On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Commission to pay the costs, including those of the applicant.**

Due Chloros Grévisse

Delivered in open court in Luxembourg on 29 October 1981.

J. A. Pompe
Deputy Registrar

O. Due
President of the Second Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 8 OCTOBER 1981 [1]

Mr President,
Members of the Court,

Changes of posting and transfers, whether or not they take place in the context of the reorganization of a department, have often in recent times been the subject of applications to the Court by the officials affected. Perhaps this is evidence of a malaise of which this case is a further example.

1 — Translated from the French.

I — On 17 July 1979, the Commission initiated a reorganization of its Directorate-General for Employment and Social Affairs. This reorganization involved the transformation of the Industrial Safety Division of the Health and Safety Directorate, the head of which was Mr Arning, into a special department under Mr Lemoine, who had previously been head of the Safety Matters in the Coal and Steel Industries Division and who was thus given increased responsibilities. The post in Grade A 3 which therefore became available became a post of adviser to the same directorate, which was given to Günther Arning. It is against the decision relating to this change of posting that Mr Arning has brought this action, which is both an application for annulment and a claim for compensation.

(a) Before joining the Commission in 1960, the applicant, who is trained as a lawyer, had been employed since 1953 by the German Federal Ministry for Labour and Social Affairs and had already specialized in the field of industrial safety. He was appointed head of the Industrial Safety Division for the first time by a decision of 18 December 1968, until that appointment was annulled on the grounds of irregularity by the judgment of the Court of 10 December 1969 in Case 12/69 *Wonnerth* v *Commission* ([1969] ECR 577). On 9 August 1970 the Commission adopted a decision identical to the first as to its subject-matter and even as to the date on which it was to take effect, but this time in due form. The appointment of Günther Arning as the head of the Industrial Safety Division was confirmed for the last time on 31 March 1976 in the context of a reorganization of what was then known as the Directorate-General for Social Affairs.

In relation to the Health and Safety Directorate, at least, that reorganization was followed by two others, in 1979 and 1980. As a result of that development, the number of divisions in the directorate was reduced from seven to four. According to the statement of its director, Dr Recht, at the hearing, that reform was intended to meet a need for rationalization and optimal use of available staff. It was all the more necessary because work on industrial safety was increasing with the preparation and subsequent implementation of the action programme of the European Communities on safety and health at work, which was the subject of a Council Resolution of 29 June 1978.

It was in this context, as Dr Recht explained to the Court, that the question arose whether Günther Arning was to remain at the head of his division. On the one hand, that division was too small to be maintained as an independent administrative unit. Thus its fusion with the other divisions responsible for industrial safety met the need for good administrative management. On the other hand, the more technical aspect of the work of the Commission on the subject, shown by the policies involved in the action programme of 1978, made it desirable for the administrative unit resulting from the fusion to be headed by an engineer rather than a lawyer. That was the reason for the appointment of

Mr Lemoine, a mining engineer, as its head. Furthermore, as there was a shortage of lawyers in the directorate, it was natural, according to Dr Recht, to entrust the applicant with general supervisory duties over work of a legal nature in all the divisions, for which a post of adviser was most suitable. That is the explanation for the decision taken on 17 July 1979 in relation to the applicant in the context of the first reorganization of the directorate, itself part of the reorganization of the directorate-general as a whole.

(b) Günther Arning became aware of this decision on 31 July in the course of an interview to which he was invited for that purpose by his director. It was not possible, we have been told, for the applicant to be informed earlier, partly because of the delays in official communications between the departments in Brussels and those in Luxembourg, and partly because of the absence of Dr Recht on official business, shortly after he was notified of the contested decision.

On 2 August, that decision became public, owing to the appearance on that day of the edition of Administrative Notices containing the new detailed list of posts of the directorate-general, adopted on 17 July. On 21 August, Günther Arning sent a note to an assistant of Mr Vredeling, the Member of the Commission responsible for Social Affairs, to ask him the reasons for the decision adopted in relation to him. That note was not answered until 23 October. Meanwhile, on 3 September, the applicant had taken up his new duties, and on 26 September he had been able to have an interview with his director-general.

