2. Orders the Commission to pay to the applicant the sum of BF 601 786 together with interest at 8 % from 9 December 1974;

3. Orders the defendant to bear the costs.

O'Keeffe Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 1 July 1976.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 24 JUNE 1976 [1]

Mr President,
Members of the Court,

Under Article 40 of the Staff Regulations an official may be granted unpaid leave on personal grounds. It is, however, provided that another person may be appointed to the post occupied by the official. Article 40 (4) (d) in the version which is contained in the regulation of 18 December 1961 and which is the material one in this case provides:

'On the expiry of his leave an official must be reinstated in the first post corresponding to his grade which falls vacant in his category or service ...

Regulation No 1473/72 of 30 June 1972 added:

'provided that he satisfies the requirements for that post.'

After the present applicant had worked for some time in the Directorate-General for Financial Control as an official in Grade A 6 he was granted leave on personal grounds by several decisions between 1 June 1969 and 31 May 1972. During his leave another person was appointed to the post he occupied. Shortly before the end of his leave the applicant informed the Directorate General in a letter dated 30 May 1972 that as from 1 June 1972 he would again be available to the Commission. He was not immediately reinstated, although during the period after the applicant's leave terminated a whole series of A 6 posts became available and although the applicant, as he explained, continually contacted the Commission either personally or by telephone. In a letter from the Directorate-General for Personnel and Administration of 27 March 1973 the applicant was simply

1 – Translated from the German.

informed that he would be notified as quickly as possible of any vacancy. Further a form of application was sent to him which towards the end of April 1973 he sent back completed but without further comment.

Since no post was made available to the applicant in 1973, he tried again to be accepted into the service of the French Ministry of Economy and Finance where he had previously worked as a tax inspector and whence he had been seconded to the European Communities. He obtained a post with effect from 1 September 1973.

Since two A 6 posts became free in the Directorate-General for Financial Control of the Commission, the one on 1 May and the other on 1 July 1974, a meeting took place at the end of April 1974 between the applicant and the Assistant Director of the Directorate-General for Financial Control during which details of the aforesaid first post were discussed. To the question whether he was interested in it the applicant requested time for consideration which was given to him. After this expired the applicant alleges, although this has not been confirmed, that he telephoned to say that he was interested in the post and would like to be officially appointed to it as quickly as possible. In this connexion all that appears from the file is that the Commission on 22 May 1974 sent the applicant an offer of reinstatement. This letter, which was apparently sent to an old address of the applicant and therefore arrived late, was followed on 30 May 1974 by a telegram in which the applicant was offered once again an A 6 post. This apparently related to the second of the abovementioned posts. In a letter dated 10 June 1974 the applicant stated that he was willing to accept this post and he thought that this would be possible as from 1 August 1974. Shortly thereafter, namely on 15 June 1974, he applied to the French authorities that with effect from 1 August 1974 he should be seconded to Brussels. On 7 July 1974 he once again asked for permission to give up his post in France on 1 August 1974. In the event that this was not authorized he said he was ready to resign at that time. The French authorities answered in a letter dated 22 July 1974 that the request could not be granted since there had been no request for secondment from the Commission; his request to resign would, however, be considered.

Although the question of the secondment to Brussels had not been clarified, the applicant gave up his post in France on 31 July 1974 in order to be able to take up his employment on 15 August 1974 with the Commission in Brussels. On 10 September 1974 a decision was taken by the Commission on the reinstatement of the applicant in the service of the Communities. The reinstatement took effect from 15 August 1974; seniority in Grade A 6 was reckoned as from 15 September 1973 and in the first step of this grade as from 1 May 1973.

On 22 November 1974 the applicant asked the Directorate-General for Personnel and Administration to request the French authorities to second him. In a letter from the Directorate-General dated 12 December 1974 the applicant was informed, however, that it was for him to request the French authorities for secondment. Owing to the incorrect termination of his employment with the French authorities the applicant was dismissed on 7 January 1965 by order of the ministers and was ordered to pay certain compensation.

The applicant some weeks previously, namely on 3 December 1974, had already sent a formal complaint to the Commission in which he referred to the fact that during the period after his leave had ended a large number of free posts in the Commission had been filled and that the applicant had the requisite qualifications for the majority of them. The Commission had thus infringed

Article 40 of the Staff Regulations and had caused the applicant damage. It was therefore obliged to amend the decision on the reinstatement of the applicant with regard to the date on which it became effective and to the determination of his seniority. Moreover the Commission must classify the applicant differently in Grade A 6 and recognize that he had become entitled to retirement pension in respect of the period 1 July 1972 to 15 August 1974 and to the appropriate back pay with interest.

