In Joined Cases 35/62 and 16/63

ANDRÉ LEROY, a member of the auxiliary staff of the European Coal and Steel Community, residing at 20 Rue Astrid, Luxembourg, assisted by Paul-François Ryziger advocate of the French Conseil d'Etat and the Cour de Cassation, with an address for service in Luxembourg at the Chambers of E. Arendt, advocate of the Luxembourg Cour d'Appel, 27 Avenue Guillaume,

applicant,

v

HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Legal Adviser, G. Sautter, acting as Agent, assisted by Jean Coutard, advocate of the French Conseil d'Etat and the Cour de Cassation, with an address for service in Luxembourg at its offices, 2 Place de Metz,

defendant,

Application for annulment of the decision of the President of the High Authority of the ECSC refusing to integrate the applicant as an established official of the Community and for damages in reparation for the injury suffered as a result of that decision;

THE COURT (First Chamber)

composed of: A. Trabucchi (Rapporteur), President, L. Delvaux and W. Strauß, Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

Mr Leroy entered the employment of the High Authority of the ECSC in Grade A/6 on 16 July 1959 under a contract valid from 1 July 1959 to 30 June 1960. A short time later, in the light of his qualifications and specialized duties he was, at his request, promoted to Grade A/5.

On the recommendation of Mr Nora, Director-General of Economics and Energy, this contract was renewed for the period from 1 July 1960 to 30 June 1961.

Following the general re-organization of the departments of the High Authority, two posts of principal administrator bearing the numbers 30 and 31 were established in the Directorate-General of Economics and Energy. Mr Leroy obtained post No 30 and as a consequence the temporary Grade A/4. In addition, his contract was renewed for a second time from 1 July 1961 to 30 June 1962.

After the entry into force of the new provisions of the Staff Regulations of officials of the ECSC authorizing the establishment of temporary staff, Mr Leroy asked to be integrated as an established official under Article 93 of the Staff Regulations. This was refused. At the same time it was decided to continue to employ Mr Leroy under contract as a member of the auxiliary staff.

The applicant was informed of this refusal and of the offer of a new contract by letter of 5 September 1962 from the Directorate-General of Administration and Finance, signed by Mr Jaurant-Singer. It was against this letter that on 5 December 1962 Mr Leroy made *Application 35/62*.

Subsequently, by letter of 4 December 1962 signed by Mr Signorini, the applicant was informed of a decision of 11 October 1962, signed by the President of the High Authority, refusing to integrate him as an established official in the post of principal administrator. In addition, this decision also terminated his contract as a temporary official as from 30 June 1962 and with effect from 1 July 1962 he was employed as a member of the auxiliary staff at the Directorate-General of Coal in Category A, Group 1, Class 3 of the scale of basic salaries set out in Article 63 of the regulations applying to other servants. It was against this decision that on 5 March 1963 Mr Leroy made *Application 16/63*.

II — Conclusions of the parties

In Case 35/62 the applicant claims in his application that the Court should:

— 'annul the contested decision with all the consequences that this entails in law; rule that this annulment also applies to the preliminary procedure and in particular that the applicant's case should be heard again by the Establishment Board after a new report based on the facts has been drawn up;

— order the High Authority to make reparation for the injury to the applicant arising from the unlawful nature of the contested decision and to pay such damages as the Court shall see fit;

— order the High Authority of the ECSC to pay all the costs and expenses of the action.'

In its statement of defence *the defendant* contends that the Court should:

'dismiss as inadmissible and in any event as unfounded the application made by Mr Leroy against the letter of 5 September 1962, signed by the Director of Personnel at the Directorate-General of Administration and Finance of the High Authority of the ECSC, informing him of his non-integration under Article 93 of the Staff Regulations and of his continued employment as a member of the auxiliary staff; with all the consequences that this entails in law, in particular as regards settlement of the costs and fees.'