It was not until 25 September that the official communication of his change of posting was sent to Mr Arning, who received it on 1 October. On 25 October, he submitted a formal complaint under Article 90 (2) of the Staff Regulations, registered four days later by the Secretariat-General of the Commission. As the latter did not reply and so was deemed to have taken a decision rejecting his complaint, within the period of four months prescribed in the Staff Regulations, he filed this application, lodged at the registry on 23 May 1980. Two days earlier, a formal decision rejecting his complaint had been adopted.

II — First, Günther Arning relies on the infringement of the second paragraph of Article 25 of the Staff Regulations, which provides that "any decision relating to a specific individual which is taken under these Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the grounds on which it is based."

He believes that neither the requirement that the communication should be in writing and at once nor that relating to the statement of grounds has been met in this case.

(a) As to the first point, it is common ground that the decision to change the applicant's posting, which is of course a decision relating to a specific individual, was adopted on 17 July 1979 and that the person to whom it was addressed did not receive the communication in writing required by the regulations until 1 October, nearly two and a half months after the decision had been adopted and nearly one month after it had taken effect. At first sight, the juxtaposition of

these two dates should be enough to establish the alleged infringement.

According to the Commission, however, this is not the only consideration. It should not be forgotten, in the Commission's opinion, that the contested decision was adopted in the context of the reorganization of an entire directorate-general. In such a case, the collective publication of the resultant changes of posting, by means of the appearance of the new detailed list of posts of the directorate-general concerned in Administrative Notices, is sufficient. The Commission points out that this publication took place on 2 August 1979, that is to say a very short time after the decision of 17 July.

This view does not seem to me to be correct. In my opinion the wording of the second paragraph of Article 25, which requires a communication, an act which by its nature concerns an individual, is wholly clear. Therefore it is difficult to accept the Commission's suggestion (see the case-law of the Court: judgment of 14 December 1962 in Joined Cases 16 and 17/62 *Confédération Nationale des Producteurs de Fruits et Légumes and Others* v *Council* [1962] ECR 471; judgment of 9 October 1974 in Joined Cases 112, 144 and 145/73 *Campogrande* v *Commission* [1974] ECR 957, paragraph 67 at p. 983). Similarly, it seems in addition that the Commission's interpretation would divest the rule set out in that provision of its meaning: the rule would thus become a dead letter, (judgment of 4 February 1970 in Case 13/69 *Van Eick* v *Commission* [1970] ECR 3, paragraph 5 at p. 10).

An objection might be raised to the effect that it is in practice impossible to comply with the rule, to which it would be possible to reply, adapting to the field of changes of posting and transfers the ideas expressed by Mr Advocate General Capotorti in relation to open competitions, in his opinion of 16 November 1978 in Joined Cases 4, 19 and 28/78 *Salerno, Authié and Massangioli* v *Commission* ([1978] ECR 2403 at p. 2427), that the unfortunate effects connected with the scope of the reorganization of a directorate-general must not be visited upon officials and that the authority initiating an internal reorganization has a duty to make preparations so that it can carry out its task in complete conformity with the rules applying to it, even if the reorganization involves numerous changes of posting.

The Commission has also put forward a second justification, to the effect that, in order to assess the legality of a decision with regard to the requirement that it should be communicated in writing and at once, it is necessary to take into account the circumstances in which it was adopted. Since this argument is common to the Commission's defence in relation to both parts of the submission, I prefer to deal with it in the course of the examination of the second part, based on the absence of an adequate statement of grounds.

(b) On the other hand, I take the view that Günther Arning has no legal interest in relying on the infringement of the rule whereby the decision should be communicated in writing and at once if, in fact, he has not suffered from such

infringement. There is well-established case-law of the Court to the effect that "an official cannot, in challenging the validity of an administrative decision, rely on an irregularity in the procedure leading to that decision, unless he can show that, but for that irregularity, he might have been in a better position" (opinion of Mr Advocate General Warner in Case 25/77 *De Roubaix née De Leye* v *Commission* [1978] ECR 1081 at p. 1095, which gives a list of relevant judgments, brought up to date in his opinion in Case 30/78 *Distillers Company Limited* v *Commission* [1980] ECR 2229 at p. 2290). In my view, there is no reason not to extend this idea to the procedure following the adoption of a decision.