Since the applicant received no reply he brought the matter before the Court on 7 July 1975.

The claims in the proceedings before the Court, the details of which I shall not now read out, are concerned with the following questions:

— first, amendment of the decision on the reinstatement of the applicant in relation to the date of its taking effect and the fixing of seniority in grade and step;
— secondly, the payment of damages due to loss of promotion opportunities, loss of salary having regard to the difference between the applicant's French salary and the salaries of the Community and also to the expenses which the applicant incurred through his employment with the French authorities and consequent separation from his family.

I — Admissibility

The Commission has raised various objections to admissibility which I must deal with first.

1. With regard to the application to amend the decision on the reinstatement of the applicant the Commission has stated that if the applicant's criticism is justified it could result at most in a partial annulment and reference back of the case to the Commission, for the Court does not have power to make findings in lieu of the administration on the re-structuring of the applicant's career. Moreover, the contested decision could not under the Staff Regulations have had the retroactive effect desired by the applicant. It related to a particular post which became free only on 1 July 1974 and moreover the applicant took up his duties in connexion therewith only on 15 August 1974.

With regard to these arguments it should be observed that if the Court upholds the applicant's criticism there can be no fundamental objection to its making direct observations on the effectiveness of the reinstatement and the fixing of the applicant's seniority. There cannot be said to be an inadmissible interference in the administrative sphere if certain legal consequences, on which the Court comments, directly follow from legislation or from clear legal principles, that is, in so far as there is no discretion vested in the administration. Such legal consequences, to which I shall return, would appear to follow in the present case from the obligation on the appointing authority to reinstate an official after the expiry of leave on personal grounds. In my opinion therefore the Court, in so far as the first head of claim is concerned, is in no way limited to a partial annulment of the relevant decision and reference back to the Commission.

The further objections purport to question the logic of the claims made. In this connexion the Commission refers to Article 4 of the Staff Regulations according to which no appointment shall be made for any purpose other than that of filling a vacant post and Article 3 which provides that the appointment shall not take effect prior to the date on which the official takes up his duties.

This argument is correct in so far as the filling of the particular post in the autumn of 1974 is concerned. On the

other hand it should not be overlooked that the applicant claims that there has been a wrongful infringement of the obligation on the part of the appointing authority contained in Article 40 (4) (d) to which I referred at the beginning and that because of this the Commission is liable to pay damages and indeed to effect as far as possible a *restitutio in integrum*. Since the applicant in truth is concerned with compensation, there can be no doubt as to the logic of his claim.

2. With regard to the applicant's claim that the Commission should by way of compensation put him in a position in which he would have been if there had been no disregard of Article 40 of the Staff Regulations, the Commission has further objected that the applicant is concerned with a result which he could have achieved earlier if he had availed himself in proper time of the possibilities under the Staff Regulations — complaint and application for annulment. Since, however, he did not contest administrative, acts adversely affecting him and his right to do so was thus extinguished, he cannot be allowed to seek the same result by means of an action for compensation. In this respect the Commission refers to Case 59/65 *Heinrich Schreckenberg* v *Commission of the EAEC* [1966] ECR 543, Case 4/67 *Anne Müller* v *Commission of the European Communities* [1967] ECR 365, Case 53/70 *Willem Vinck* v *Commission of the EEC* [1971] ECR 601 and Case 9/75 *Martin Meyer-Burckhardt* v *Commission of the EEC* [1975] ECR 1171. It regards the applicant's letter of 30 May 1972 as an application under Article 90 of the Staff Regulations and refers to the measures adopted during the period after the applicant's leave terminated in order to fill vacant posts for which the applicant too came into consideration.

Consideration of this objection turns essentially on whether the applicant could in fact in 1972 and 1973 have made the infringement of Article 40 of the Staff Regulations adversely affecting him the subject of an action for annulment.

