# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 27 February 1986 *

*Mr President,*
*Members of the Court,*

1. This action was brought by Elio Bevere, an official of the Commission of the European Communities, who claims that the Court should annul the decision of 31 January 1984 concerning the transfer of pension rights under Article 11 (2) of Annex VIII to the Staff Regulations of Officials.

The Commission contends that the application is inadmissible and, in the alternative, that it is unfounded.

2. As always in such cases, the argument is clarified if the facts are considered in chronological order.

*1 December 1971*: the Commission recruited Mr Bevere as a member of its temporary staff.

*1 July 1975*: Mr Bevere was established as an official.

*13 May 1982*: the Commission informed Mr Bevere, who had made an application under Article 11 (2), of its estimate of the additional seniority which he could claim for his previous service. It estimated the additional seniority to be four years, 11 months and four days. Printed at the foot of the document were the words 'dichiaro accettare la presente proposta' (I declare my acceptance of this proposal), followed by Mr Bevere's signature and the date on which he signed the document (2 June 1982).

*31 January 1984*: the Commission informed Mr Bevere that the period of pensionable service with which he had been credited was four years, 11 months and four days.

*15 February 1984*: Mr Bevere submitted a 'request' to the Commission 'under Article 90 (1) of the Staff Regulations' asking it to credit him with a period of 15 years, 11 months and five days or alternatively to credit him with a period of eight years, one month and eight days, or, in the further alternative, to provide 'a logical mathematical and financial explanation' of the anamolies which he believed he had detected in its calculations. His letter was received by the Commission on 21 February 1984.

*9 July 1984*: Mr Bevere wrote to the Commission informing it that he considered its silence constituted 'a rejection of his request'.

*3 September 1984*: in view of the fact that 'no reply had been given within the time-limits provided for in the Staff Regulations' Mr Bevere lodged a 'complaint' with the Commission 'under Article 90 (2) of the Staff Regulations' in which he made the same request supported by further arguments. That document was received by the Commission on 5 September 1984.

*16 October 1984*: in a letter addressed to Mr Bevere the Commission described his 'request' of 15 February 1984 as a 'complaint' and stated that its decision of 31 January 1984 was adopted in accordance with the General Provisions for Giving Effect to Article 11 (2) of Annex VIII to the Staff Regulations, the provisions of the Staff Regulations themselves and with overriding principles of law. The letter was received by Mr Bevere on 18 October 1984.

* Translated from the French.

*19 November 1984*: the Commission informed Mr Bevere that it would not examine the complaint he lodged in September since it had the same purpose as the complaint lodged on 15 February 1984, to which it had already given its reply on 16 October 1984.

*16 January 1985*: Mr Bevere brought this action before the Court.

3. In support of its objection of inadmissibility the Commission contends that the applicant seeks the annulment of its clear and explicit decision of 31 January 1984 which allegedly constitutes an act adversely affecting him within the meaning of Article 90 (2). Consequently, it is irrelevant that Mr Bevere described his letter of 15 February 1984, which was received by the Commission on 21 February 1984, as a 'request'; that letter must be regarded as a complaint which was the subject, prior to its express rejection on 16 October 1984, of an implied decision rejecting it, against which an appeal could not be brought except within a period of three months, which expired on 21 September 1984. The Commission therefore considers this action inadmissible on the ground that it was commenced out of time.

Mr Bevere contends that the objection of inadmissibility should be dismissed on the ground that his 'request' of 15 February 1984 cannot be regarded as a complaint and that the Commission cannot take advantage of the fact that it did not reply to him within the time-limits laid down.

During the oral procedure the Court deplored the fact that the Commission waited until 16 October 1984 to inform Mr Bevere that it regarded his 'request' as a 'complaint'. Supposing it to be justified, such a reclassification, made within good time, would have enabled Mr Bevere to bring his action without the risk of its being inadmissible.

The Commission's representative did not dispute that there had been a delay which he attributed to the increasing number of complaints. He observed, however, that it was legally unsafe to make the classification of the decision of 31 January 1984 depend on the degree of diligence shown by the Commission.