In *Case 16/63 the applicant* claims in his application that the Court should:

— 'order the joinder of this case with Case 35/62;

— annul the contested decision with all the consequences that this entails in law; rule that this annulment applies

also to the preliminary procedure and in particular that the applicant's case should be heard again by the Establishment Board after a new report based on the facts has been drawn up;

— order the High Authority to make reparation for the injury suffered by the applicant from the unlawful nature of the contested decision and to pay such damages as the Court shall see fit;

— order the High Authority of the ECSC to pay all the costs and expenses of the action.'

In its statement of defence *the defendant* contends that the Court should:

'dismiss as unfounded the application made by Mr Leroy against the decision of 11 October 1962 of the President of the High Authority of the ECSC informing him of his non-integration under Article 93 and of his continued employment as a member of the auxiliary staff; with all the consequences that this entails in law, in particular as regards settlement of the costs and fees.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — On admissibility

Case 35/62

In its statement of defence *the defendant* contends that this application is inadmissible since the letter of 5 September against which it is made did not amount to a decision. This was clear from the letter itself which stated in a postscript that the applicant would shortly receive a certified copy of the decision of the President of the High Authority. In fact, although the unfavourable recommendation in respect of the establishment of Mr Leroy was given by the Establishment Board on 2 July 1962, for purely technical reasons the formal decision could not be taken at the same time. Since Mr Leroy's contract as a member of the temporary staff came to an end on 30 June and since it was desirable for him to know his position in order to make arrangements for the future, in particular as regards the contract as a member of the auxiliary staff which it had been decided to offer to him, the Director of Personnel considered that Mr Leroy should be informed of the situation. According to the defendant, this letter was a mere notification by the Director of Personnel sent on his own responsibility but with the knowledge of the President, and therefore could not be made the subject of any application.

In his reply *the applicant* emphasizes that the way in which the letter begins 'I regret to inform you that the President has decided: (a) not to integrate you in accordance with Article 93 of the Staff Regulations' appears to amount to a notification of a decision. In these circumstances the applicant considers that, if he had not contested this letter but had waited for a formal decision to be conveyed and had therefore calculated the time-limit for the institution of proceedings from 5 December, the day on which he was informed of the decision, an objection would have been made on the ground that his application was out of time.

In its rejoinder *the defendant* observes that the applicant is confusing the decision itself with the notification of a decision: only the former may be the subject of an application for annulment. The suppositions of the applicant as to what the High Authority might have done had he not contested this letter are therefore completely irrelevant.

Case 16/63

The defendant does not dispute the admissibility of the application.

B — On the substance of the Case

(a) Irregularity of the integration proceedings

The applicant observes that, since there is no provision governing the procedure to be followed by the Establishment Board set up under Annex X to the Staff Regulations, general principles of law must be applied. As integration is merely a recruitment procedure for officials who are already employed in the ECSC, it must reconcile the general interest of the institution in recruiting the most highly-qualified staff with the particular interest of the officials concerned in the security of their employment. It is therefore important that reports made by a candidate's immediate superior should not be the only sources of information available to the Establishment Board, and that candidates for establishment should be aware of all the facts before the Board in order to correct, if necessary, any false information. The procedure should therefore generally allow the candidate to be heard. In particular, the applicant considers that, if he so requests, a servant about whom an unfavourable report is made by his superior officer should be permitted to interview the latter. In this case the Board rejected the request of the applicant for a meeting with the Board in the presence of Mr Maillet, his superior officer, who had made a report unfavourable to his establishment.

The procedure was also irregular in that, as is shown by the extract from the minutes of the sixth meeting of the Establishment Board held on 20 June 1962, the applicant had not been shown all the minutes of its previous sessions, in particular those of the meeting at which Mr Nora, Director-General of Economics and Energy, had been heard. He had merely received an oral summary of the statements made by Mr Nora without receiving all the minutes of the hearing.

The *defendant* replies that the character of the Establishment Board is not that of a court and even though the legal principle 'audi et alteram partem' must be observed before it, it must be agreed that the Board is free to choose the means to be adopted for this purpose and the procedural safeguards to be observed are not, as the applicant appears to contend, necessarily the same as before a court. Mr Leroy was twice heard by the Board which considered it undesirable for him to meet his superior.

