OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 3 October 1991 *

Mr President,
Members of the Court,

A — The Facts

1. The case on which I am presenting my Opinion today is an appeal against a judgment of the Court of First Instance in a staff case which the Court is to decide without an oral hearing.

2. The applicant at first instance, Mrs Virgili-Schettini (to whom I shall refer as 'the respondent'), upon the termination of her employment, asked the appointing authority at the European Parliament, 'the appellant', for compensation in respect of unused leave pursuant to Article 4 of Annex V to the Staff Regulations. This was refused by decision of 1 February 1989 on the ground that she no longer had any leave entitlement.

3. The respondent contested that decision, since she claimed that she was still entitled to leave for two reasons, first, as a result of leave carried over from 1987 to 1988 and, secondly, on the basis of a different calculation of the start and end of her maternity leave in 1988.

4. The Court of First Instance accepted the respondent's argument with regard to the unused leave carried over to 1988, but dismissed the remainder of her application.

5. The Parliament has now brought an appeal against the judgment of the Court of First Instance ordering it to pay compensation in respect of 27 days' leave. For the particulars of the facts, the parties' arguments and the procedure, I would refer to the Report by the Judge-Rapporteur.

6. The appellant sets out three pleas in its appeal:

(1) inadmissibility of the application,

(2) lack of reasons for the judgment of the Court of First Instance,

(3) infringement of Article 4 of Annex V to the Staff Regulations.

* Original language: German.

B — Opinion

1. *Inadmissibility of the application*

7. At first instance the appellant did not claim that the application should be dismissed because it was inadmissible, but expressly left the question of admissibility to the Court of First Instance to decide in the due exercise of its discretion. In the alternative, it argued that the application was inadmissible on the ground that the applicant's complaint submitted in the pre-litigation procedure was not signed by her personally but by her lawyer, who subsequently represented her in the proceedings before the Court.

8. The Court of First Instance held that it was not disputed that the initiative for the complaint emanated from the official, who had also determined its content. In those circumstances to demand that the official should sign the complaint prepared by her lawyer would constitute completely excessive formalism, devoid of any legal basis and contrary to the case-law of the Court of Justice. [1]

9. Since the appellant did not claim that the application should be dismissed as inadmissible it could not formally have failed to obtain a form of order based on inadmissibility. Article 113(1) of the Rules of Procedure of the Court of Justice expressly provides that a different form of order may not be sought on appeal. Article 113(1) provides as follows:

'An appeal shall seek:

— to set aside, in whole or in part, the decision of the Court of First Instance;

— the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order.'

10. Since a form of order was not sought at first instance claiming that the application was inadmissible, it cannot be 'upheld' on appeal.

11. This complaint must therefore be rejected as inadmissible, since it goes beyond the form of order sought at first instance.

12. In the alternative, I would point out that that complaint could not be held to be well founded. Both parties relied on the Court's judgment in *Herpels* v *Commission* [2] to support their arguments. The appellant claimed that the nature of the pre-litigation procedure as an exchange between the official and the appointing authority would be distorted if the official were permitted to be advised and represented by his lawyer at this stage.

13. For her part, the respondent maintained that servants of the European Community

1 — Judgment of 26 September 1990 in Case T-139/88 *Virgili-Schettini* v *European Parliament*, at paragraph 20.

2 — Judgment in Case 54/77 *Herpels* v *Commission* [1978] ECR 585.

were at liberty, even during the pre-litigation stage, to obtain advice and assistance from a lawyer.

14. As far as the judgment in the *Herpels* case is concerned, it should be observed first that it was concerned with the question of representation by a lawyer at the complaint stage solely as regards the reimbursement by the other party of costs incurred at that stage.

15. The appellant bases its view of the law on a narrow literal interpretation of a phrase in paragraphs 45 to 49 of the judgment in *Herpels*, where the pre-litigation stage is described there as an 'exchange between the official unassisted by a lawyer and the administration'. [3]

16. The respondent based her arguments on the context of those same paragraphs of the judgment. In the same paragraph the Court stated that an official could not be prohibited from seeking advice even at that stage. In view of the question at issue in that particular case, this finding was qualified by the remark that the decision to use a lawyer for this purpose was the official's own decision and that 'the institution concerned cannot be held liable for the consequences'. [4]

17. The statements contained in the judgment of the Court of First Instance regarding legal representation in the pre-litigation stage cannot be regarded in the light of the judgment cited as erring in law.