Would the applicant have been in a better position if the decision to change his posting had been communicated to him immediately? I believe that to answer that question, reference must be made to the purpose of the rule that the decision must be communicated at once.

Contrary to what one might imagine, this rule is not designed to meet the procedural requirement of enabling the official concerned to have recourse as early as possible to the remedies provided in the Staff Regulations. According to the judgments of the Court, the "notification . . . to the person concerned" from the date of which the period within which a complaint must be submitted starts to run (Article 90 (2)) must be interpreted as the "written communication to the official concerned as required by Article 25 of the Staff Regulations in the case of any decision relating to a specific individual" (judgment of 27 June 1973 in Case 71/72 *Kuhl* v *Council* [1973] ECR 705, paragraph 3 at p. 711; judgment of 16 March 1971 in Case 48/70 *Bernardi* v *Parliament* [1971] ECR 175, paragraph 18 at p. 184; judgments which refer to the former Article 91 of the Staff Regulations, which concerned the period within which a complaint was to be brought).

Therefore if the communication of a decision to an individual is late, this will have no legal effect; the period laid down for lodging a complaint and possibly an application to the Court will merely be deferred.

But the requirements of good administration, which require that the person to whom a decision is addressed should be the first to be informed of it, as well as the most basic courtesy which should characterize the relationship between the administration and its officials (in this regard, see the judgment of the First Chamber of 21 May 1981 in Case 60/80 *Kindermann* v *Commission* [1981] ECR 1329 at paragraph 21) appear to me to be sufficient justification for complying with this requirement.

As to the duty to provide a communication in writing, that alone enables the official concerned to be certain that a decision has indeed been adopted in his regard, whereas otherwise this may be only a rumour. It also enables him, and this is no less important, to discover the precise content of the decision. Therefore this is a requirement of fundamental importance.

III — However, although the requirement that a decision relating to a specific individual shall be in writing is necessary, it is not sufficient, since the last sentence of the second paragraph of Article 25 further requires that the grounds on which the decision is based must be given. The applicant claims that that condition was not met as regards the disputed decision.

In order to determine whether or not this condition has been fulfilled, reference must be made to the communication of the decision in writing dated 25 September 1979 and not to the Commission decision of 17 July which is an internal document and the grounds of which are not normally known to the officials concerned. The only explanation appearing in that communication is that the Commission adopted its decision in relation to Günther Arning "in the context of measures relating to the reorganization of Directorate-General V, for Employment and Social Affairs".

(a) Mr Arning takes the view that this reference does not enable him to understand exactly why the Commission moved him from his duties as head of the Industrial Safety Division to those as adviser to the Health and Safety Directorate. He considers that only a specific statement of grounds, adapted to his particular situation, would meet the requirements of the second paragraph of Article 25, for only a statement of grounds of that kind would provide the means "to determine whether the decision is defective making it possible for its legality to be challenged and to enable it to be reviewed by the Court" (judgment of 28 May 1980 in Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, paragraph 15 at p. 1695).

In its defence, the Commission refers to the judgments of the Court in relation to the statement of the grounds on which decisions concerning transfers and changes of posting are based, particularly the judgment in the aforementioned case of *Kuhner,* which is the most recent. In that case, the Court held that "since the decision at issue is necessarily linked to the organization of the service in the interests of the service, in respect of which the competent authority must necessarily have a wide discretion" (paragraph 17 at p. 1696), "the duty to give a statement of grounds must be related to the discretionary power which the appointing authority exercises in this connection and also to the marginal nature of the disadvantages which result for the official concerned from this kind of measure" (paragraph 14 at p. 1695).

Although I entirely agree with this opinion with regard to the extent of the discretion which the administration must enjoy in relation to its internal organization, I am, on the other hand, inclined to think that, as far as the marginal nature of the disadvantages resulting from a change of posting is concerned, this assessment seems incontrovertible only on the material level and not on that of the interest and value of the new duties, or even of the development of the career of the official concerned, or especially that of the conditions in which measures of this kind are adopted, which may not always be objectively irreproachable.