Moreover, as regards the observations made by Mr Nora, the defendant points out that the applicant does not deny that he was informed of those statements and had an opportunity to discuss them; this is sufficient to satisfy the requirements of a procedure allowing the candidate to be heard.

(b) Lack of sufficient reasons for the decision

In *Case 35/62 the applicant* maintains that no reasons were given for the decision not to integrate him. In fact, no reasons were given in the letter of 5 September 1962 informing the applicant of the decision not to integrate him; he was only informed of the grounds for the recommendation of the Establishment Board long after the contested decision had been given; the minutes of the meetings of that Board were sent to him only at his request and only on 14 November 1962.

Even if the Court should consider that, despite these circumstances, the reasons for the Board's recommendation make up for the lack of reasons for the decision contested in Application 35/62, the reasons for the recommendation still appear to be insufficient since they are of too general a nature to enable Mr Leroy to produce any evidence to refute them.

Furthermore, even if the Board intended, in its recommendation, to adopt the reasons given in the establishment re-

port drawn up by Mr Maillet, they are still insufficient, as being extremely general and subjective.

In *Case 16/63 the applicant* recognizes that, since the discretion of the High Authority as regards the integration of officials is fettered inasmuch as under Annex X to the Staff Regulations an official who has been the subject of an unfavourable recommendation by the Establishment Board cannot be integrated, it is the reasons for this recommendation which must be reviewed by the Court. In this context, the applicant makes the same criticism as those already set out in Case 35/62.

In its statement of defence in *Case 35/62 the defendant* contends that the letter of 5 September did not comprise any decision and therefore no reasons were necessary. Moreover, since the real reason for the refusal to integrate the applicant was the unfavourable recommendation of the Establishment Board, that reason is sufficient provided that it is factually accurate.

In both cases, the defendant emphasizes that the judgment of the Board as to the ability of the servant to perform the duties assigned to him is made only on its own discretionary assessment and therefore neither the High Authority nor the Court could substitute a favourable assessment for an unfavourable one made by the Board.

The applicant replies that the fact that the High Authority was bound by an unfavourable recommendation made by the Establishment Board must not deprive the Court of Justice of its power to review the reasons for which the Establishment Board took this view.

In its rejoinder *the defendant* emphasizes that both the recent conduct of Mr Leroy and his work were criticized not only by Mr Maillet, his superior, but also by Mr Nora, Director-General of Economics and Energy and by Mr Regul in his capacity as assistant Director General of the same directorate. Whilst recognizing the power of the Court to verify the existence and legal consequences of the reasons for the contested decision, the defendant does not accept that it is able to determine whether the conduct of Mr Leroy justified an unfavourable recommendation as to his integration; this would amount in fact to substituting the value-judgment of the Court for that of the normal administration.

(c) Factual inaccuracy of the reasons given

After recalling that its judgment in the Mirossevich case the Court of Justice, while considering that the discretionary power to assess a candidate's ability to perform his allotted duties is vested in the competent administrative authority, nevertheless reserved the power to review the grounds for such an assessment, *the applicant* concludes that the official concerned has therefore the right to contest before the Court the factual accuracy of the reasons on which the decision at issue is based.

In answer to the criticism made by Mr Maillet in his report to the effect that he showed insufficient initiative in the performance of his duties, the applicant states that the justification put forward by Mr Maillet for this assessment—namely that he never made any specific proposals for undertaking further projects—is totally without foundation as he had on several occasions put forward concrete proposals for the carrying out of fresh studies. In this connection the applicant refers to several points made in his observations on the establishment report. He emphasizes that the administration has not challenged these points and requests that it be invited to produce the various memoranda and documents drafted by him. In addition he offers to produce the evidence of witnesses in support of his claims.

As to the allegation that he did not generally succeed in carrying out alone the tasks entrusted to him, the applicant

observes that as a statistician his task was to draft preparatory documents and that it was not his duty to prepare or to debate the statistics.

As to the completion of the work and the period required for it, the applicant maintains that he completed the tasks entrusted to him within the required time.