I have considerable hesitation in affirming this in so far as the Commission relies on the applicant's letter of 30 May 1972 and alleges that its failure to reply amounted after the expiry of the period of four months to an implied decision of rejection which could have been contested by complaint and subsequently in the event of implied rejection of the complaint by an application for annulment. In my view the Commission's premise is mistaken; it is not possible to see in the said letter any proper request within the meaning of Article 90 of the Staff Regulations, especially if account is taken of its content, the objective legal position and the interests of the applicant. Thus in my view it is important that the letter contains nothing more than notification that the applicant was again available to the Commission as from 1 June 1972. Further it is significant that Article 40 in no way requires an application. Finally, it must be recognized that the applicant could scarcely be expected, shortly before the end of his leave and without knowledge of the vacant posts available, to require the appointing authority to make a decision on his reinstatement within the time-limit which under the Staff Regulations applied at the time to the determination of formal applications.

As regards the Commission's decisions, taken after the applicant's leave had expired, on filling posts for which the applicant came into question, it must be recognized that they represent acts adversely affecting the applicant. In so far as they were taken after the amended Staff Regulations came into force, that is to say after 1 July 1972, they could have been contested by complaint within the time which for general measures ran from their publication and for individual measures from the complainant's having knowledge thereof, or at the latest from their publication. To this extent the

inference seems obvious that since he neglected to make use of the legal remedies under the Staff Regulations in good time, the applicant could not allege the unlawfulness of these measures later in an action for liability for breach of official duty.

After mature consideration, however, I take the view that this conclusion cannot be drawn.

In this respect the decisive factor is that the abovementioned case-law is based on the concept of contributory blame in the sense of *wrongfully* not using a legal remedy. Fuss rightly stressed this in his article 'Grundfragen der Gemeinschaftshaftung' (Europarecht 1968, p. 369). Further it is important that the said case-law related to matters concerned with decisions which were either directed to the applicant or of which the applicant unquestionably had knowledge. Contributory blame was thus quite obvious here and accordingly it was possible for the strict consequence — barring of the action for breach of official duty due to loss of the right to contest the decisions — to appear appropriate.

The position in the present case on the other hand is quite different. The applicant has explained, and this has not been disputed, that he did not have any knowledge at the time of the measures which were taken to fill posts and which were of interest to him. Only as a result of inquiries which he made after he had been reinstated did he become aware that the Commission had already infringed Article 40 of the Staff Regulations in 1972 to his detriment. This appears credible because the Monthly Staff Report in which such decisions are published is distributed in principle only to staff in active employment and not to officials such as the applicant who are on leave on personal grounds. In such circumstances a claim based on liability for breach of official duty could be ruled out only if the objectively existing *possibility* of knowledge were equated with actual knowledge of the decisions taken. I do not, however, consider this to be a defensible conclusion. I find no basis for such a strict view in our case-law and no justification for it has been shown by reference to principles common to the national legal systems.

The second objection to admissibility is thus also unfounded.

3. Finally, the Commission also considers inadmissible the applications which relate to the damage which the applicant has suffered as a result of his dismissal from the French civil service and the compensation for the expenses which the applicant incurred as a result of living separately from his family during his employment in France, because these matters were not mentioned in the complaint addressed to the Commission.

With regard to the application relating to the financial consequences of dismissal from the French service, it is in my view decisive that no claim for compensation has yet been made. Since. the applicant has taken legal action, which has not yet been the subject of a decision, against the French measures relating to him and therefore as yet there cannot be said to be definite damage, there is no more than a quite vaguely expressed reservation in the application. This justified disregarding it. In this respect I would like to refer to a similarly formulated claim in Case 188/73 *(Daniele Grassi* v *Council of the EEC* [1974] ECR at p. 1107). The Court then ruled:

'The meaning of the fourth part of the claim is, to say the least, obscure and its relevance to a solution of the dispute has not been established. This claim must therefore be treated as inadmissible.'

A similar finding is appropriate in the present case so that it is not necessary to deal with the question whether not mentioning this matter in the applicant's complaint leads to its inadmissibility.

With regard to the other claim for compensation and the fact that it has not been mentioned in the complaint, it must be admitted that according to the new version of the Staff Regulations, which already applied at the time, the preliminary administrative procedure was stated in general terms to be compulsory and thus compulsory also as regards compensation. The judgment in Case 9/75 *(Martin Meyer-Burckhardt* v *Commission of the EEC* [1975] ECR at p. 1182) proceeds on this basis when it stresses that there is no distinction between actions for annulment and actions for damages by officials as regards the administrative and contentious procedures.