What is more, even if it is admitted that the statement of grounds may be brief, it must in any event be sufficiently precise to enable the official concerned, and possibly the Court, to determine whether or not it is lawful, as has been pointed out in the judgment in the case of *Kuhner* (paragraph 15) (see also the judgment of the Court of 15 July 1960 in Joined Cases 43, 45 and 48/59 *von Lachmüller and Others* v *Commission* [1960] ECR 463). It does not seem to me that the mere reference to the reorganization

of a directorate-general satisfies this minimum requirement.

(b) It is true that, according to the well-established case-law of the Court, a review of the statement of grounds must be carried out with due regard not only to the document by which the contested decision is communicated, but also to the circumstances in which it was taken and brought to the knowledge of the official concerned, as well as to the departmental memoranda and other communications underlying it, provided that they have clearly given the applicant information as to the grounds and basis of the said decision (judgment in *Kuhner*, cited above, paragraph 15 at p. 1695, see also judgments of 14 July 1977 in Case 61/76 *Geist* v *Commission* [1977] ECR 1419, paragraph 23 at p. 1432 and of 12 October 1978 in Case 86/77 *Ditterich* v *Commission* [1978] ECR 1855, paragraph 40 at p. 1867).

Whereas in the case of *Kuhner*, the application of these principles led the Court to consider that the contested decision set out adequately the grounds on which is was based, the facts in this case lead me to the opposite conclusion. First, unlike Mr Kuhner, the applicant had not "on several occasions had the opportunity to acquaint himself with the reasons for the ... planned disappearance of the specialized department which he directed" *(Kuhner* [1980] ECR 1677 at p. 1685) since it was only in the course of his interview with Dr Recht that he learned of the decision on his change of posting and that the first statement of the grounds on which that decision was based was given to him.

Next, unlike the reorganization of the Statistical Office which led to Mr Kuhner's change of posting ([1980] ECR 1677 at p. 1685) the grounds of the contested decision are not evident from the minutes of the meeting of the Commission of 17 July 1979, which state only:

"It was considered more rational to allocate all safety problems to one special department of which Mr Lemoine would be appointed the head."

Finally, unlike Mr Kuhner, who in his complaint through official channels referred to the minutes of the meeting of the Commission at which the decision relating to the reorganization of the Statistical Office was adopted ([1980] ECR 1677 at p. 1685 and paragraph 16 at pp. 1695 and 1696), it does not appear from the file that Günther Arning was aware of that document before its production by the Commission annexed to its defence.

It is true that, in the Commission's view, the applicant could not have been surprised that the reorganization of the Directorate-General for Employment and Social Affairs involved a change of his posting. Indeed, like all the heads in the Health and Safety Directorate, he had been involved in the preparation of the action programme of the Communities on health and safety at work, which was to take effect as a result of the Council Resolution of 29 June 1978. By accentuating the technical aspect of these questions, that programme was bound to result in the replacement of the applicant at the head of his division by an engineer, as Günther Arning cannot have been unaware. He must have been all the more certain in view of the fact that his

division was very small and it was well-known that the Commission, anticipating as it were the conclusions of the Spierenburg Report by several months, was striving to abolish the very small divisions with a view to administrative rationalization by re-grouping them with others of the same size or merging them into larger units.

To this, the applicant replies that the discussions mention by the Commission essentially concerned the Industrial Medicine and Hygiene Division and particularly its subdivision for toxicology, biology and control of the effects on health, and not the special field of industrial safety. He adds that, during these discussions, the question of structural and personnel problems never arose.