The defendant contends that the purpose of these arguments is to substitute the value-judgment of the Court for that of the Establishment Board and that this would be inadmissible. It is impossible to conclude from the judgment in the Mirossevich case that the Court has the power to make such a value-judgment, since in that case the only question to be determined by the Court was whether a probationer had been given a sufficient opportunity to show her abilities during the probationary period. In this case the applicant does not claim to have been given insufficient work while he was employed by the High Authority.

(d) Misuse of powers

According to *the applicant,* personal animosity had led Mr Maillet to draw up an unfavourable report so as to prevent his integration in spite of his earlier satisfactory services. This presumption emerges in particular from the fact that Mr Leroy had worked sufficiently well to have his contract renewed twice and to be promoted on a temporary basis to a higher grade, by the fact that the unfavourable report made by Mr Maillet made no specific accusations and by an offensive remark written by Mr Maillet on mission instructions adressed to Mr Leroy.

The defendant replies that a similar assessment of Mr Leroy had been made by his former superior even before the arrival of Mr Nora and Mr Maillet and that the latter's opinion is confirmed by Mr Nora and by Mr Regul. If the assessment of Mr Leroy has changed from the favourable opinion formed with regard to him at the beginning this is because 'first, although a good statistician, he no longer gave satisfaction when, in a higher position, he was required to exhibit the capacities of an economist and, secondly, that he seems always to prefer to work alone and finds great difficulty in working as a member of a team. His temporary position as an administrator would have required him to work with a team'. As regards the remark made by Mr Maillet on a travel authorization, the defendant maintains that this quite justified observation appears on a paper which has remained 'undisclosed by Messrs Maillet and Leroy'.

(e) On the request for compensation

The applicant contends that he has been injured by the decision which reflects adversely on his honour and reputation. Out of 225 servants only Mr Leroy and one other were refused integration while a third was allowed a further period in which to prove his capacities.

In addition, the applicant maintains that the contested decision has affected his normal life in that he is unable to make any arrangements for the future until judgment is given on his application. Therefore, even if the disputed measure is annulled, he will still have been adversely affected by it.

The defendant refers to its earlier observations in order to dismiss any claim for compensation by the applicant. In addition, it emphasizes that the applicant is still employed by the High Authority at the same salary as before and is still able to take part in competitions for recruitment.

IV — Procedure

The procedure followed the normal course.

By an Order of 20 March 1963, the First Chamber of the Court, considering that Cases 35/62 and 16/63 were

interconnected by reason of their subject matter, at the request of the applicant joined the two cases for the purposes of procedure and judgment.

On 22 June 1963 the applicant requested that the operation of the measures disputed in the two applications be suspended.

By an Order of 16 July 1963, the President of the Court, hearing the application in chambers, dismissed it as inadmissible, after having heard the parties.

Grounds of judgment

On admissibility

The defendant maintains that the letter contested in *Application 35/62* is not a decision but merely the notification of a decision of the President of the High Authority which was to be taken later.

The formal decision of the President of the High Authority was only taken on 11 October 1962.

Consequently, the letter contested in Application 35/62 signed by a mere official could only notify the person concerned of the content of a future decision.

Therefore, Application 35/62 must be declared inadmissible.

However, although the unusual nature of the procedure followed by the defendant may be explained by a desire to inform the applicant of his fate without delay after the unfavourable recommendation made by the Establishment Board, it is true that the terms of the letter in question might reasonably have led the applicant to believe that the decision of the President of the High Authority refusing to integrate him had already been taken.

This fact must influence the decision as to costs.

The defendant does not contest the admissibility of Application 16/63 and no objection of inadmissibility need be raised by the Court of its own motion.

On the substance of the case

As regards the complaint based on the irregularity of the integration procedure

The applicant maintains that the integration procedure should allow the candidate full opportunity to be heard.

It is true that an unfavourable recommendation by the Establishment Board is binding on the appointing authority under Annex X, paragraph 2, to the Staff Regulations of officials of the ECSC. Before making such a recommendation, the Board must enable the candidate to comment on any points likely to influence the decision as to his establishment.