I agree, however, with the applicant in considering it right not to require any unduly formal application of this principle. It should therefore be regarded as sufficient that the applicant argued in his complaint the fact that the Commission had infringed Article 40 of the Staff Regulations and this caused him damage in various respects. This attitude seems to me all the more appropriate since it cannot be disputed that there is a material connexion between the various claims to compensation made by the applicant and since it became apparent that the Commission in principle denies (both in the administrative procedure and in the Court proceedings) any liability to make compensation, with the result that a new complaint to the Commission which would still be possible would obviously serve no purpose.

With the exception of the part of the claim which relates to the financial consequences of the applicant's dismissal from the French civil service the claims are thus admissible.

II — The substance of the Case

1. The first question, which arises in this connexion according to the grounds of the claim, whether the Commission has infringed the Staff Regulations in its treatment of the applicant after his leave had expired, clearly causes no difficulties.

Article 40 of the Staff Regulations imposes on the appointing authority a clear duty not dependent on any application of the person concerned, to reinstate an official on the expiry of his leave in the first post which falls vacant in his category or service. I do not need to discuss the question whether the former Staff Regulations in which there was no proviso that he satisfy the requirements for the post applied to the applicant or whether this proviso did apply and if so from when. This is irrelevant in the present case because the representative of the Commission did not hesitate to say in the oral proceedings that the possibility in fact existed to reinstate the applicant in the Commission immediately after the expiry of his leave, that is, essentially as from 1 June 1972.

Accordingly it is thus clear that the Commission, contrary to its obligations under the Staff Regulations, did not take care to see that the applicant was reinstated in its service as from 1 July 1972, that is from the date mentioned by him in the application. This conduct was unlawful.

2. Similarly, the answer to the question whether the Commission is open to blame and whether it has been guilty of a wrongful act or omission, causes little difficulty.

Without exaggeration it may be said that it is simple for a properly conducted administration to retain a reliable general view of the cases of leave on personal grounds. It is also not over-taxed if it is expected at the end of leave, as the occasion arises, to put in motion the examination necessary under Article 40 and to consider the posts falling vacant at this time and thereafter from the point of view of using them for the purposes of Article 40. In this respect if the necessary

precautions, in particular by coordination of the various departments responsible, are not taken and the duty to reinstate is therefore not performed, then there may certainly be said to be a substantial infringement of the duty of care which is incumbent on the Commission.

3. With regard to the question as to the extent to which the Commission has to make good the damage obviously caused to the applicant by the belated reinstatement, it depends on whether there is contributory blame on the part of the applicant and how far this should be taken into account.

On principle I take the view that contributory blame should also be taken into account in claims based on Article 40 even though, as already mentioned, this provision contains no obligation on the particular official to do anything. The decisive factor, as the Commission has rightly pointed out, is that we are concerned with a claim for liability for breach of official duty. However, the general principle applies in this sphere also that an injured party, especially where it is a question of continuing damage, must endeavour by appropriate and reasonable action on his part to mitigate the damage as much as possible.

The applicant informed the Commission in his letter of 30 May 1972 that as from 1 June 1972 he was again available for employment. Further, in April 1973 he completed a form of application sent to him and sent it back to the Commission without comment. The applicant maintained that he had further contacts with the Commission, but this is disputed by the Commission and neither the dates nor particulars could be given nor, more important, could be proved. I must accordingly leave it out of account and can only observe that on the whole the applicant took only very modest steps in relation to his reinstatement in the Commission.

On the other hand it may be said that he could easily have taken much more trouble over his affairs since he had his residence in Brussels until the autumn of 1973 and since his wife was employed by the Commission. At least after the lapse of a lengthy period he could have made effective inquiries about vacancies, such as by following up notices in the buildings of the Commission or requesting the Staff Courier to be sent to him, and he could have reminded the Commission of its obligation in an effective manner, for example by making a complaint and, if necessary, bringing the matter before the Court. There was cause for him to do this at least at the time when, allegedly with resignation, he set about preparing to return to the French administration. Had he acted in the manner described, his position, in my opinion, would have been settled in a satisfactory manner in the summer of 1973.

I would therefore not hesitate to say that the applicant contributed to the extent of the damage. This should be taken into account in assessing the compensation on the basis that the applicant should alone bear the consequences of the disregard of Article 40 of the Staff Regulations after 1 September 1973.