Assuming that the Commission's argument, which requires psychological inquiry as to which there can be no certainty, is permissible, it may be concluded from this discussion that there is some doubt whether Günther Arning was necessarily bound to know in his own mind that the planned reorganization would involve the abolition of the division of which he was the head. If there is any doubt on this point, there must be even more as to whether the applicant was necessarily bound to have thought that following such abolition he would be appointed adviser to the directorate, which is in fact the purpose of the contested decision. In my opinion, on the basis of the restrictive case-law of the Court in this area, the applicant must be given the benefit of the doubt. Even when the circumstances in which the decision was adopted and made known to the applicant are taken into account, it does not seem as if he could be said to have been clearly informed of the reasons for and the basis of that decision.

IV — According to Günther Arning, the decision regarding his change of posting is void on another ground, in so far as, by adopting it, the Commission failed in its duty of care towards its officials (Fürsorgepflicht).

In the words of the judgment in *Kuhner*, the duty to look after the well-being of its officials (Fürsorgepflicht) has been defined as "the duty ... according to which when the authority enacts measures it must take account not only of the interests of the service but also of the interest of the official in avoiding any detriment to his career" (paragraph 18). The judgment in *Kuhner* also states that "although this concept is not mentioned in the Staff Regulations of Officials of the European Communities, it reflects the balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants" (paragraph 22). More precisely, "a particular consequence of this balance is that when the official authority takes a decision concerning the situation of an official, in this case his assignment to a specific post, it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the official concerned" (paragraph 22).

The applicant alleges that the Commission failed in the duty of care which it owed to him, by not taking into account, when it decided to relieve him

of his duties as Head of the Industrial Safety Division, either his considerable experience in his field, or his ability in the subject, shown by his periodic reports, so as to damage his professional standing and reputation.

In my opinion, these allegations do not amount to breaches of the duty to look after the well-being of officials as defined by the Court. First, it is clear that it is not for the Court to put itself into the position of the administration by determining the advisability of a decision concerning a change of posting, as the applicant's arguments appear to invite the Court to do (see in this regard the opinion of Mr Advocate General Reischl in Case 61/76 *Geist* v *Commission* [1977] ECR 1419 at p. 1441, referred to in his opinion in Case 60/80 *Kindermann* v *Commission* [1981] ECR 1329).

Furthermore, I cannot see in what way a change of duties from head of division to adviser may damage the standing and reputation of the official involved, always provided that this change is carried out in due form.

V — In his third and final submission, Günther Arning accuses the Commission of changing his posting without consulting him in advance. In his application, he took the view that this failure was an infringement of the rights of the defence, but following the judgment in *Kubner* he decribed them as a breach of the principle of good administration.

(a) In the *Kubner* judgment, the Court stated with regard to an identical submission:

"This case cannot be said to concern 'the rights of the defence' but only a general principle of good administration to the effect that an administration which has to take decisions, even legally, which cause serious detriment to the persons concerned, must allow the latter to make known their point of view, unless there is a serious reason for not doing so. The contested decision, under which the applicant retains all the advantages of his grade and basic post, is not of such a kind as to make it necessary to comply with formal requirements other than those provided by Article 90 of the Staff Regulations for the purpose of protecting the interests of officials and servants, to which is to be added, if need be, judicial review by the Court" (paragraph 25, [1980] ECR at p. 1698).

It is clear from that paragraph that the Court draws a distinction between decisions which cause serious detriment to an official and other decisions. With regard to the former, even if they are lawfully adopted, the administration is obliged to allow the persons concerned to make known their point of view. On the other hand, other measures adversely affecting an official may lawfully be adopted without prior consultation. Thus where his superiors have not informed him of the decision about to be taken in relation to him, the person concerned will be unable to make known his point of view before it is adopted, even if, had he been informed, he would have had good reason to think that the projected

decision was illegal. He may only take action with a view to changing the position of the administration *a posteriori*, by submitting to the appointing authority a formal complaint under Article 90 (2) of the Staff Regulations. If such complaint is rejected, his only remaining alternative is to apply to the Court of Justice.

(b) In fact the distinction on which these different rules are based does not seem to me to be totally satisfactory.