The applicant contends that in this case this requirement has not been respected since he did not receive the minutes of the examination of the Director-General of Economics and Energy and was not allowed to meet his immediate superior before the Establishment Board.

It is not necessary to consider the applicant's argument that he had a right to see these minutes and to meet his superior, since it must be stressed that the failure to produce the minutes could only make the proceedings irregular if the result of this omission had been to prevent the applicant from making known to the Establishment Board his views on the observations made with regard to him by Mr Nora.

This is not so in this case since the applicant had been informed by a summary of the substance of these observations.

Moreover, although it is clear from the letter sent to him by the defendant on 31 October 1962 that the applicant was later given access to all the passages relating to him in the documents concerning the integration procedure, he has raised no objection, either before the administration or before the Court, to the substance of the observations made by Mr Nora with regard to him before the Establishment Board which appeared in the minutes of the meeting of 21 May 1962.

As regards the refusal to allow the applicant to meet his immediate superior, it is clear from the minutes of the meeting of the Establishment Board 20 June 1962 that, as regards his request to meet his superiors, the applicant had expressed himself at that meeting as satisfied with the oral information given by Mr Signorini, chairman of the Board.

Therefore, the complaint based on the irregularity of the integration procedure cannot be maintained.

As regards the lack of sufficient reasons

The applicant alleges that sufficient reasons were not given for the recommendation of the Board.

According to the first paragraph of Article 25 of the Staff Regulations of officials, any decision adversely affecting an official shall state the reasons on which it is based.

This requirement is satisfied when the reasons on which the decision adversely affecting the official is based are given clearly and unequivocally.

In its report of 16 July 1962 the Establishment Board states that its recommendation not to establish Mr Leroy 'was issued on the basis of the establishment report drawn up by the candidate's superior officer and the observations made by the candidate on the report, after studying his file and hearing both Mr Leroy and his superiors'.

It is true that the Board could have been more explicit and could have indicated precisely the factors concerning the applicant's ability to perform the duties assigned to him on which the unfavourable recommendation was based. However, the general reference made at the outset to the report of the applicant's immediate superior makes it clear beyond all doubt that the observations contained in this report, which were confirmed by the applicant's Director-General, constitute the reasons for the recommendation in question. This view is confirmed by the fact that the applicant has not failed to criticize the observations contained in the report of his superior. The applicant contends that these observations are general and subjective. It must be remarked that the report was intended to provide an assessment of Mr Leroy's general behaviour. It cannot therefore be criticized for not going into details and mentioning specific facts.

This being so, the lack of detail noted above in the reasons for the recommendation of the Board does not prevent an examination of its merits, since the reasons are sufficiently indicated by the reference made therein to the establishment report drawn up by the applicant's superior officer. This omission is therefore not a sufficient reason to annul the contested decision. This being so it is desirable to consider the complaint based on the justification for the decision.

As regards the factual inaccuracy of the reasons given

The applicant criticizes the establishment report drafted by his superior officer on the three points in connection with which the word 'inadequate' was used. The assessment was made on the basis of the work carried out by the applicant and of his professional conduct since he had held post No 30 on a temporary basis, that is, for about two years. It has been confirmed by the Director-General under whom the applicant was working.

It must be stressed that the applicant's criticisms are not directed against the material accuracy of findings of fact which are capable of objective verification, nor against assessments which may be objectively reviewed, but against complex value-judgments the merits of which, by their very nature and subject, cannot be reviewed by the Court. For this reason this complaint must be rejected without any examination of the accuracy of the criticisms contained in the establishment report.

On the submission of misuse of powers

The applicant states that personal animosity had induced his immediate superior to draft a report which did not recommend his integration. The facts referred to by the applicant in support of his allegation, although they may raise the presumption that relations between Mr Maillet and the applicant were strained, are not of such a nature as to show that this incompatibility of character was the real cause of the unfavourable tone of the establishment report drafted by Mr Maillet.