The following observations may thus be made on the individual claims of the applicant:

– Since it is clear that the applicant could have been employed again in the Commission on 1 July 1972, this date must be taken as the criterion in reckoning his seniority according to which, *inter alia,* the claims to retirement pension are assessed. The applicant's present seniority must in consequence be determined on the basis of his seniority in the first step of Grade A 6 at the beginning of his leave on personal grounds. The Commission, to whom the details may be left, must also have regard to the advancement to the next step in grade provided for in Article 44 of the Staff Regulations and to make salary payments to the applicant accordingly.

— With regard to the loss of promotion opportunities and the damage to the applicant relating thereto, it should be borne in mind that the applicant, who had a seniority of 11 months in the salary grade A 6 at the beginning of his leave, would have completed the minimum period of two years in his grade laid down by Article 45 of the Staff Regulations for promotion on 1 August 1973 if he had been reinstated on 1 July 1972. After the decision of 10 September 1974, which provided for reinstatement on 15 August 1974, the administration on the other hand assumed that the applicant would be entitled to promotion only on 15 September 1975. The applicant was thus deprived of opportunities for promotion for a period of more than two years.

It is very difficult, however, to know how these opportunities are to be assessed. It must be borne in mind that many circumstances are relevant in promotion such as the possibilities of transfer within an institution and within the Community or the abilities of other candidates. Statistical considerations such as the Commission has provided do not help the applicant. According to these there was at most a chance of 1 : 9 in respect of the years 1969 to 1974 on comparing the number of candidates suitable for promotion with the number of actual promotions. If this is considered and it is further borne in mind that promotion within the career bracket where the chances are probably greater did not come into question for the applicant and if the fact is further borne in mind that promotions to Grade A 5 are on average only after five years in the previous grade, then it is hard to arrive at a decision to accord the applicant compensation for any loss of promotion opportunities.

— With regard to the claim for arrears of salary it should be stressed on the one hand that the Commission's objection — no longer pursued, moreover, in the oral proceedings — that the applicant in fact did no work, is certainly not valid. It cannot be objected, at least in respect of the period immediately following on the applicant's leave, because in this respect the failure to perform any services is solely due to the Commission's conduct.

On the other hand, however, account must be taken of the applicant's contributory blame in assessing the relevant means of pay. If account is taken of what I have said in this respect then it is proper to acknowledge that the applicant is entitled to arrears of pay only in respect of the period from 1 July 1972 to 31 August 1973. The Court should restrict itself to this finding. Details of the computation, for which the salary tables relevant to that time apply, may be left to the Commission.

— In my view these observations cover all that is necessary to be said in respect of the applicant's claim to payment of the difference between the remuneration which he received while employed in the French civil service and the Community salary which he would have received had he been reinstated in good time and also the claim for refund of the expenses which he incurred through the separation from his family and his stay in Paris from 1 September 1973. If it is assumed that the applicant could have been again in the employment of the Community on 1 September 1973 had he exerted himself in time and if the neglect to make such an effort is regarded as contributory blame, the consequence may be drawn from this that the applicant is himself liable for the said damage. I do not therefore regard a claim for compensation against the Commission in this respect as justified.

— Finally, a few words are all that are necessary with regard to the applicant's claim for the payment of interest.

The question can remain open whether and under what conditions in Community law interest is due in respect

of delay or on sums awarded in judgments. In the present case it is enough to observe that the applicant's rights arise out of a wrongful omission on the part of the Commission.

This means that the applicant must be put into the position in which he would have been if the amounts now to be paid back to him had been properly paid, that is to say, in due time. This means that interest should be paid from the time when the payments were due. Since the interest rates which the applicant has mentioned appear proper and since the Commission has raised no objections in this respect, I have nothing to say against including them in the order, that is interest at 6 1/2 % until 31 October 1974 and 8 % from 1 November 1974.

III – To summarize I propose that the present application should be decided as follows:

1. that the Commission be required to amend the decision of 10 September 1974 so as to provide that the applicant's seniority in A 6 shall have effect as if he had been reinstated on 1 July 1972 and that amounts due to the applicant from 15 August 1974 be calculated on this basis;
2. that the Commission be ordered to pay the applicant the amounts for the period from 1 July 1972 to 31 August 1973 to which he would have been entitled had he been reinstated on 1 July 1972 and that interest be paid on these sums as from when they fell due at 6 1/2 % until 31 October 1974 and 8 % from 1 November 1974;
3. that for the rest the application be dismissed;
4. that the Commission pay the applicant one half of the costs incurred by him.