18. The appellant has not stated any reservations about the assessment of the facts made by the Court of First Instance to the effect that, with regard to both form and content, the complaint was made at the initiative of the respondent. Since errors of law were not invoked by the Parliament and are not discernible in respect of this finding of fact, the Court of Justice must assume that it is correct. Finally, the lower court's assertion that a lawyer who represents a party in proceedings before the Community Court has to produce proof of authority only if challenged is a legally correct interpretation of the Rules of Procedure. [5]

19. The Parliament's first ground of appeal must therefore be rejected.

2 and 3. *Lack of reasons for the judgment; erroneous interpretation of Article 4 of Annex V to the Staff Regulations*

20. In its appeal, the Parliament maintains that it is clear neither from the judgment nor from the Report by the Judge-Rapporteur what legal criteria the Court of First Instance used in order to calculate the balance of 27 days' unused leave.

3 — Judgment in Herpels, cited above, at paragraphs 45 to 49.

4 — Loc. cit.

5 — Cf. Article 38(3) of the Rules of Procedure.

21. The compensation payable in respect of days of leave not taken upon termination of employment is based on Article 4 of Annex V to the Staff Regulations. Consequently, in law, matters can turn solely on the application of that provision, so that the third ground — erroneous application of this provision — must be considered together with the complaint alleging lack of reasons. The legal considerations relating to the interpretation and application of Article 4 of Annex V to the Staff Regulations are the precondition for the purely factual calculation which resulted in the Court of First Instance ordering the appellant to pay compensation in respect of 27 days' leave.

22. The first paragraph of Article 4 of Annex V to the Staff Regulations provides that the amount of leave which may be carried over from one calendar year to the next may not exceed 12 days where the failure to take the leave is due to *reasons other than the requirements of the service.* However, if there are such reasons, there is no limit to the number of days that may be carried over. The Court of First Instance held that the respondent 'gave credence to her submission that the accumulation of her leave was due to the requirements of the service, and the Parliament was unable to shake those claims'.[6] The Parliament has not maintained that this finding was wrong in law; nor is this discernible in the judgment. Consequently, this finding of fact must be accepted.

23. The Parliament maintains, however, that the Court of First Instance disregarded the internal rules adopted pursuant to the institution's power of internal organization dealing with recognition of leave not taken owing to requirements of the service. In this connection it refers to the internal memoranda which, it argues, are applicable and exclude any days carried over in excess of 12 from 1987 for failure to comply with the prescribed procedure.

24. It must be granted that the Parliament may, within the framework of its power of internal organization, adopt provisions to determine technical administrative procedures for the implementation of the rights granted to officials by the Staff Regulations. However, those administrative provisions cannot detract from the right of the person concerned to adduce proof of requirements of the service in other appropriate ways. That is what happened in the present case.

25. The calculation of 27 days' leave on the date when the respondent left the service of the Parliament at the end of January 1989 is the purely mathematical result of the legal considerations. The relevant figures are set out in the judgment of the Court of First Instance.[7] In this respect the Court of First Instance took over the Parliament's calculation set out in its original decision, with a single alteration relating to the days carried over from 1987 to 1988. In order to make matters clear, I shall reproduce the calculation here:

6 — Judgment in Case T-139/89, at paragraph 31.

7 — At paragraph 2 of the judgment.

	Calculation by the European Parliament	*Calculation by the Court of First Instance*
Carried over from 1987	12 days	44 days
Leave for 1988:		
— 24		
— travelling time 5		
— age 1	+ 30 days	+ 30 days
	42 days	74 days
16 weeks' maternity leave, plus two days special leave for the birth of a child (11 July — 4 November), set off against unjustified absences (7 November — 21 December 1988)	— 33 days	— 30 days
Carried over from 1988:	9 days	41 days
Leave for 1989:		
— 2	+ 7 days	+ 7 days
— travelling time 5		
Less unjustified absences (3 January — 31 January 1989)	— 21 days	— 21 days
	— 5 days	+ 27 days

It is completely immaterial for the purposes of the calculation whether a subtotal is formed for the end of 1988 or the total number of days' leave for the two years is considered for the purposes of offsetting:

Carried over from 1987: 44

Leave for 1988: + 30 — 33 (unauthorized
Leave for 1989: + 7 — 21 absences)
81 — 54 = 27

Consequently, the contested judgment contains all the elements of fact and law upon which it is based. The claim of lack of reasons and erroneous application of Article 4 of Annex V to the Staff Regulations must therefore be rejected.

Costs

26. Since the Parliament's appeal is unsuccessful it must be ordered to pay the costs in accordance with the first and second paragraphs of Article 122 and Article 69(2) of the Rules of Procedure.

C — Conclusions

27. I suggest that the Court should decide as follows:

(1) The appeal is dismissed;

(2) The appellant is order to pay the costs of the appeal.