This submission must therefore be rejected.

On the request for compensation

The applicant alleges that he has been injuriously affected by the decision in dispute which reflected adversely on his honour and reputation and affected his normal life.

It is clear from the above considerations that the decision in dispute is not vitiated on any of the grounds alleged by the applicant. A measure which has not been shown to be unlawful cannot constitute a wrongful act or omission and thus unlawfully prejudice the honour and reputation of the person to whom it refers, unless it contains superfluous criticisms of that person. In this case, the reasons for the contested decision were limited to the absolute minimum. The applicant has therefore no right to compensation for any injury caused by the decision in dispute.

Costs

The applicant has failed in his applications.

Under the terms of Article 70 of the Rules of Procedure of the Court of Justice of the European Communities and without prejudice to the second sub-paragraph of Article 69 (3) of those Rules, in proceedings by servants of the Communities institutions shall bear their own costs.

Under the terms of the second subparagraph of Article 69 (3) of those Rules, the Court may order even a successful party to pay costs which the Court considers that party to have unreasonably caused the opposite party to incur.

The conduct of the defendant has encouraged the applicant to bring two applications, whereas if the letter of 5 September 1962 had been drafted less equivocally a single application would have been sufficient.

However, once the formal decision contested in Application 16/63 had been taken, the applicant should have realized that he had no grounds for proceeding with Application 35/62 from which it would have been reasonable for him to withdraw.

In these circumstances it is appropriate that the applicant's costs be borne as stated in the operative part of the judgment.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Staff Regulations of the European Coal and Steel Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Dismisses Application 35/62 as inadmissible and Application 16/63 as unfounded;**

2. **Orders the applicant to pay his own costs incurred in Application 35/62 after notification of the decision of the President of the High Authority of 11 October 1962, the remaining costs of the application and the costs incurred by the defendant being borne by that party;**

3. **Orders the applicant to pay the costs of Application 16/63, the costs incurred by the defendant being borne by that party.**

Trabucchi Delvaux Strauß

Delivered in open court in Luxembourg on 5 December 1963.

A. Van Houtte
Registrar

A. Trabucchi
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL M. LAGRANGE DELIVERED ON 17 OCTOBER 1963[1]

Mr President,
Members of the Court,

I — Facts and Admissibility

The facts are sufficiently familiar to you from the report of the Judge-Rapporteur and I hope that thanks to the excellent oral arguments which you heard last week, they are still fresh in your memory, so that I need not go over them again.

Let me remind you simply that Mr Leroy, a member of the temporary staff of the High Authority since 1 July 1959, whose one-year contract had been renewed twice and finally expired on 30 June 1962, asks you to annul:

(1) A decision by the President of the High Authority notified in a letter of 5 September 1962 from the Director-General of Administration and Finance, rejecting his request for integration under Article 93 of the Staff Regulations of Officials of the Community (Application 35/62);

(2) A decision of the President of the High Authority of 11 October 1962 on the same question.

In addition he claims compensation for the loss suffered as a result of the unlawful nature of the contested decisions. Thus the subject of both applications is the same and they have been joined, but the High Authority has raised a plea of inadmissibility against the first application, which must first be examined although it is important only from the point of view of costs.

The defendant maintains that the letter of 5 September 1962 is not a decision, but merely the *notification* of a decision of the President of the High Authority which was not formally taken until the following 11 October.

The dispatch of this letter to the applicant was in his own interest, first, because it was necessary to inform him without delay of the decision not to integrate him, which, although not then taken, was inevitable in view of the unfavourable recommendation made by the Board, and, secondly, in order to regulate his position from 1 July 1962 onwards, the date at which his contract came to an end.

It may be that the dispatch of the letter before the decision had actually been taken was in the interests of the applicant, but it is nevertheless clear from the terms in which the letter was drafted 'I regret to have to inform you that the President has decided (a) not to integrate you in accordance with Article 93 of the Staff Regulations' . . . that the applicant was reasonably entitled to conclude that the President of the High Authority, the competent authority in this case, had already taken a

1 — Translated from the French.