I take the same view. The letter of 31 January 1984 notifying Mr Bevere of the previous service taken into account for the purpose of calculating his pension rights is the act which may adversely affect him. Moreover, it is that act which he seeks to have annulled by the Court.

The Commission would certainly have been better advised to explain its refusal without waiting such a long time, particularly after receiving Mr Bevere's second letter of 9 July 1984 and especially after receiving his letter of 3 September headed 'complaint'. Such delay, if it were to prove wrongful, might give rise to liability on the Commission's part. However, there is nothing to suggest that the Commission remained silent in order to keep the applicant under misapprehension. The duty to have regard to the welfare of employees cannot be identical with a duty to give advice and assistance. The convention of the implied decision rejecting a complaint and the effects attached to it as regards the exercise of rights of appeal show that it is for officials to act to secure their rights and provide them with the procedural means to do so. However justified it may be, the desire to protect officials from their own errors of judgment must not open the way to legal uncertainty.

In addition, it is not irrelevant to recall that, prior to submitting his 'request' of 15 February 1984, Mr Bevere had declared that he accepted the proposal submitted to him on 13 May 1982, which was set out in identical terms, in the form of a decision, in the contested document. His acceptance certainly did not deprive him of the right to challenge the decision; however, it could be challenged only by means of a complaint under Article 90 (2) of the Staff Regulations and not by means of a request as provided for in Article 90 (1).

I therefore take the view that the Commission was right to reclassify as a complaint the 'request' submitted to it on 15 February 1984 which was therefore the subject of an implied rejection four months after the date on which it was received by the Commission.

Consequently, for reasons of legal security, it is my view that this application must be declared inadmissible.

4. However, I will give my opinion on the substance of the case in case the Court should regard the application as admissible. For this purpose I rely on the summary of the parties' arguments contained in the Report for the Hearing.

In essence Mr Bevere complains that in the implementing provisions the date of establishment is taken as the reference date for the *calculation* of the additional years of pensionable service to be credited whereas in his view the sole effect of establishment is to give rise to *entitlement* to that credit. He adds that that choice of date discriminates against him contrary to the principle of equality of treatment of officials.

Article 11 (2) of Annex VIII to the Staff Regulations contains no support for the interpretation suggested by Mr Bevere. Whichever language version is considered (in this regard Mr Bevere has pointed out the difference between the French language version on the one hand and the English, German and Italian language versions on the other), it is clear that the obligation imposed on the Commission is to determine, 'taking into account [the official's] grade on establishment', 'the number of years of pensionable service with which he shall be credited under its own pension scheme . . . on the basis of the amount of the actuarial equivalent or sums repaid [from the previous pension fund]'. Each Community institution is therefore free to determine the method for calculating the additional credit taking into account the official's grade on establishment, provided that the criterion adopted is an objective criterion. Such objectivity is ensured by the reference criterion laid down in the provision at issue.

Admittedly the application of that provision may lead to different results due to differences in the administrative positions of officials. After completing a long period of service as a member of the temporary staff, Mr Bevere received a higher salary on his establishment than at the time of his initial recruitment. That increase, favourable in itself, had an adverse effect since the number of additional years of pensionable service credited is inversely proportional to the amount of salary taken into account. Other officials established in a post for which the salary is lower than that which they received as members of the temporary staff will be in the opposite position. Such a difference cannot be treated as discriminatory under the principle laid down by the Court according to which discrimination consists in

'treating either similar situations differently or different situations identically' (judgment of 17 July 1963 in Case 13/63, *Italy* v *Commission* [1963] ECR 165, especially at p. 177).

For the purpose of calculating Mr Bevere's pension rights, periods of service completed as a member of the temporary staff are normally taken into account pursuant to the provisions of the second paragraph of Article 40 of the Conditions of Employment of Other Servants of the European Communities. Since the sole periods of service at issue are periods of previous service, they afford entitlement to a credit of additional seniority only under the Staff Regulations. The applicant has not established that in the contested decision the relevant rules of the Staff Regulations were applied in a way which discriminated against him. His application must therefore be declared unfounded.

5. Consequently, I suggest that the Court should:

(1) Declare the action inadmissible;

(2) In the alternative, declare it unfounded;

(3) Apply Article 70 of the Rules of Procedure to the matter of costs.