu'à la demande du Comité de gestion du contrat d'association, M. Vecchioli a cessé d'exercer ses fonctions auprès du Centre de recherche nucléaire de Saclay le 8 octobre 1970".

Those findings are amply supported by the evidence but Mr Vecchioli criticizes them on the ground that his attitude "trouvait son origine dans la liberté du chercheur scientifique, et ce en l'absence de toutes directives précises". In my opinion Mr Vecchioli cannot have it both ways. He cannot complain that his superiors failed to give him precise instructions and then rely on the freedom of the researcher to justify his ignoring such guidance as they did seek to give him.

Secondly Mr Vecchioli criticizes Mr Tugendhat's findings relating to the period 1970-74, which were expressed as follows:

"que d'octobre 1970 à décembre 1974, tout en continuant, de sa propre initiative, à effectuer des travaux théoriques personnels, M. Vecchioli n'a pas donné suite à diverses propositions d'affectation nouvelle tendant à lui trouver un emploi correspondant à ses qualifications, ni parfois même répondu aux convocations organisées à cette fin".

Although those findings are in point of fact accurate, Mr Vecchioli criticizes them on the ground that it was not his fault if the Commission was unable to find him a job corresponding to his qualifications, to his interests and to the appointment he had received in 1962 (i.e. his appointment to Saclay). Any comment of mine on that would, I think, be superfluous.

Thirdly Mr Vecchioli criticizes Mr Tugendhat for having failed to take into account that the Commission's own conduct in sending him (Mr Vecchioli) to Directorate E of DG XVII in 1974 was largely responsible for his behaviour thereafter. The decision to send him there was, said Mr Vecchioli, unlawful, because it involved his return from the scientific staff to the administrative staff, and so was a *deminutio capitis.* Counsel for Mr Vecchioli acknowledged that, if

he took that view, his correct remedy was to submit a complaint under Article 90 (2) against the decision, but sought to explain his omission to do so on the ground that he was essentially a peaceful person who hoped that the authorities would be brought to see the error of their ways. I find that explanation difficult to credit because there is among the papers a virulent letter written by Mr Vecchioli to Mr Palumbo, the Director of the Fusion Programme, on 14 October 1974, which reveals him as anything but a man of peace (Annex 17 to the Defence) and because, at a meeting in Brussels on 4 December 1974, he expressly asked whether the decision was an act susceptible of challenge before the Court (see the minutes of that meeting — Annex 25-16-j to the Defence). Be that as it may, I can see no reason why Mr Tugendhat should have condoned Mr Vecchioli's failure to produce any useful work while employed at Directorate E on the ground that, although he had not challenged in the proper way the decision to send him there, he resented it.

Lastly Mr Tugendhat was criticized on Mr Vecchioli's behalf for having (so it was alleged) failed sufficiently to take into account various compassionate and mitigating factors, such as the length of Mr Vecchioli's service with the Commission, his age (56 at the date of the decision), the fact that he had five young children, his psychological state, and a promise made on his behalf by his Counsel before the Disciplinary Board and reiterated before Mr Tugendhat that he would, if spared dismissal, mend his ways. I think it enough to say that, as regards such factors, it is not for this Court to substitute its judgment for that of the appointing authority.

Conclusion

In the result I am of the opinion that this action should be dismissed with the usual result as to costs.

The Court invited the parties' submissions at the hearing as to the possible application in this case of the principle, established by decisions of the Court, that a person challenging the validity of an administrative decision cannot rely on an irregularity in the procedure leading to that decision unless he can show at least a possibility that, but for the irregularity, the decision would have been different. If I am right in thinking that Mr Vecchioli has not shown that there was any irregularity in the procedure leading to his dismissal, there will of course be no question as to the application of that principle. Lest,

however, Your Lordships should take a different view, particularly on the questions that arise in relation to the Commission's Decisions determining who within that institution should exercise the powers of appointing authority in different circumstances, I must add simply this. The latest case in which the Court has held the principle applicable is of course Case 30/78 *Distillers Co Ltd* v *Commission* (10 July 1980 — not yet reported). In my opinion in that case I had sought to refer, directly or indirectly, to all the relevant authorities, both in competition cases and in staff cases, but Counsel for the Commission in this case drew our attention to two which I had overlooked namely Case 124/75 *Perinciolo* v *Council* [1976] 2 ECR 1953 (see paragraphs 23 to 26 of the judgment) and Case 5/76 *Jänsch* v *Commission* [1977] 2 ECR 1817 (see paragraph 23 of the judgment). Counsel for Mr Vecchioli suggested for his part that the opinion of Mr Advocate General Mayras in Cases 33 and 75/79 *Kuhner* v *Commission* (not yet reported) might be relevant, but that does not appear to me to be so.