As Mr Advocate General Mayras pointed out in his opinion in the *Kuhner* case, certain Member States, with the exception of the United Kingdom and Ireland which have no administrative law in the sense in which it is understood on the Continent, "have made provision for procedures which ... enable an official to be heard either directly or through his representatives" [1980] ECR at p. 1710). This is the case, according to Mr Mayras, in the Federal Republic of Germany, the Netherlands, Luxembourg and France. In relation to French law, there may be added to the case-law cited by my predecessor the judgment of the Assemblée of the Conseil d'État [State Council] of 4 March 1977, *Rondeau* (Gazette du Palais 1978, Case-law p. 247-249, note Moderne) which extended the duty to consult the joint administrative committee so as to cover transfers of officials not subject to the general regulations of the public service when they involve a "very appreciable loss of responsibilities in the new posting compared with the old".

It seems to me that, in the relationship between the administrations of the Community institutions and their officials, the consultation of the latter prior to their transfer or change of posting is also a necessity to which this case offers an opportunity of giving judicial approval. Like other officials who have already brought actions against decisions of this nature, one of the factors which shocked Günther Arning most was the very fact that his superiors did not discuss his situation with him in the context of the planned reorganization of the department to which he belonged. This is sufficiently clear from his note of 21 August 1979, in which he related, without being challenged, that in the course of his interview of 31 July with Dr Recht, he had asked the latter whether it would not have been fairer to discuss his situation with him before the contested decision was adopted. Similarly, in his complaint through official channels of 26 October 1979, he summed up very well the point at stake in the following terms:

"The need to promote confidence between the Commission and its employees, particularly (nicht zuletzt) its senior officials, ought to prevent a measure of this kind from being taken without first being discussed with the person concerned and without a satisfactory solution being sought by the two parties in common and, if possible, found. I refuse to be considered as a pawn in the internal administrative game or to play the part of one."

It also seems to me that, while there is incontestably among the rights which an administration enjoys in relation to its officials, that of organizing its departments in such a way as to achieve

the tasks which are assigned to it, in exchange an administration also has a duty to try to obtain the consent of the official concerned before adopting a decision as important for his career as a change of posting or a transfer. As Mr Advocate General Mayras also noted in his opinion in the *Kuhner* case ([1980] ECR 1700 at p. 1711) one cannot fail to be struck by the difference between the very elaborate safeguards granted to officials in connection with periodic reports and promotion and the total absence of safeguards in relation to transfers and changes of posting, although the subjective and objective importance of these in the careers of officials does not appear to justify such a difference in treatment.

However, it must be stated that, even in the event of disagreement with an official, the administration may change his posting if it is in the interests of the service (judgment of 24 February 1981 in Joined Cases 161 and 162/80 *Carbognani and Coda Zabetta* v *Commission* [1981] ECR 543, paragraph 28); but it ought at least to hear his views beforehand. From the resulting dialogue, there might ultimately appear some new factors which were not known to the administration up to that time and which might be capable of persuading the latter to alter the decision which was planned. But even if that is not the case, in my view the duty to inform the official in advance is likely to improve the quality of the relationship between the administration and its officials, which must be one of mutual trust, as Mr Advocate General Reischl recently pointed out (opinion of 19 March 1981 in Case 60/80, *Kindermann* v *Commission* [1981] ECR 1329).

If they were thus informed of the true grounds for the decisions planned concerning them and not presented with a *fait accompli*, officials would undoubtedly have less reason to resort to proceedings through official channels and before the Court as set out in Articles 90 and 91 of the Staff Regulations. In any event, they would no longer be obliged to resort to these in order to discover the contents of those decisions and the grounds on which they were based. In other words, the recognition of the duty to consult the official in advance of a change of posting or a transfer seems to me to be likely to prevent litigation.

(c) This need to prevent actions seems to me to fall entirely into the framework of a duty of good administration which, in the absence of a rule in the Staff Regulations, has been recognized as a principle of law in the case-law of the Court in various situations. This principle demands that the administration should, *inter alia:*

(i) take all necessary steps to establish whether serious accusations reflecting on the integrity of an official in carrying out his duties are correct (judgment of 11 July 1974 in Case 53/72 *Guillot* v *Commission* [1974] ECR 791 at p. 802, paragraph 3);

(ii) comply with a memorandum drawn up after agreement with the staff representatives setting out directives for the organization of internal competitions (judgment of 29 September 1976 in Case 105/75 *Giuffrida* v *Council* [1976] ECR 1395 at p. 1404, paragraph 17);

(iii) take all temporary measures which are not likely to have an adverse effect on the functioning of the institution to enable an official to overcome his personal difficulties (judgment of 9 November 1978 in Case 140/77 *Verhaaf* v *Commission* [1978] ECR 2111 at p. 2124, paragraph 12).

Finally, if there is in every case a requirement that the official should be informed in advance, in the present case there are indeed special reasons for penalizing its breach. These reasons relate to the applicant's considerable experience in his specialized field, his years as head of the Industrial Safety Division and his ability, attested by his periodic reports, as head of the latter.

These circumstances, to which must be added the reduction in status of that division into a specialized unit in spite of the extension of its duties, render the contested decision all the more open to criticism and the reaction of the person to whom it was addressed all the more understandable.

In these circumstances, it seems to me that the Commission's decision of 17 July 1979 changing Günther Arning's posting from head of the Industrial Safety Division to adviser to the Health and Safety Directorate of the Directorate-General for Employment and Social Affairs should be annulled on the grounds of the following formal defects: infringement of the second paragraph of Article 25 of the Staff Regulations inasmuch as that decision, on the one hand, was not communicated in writing and at once to the person to whom it was addressed and on the other does not meet the minimum requirements of an appropriate statement of the grounds on which it is based; infringement of the principle of good administration in so far as it was not preceded by consultation of the person concerned.

VI — It remains for me only to examine whether the applicant's claim that the Court should order the Commission to pay him damages of one unit of account in respect of the non-material damage which he claims to have suffered is well-founded. In his view, the alteration of his duties from those of head of division, which, in addition, he had directed for many years, to those of adviser, caused him non-material damage on account of its effect on his standing and reputation in so far as it exposed him to lasting discredit. It would be otherwise, he alleges, only if he had applied for the post of adviser or had at least agreed to such a change of posting.

In order for this application, which must be regarded as a claim for damages, to be successful, the case-law of the Court requires that, in adopting the contested decision, the administration should have committed a wrongful act or omission and that such act or omission should have caused the applicant injury (judgment of 13 July 1972 in Case 79/71 *Heinemann* v *Commission* [1972] ECR 579 at p. 589, paragraph 9).

Its is apparent that the considerations mentioned by the applicant in no way prove that the Commission committed a wrongful act or omission in relation to him. In the context of its powers in relation to its internal organization, the administration is perfectly entitled to alter the posting of an official, even

against his will, by moving him, as in this case, from one basic post in his grade to another (judgment of 28 May 1980, *Kuhner*, as above, paragraph 20 at pp. 1696 and 1697). In itself the contested decision cannot be regarded as a wrongful act or omission on the part of the administration.

On the other hand, by the conditions in which it was adopted, it seems to me to reveal improper conduct on the part of the administration. In not giving the applicant the opportunity to express his point of view on the decision planned concerning him, then in not putting him in a position to know the precise grounds on which that decision was based and in failing to communicate it to him in writing and at once, the Commission seems to me to have committed several negligent acts for which it must be held liable.

These circumstances also explain why the applicant feels that his personal standing has been damaged by the contested decision, of which he might legitimately wonder whether it was the result of his personal conduct or inadequacy in the performance of his duties, up to the time of the official assurances contained in the reply to his complaint. It may also be imagined that he was affected by the rumours and surmises which were the result of the conditions in which the contested decision was adopted. It seems to me that the reality of the non-material damage which the applicant has suffered is undeniable.

The nominal damage which he claims seems to me, therefore, to be justified.

In short, for all the aforementioned reasons, my opinion is that the Court should:

— Annul the Commission's decision of 17 July 1979 appointing Günther Arning as an adviser to the Health and Safety Directorate of the Directorate-General for Employment and Social Affairs;

— Order the Commission to pay him one unit of account as compensation for the non-material damage which he has suffered;

— Order the Commission to pay the costs, pursuant to Article 69 (2) of the Rules of Procedure.