Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations, especially Article 87 and Articles 7, 8 and 9 of Annex IX;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 70;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action.**
2. **Orders each party to pay its own costs.**

Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 30 May 1973.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 5 APRIL 1973 [1]

Mr President,
Members of the Court,

Two cases (Case 46/72 and Case 49/72) concerning illegal conduct of extreme seriousness are submitted for our examination and your judgment. Fortunately the Court, in its control of the disciplinary measures imposed by the Commission, does not have to examine the details of an affair which still 'male olet'; in fact, the parties concerned are not contesting the facts. And it even seems strange that in a disciplinary matter, where the facts are of pre-eminent importance, we find ourselves dealing with two cases in which the material accuracy of the

1 — Translated from the Italian.

events, which form the basis of the decisions here contested, has not been raised at all.

The facts are known and need only be recalled in brief outline. Mr De Greef, was an official in grade D 2, engaged by the Commission of the EEC on 25 September 1959 as an usher, and continued to be employed in that capacity, apart from the period intervening between a decision to dismiss him taken on 28 June 1963 and the judgment of the Court on 1 July 1964 annulling such decision. During the course of 1971 he offered to help an outsider obtain a post with the Commission. With regard to this matter, he had applied to Mr Drescig, an official in grade C 3 employed in the telex department from 16 May 1967, asking if he would help him in his aim. Having agreed with Drescig, De Greef then conveyed to the person concerned Drescig's demand to pay him 12 000 Belgian francs for which he would obtain for him a post in the Commission's departments. Then De Greef arranged a meeting between the person concerned and Drescig, and on that occasion he handed over to Drescig 12 000 Belgian francs in advance, since, unlike De Greef, the person concerned did not at that time have such a sum of money.

After various 'manoeuvres' (i.e. notification of an invitation to a non-existent examination, written on the Commission's headed paper and bearing a fictitious signature, and the fixing of an imaginary appointment with the Director of a department of the Commission) Drescig succeeded by underhand methods in securing the engagement of the person concerned in the Commission's departments. In addition, through the party above, he came into contact with another person wanting a post with the Commission, and he also received from this latter person the same sum of 12 000 Belgian francs for his promised 'services'.

Following such events, the Commission by an order of 14 April 1972 decided to dismiss De Greef and Drescig from their posts. The latter suffered in addition the loss of his pension rights.

Mr Drescig, plaintiff in Case 49/72 invokes exclusively grounds of a procedural character; not only does he not dispute the facts attributed to him, but he does not even criticize the contested decision as to its merits.

One can infer that the sole aim of his action is to continue to obtain his salary gratuitously until a new decision of the Commission on his case. Such decision, considering the acts committed and the seriousness of his wrongdoing, could not in all probability be any more lenient than the decision now in question.

It can be said at once that in a situation of this nature, that is to say when the seriousness of the events and the responsibility of the servant are practically not in issue, the contested decision could be annulled only if it were vitiated by particularly serious defects of procedure or form. And in any case, since the law must not be a purely formal remedy destroying the substance of retributive justice, the Commission should at least be given the opportunity of correcting possible defects which had no influence on the merits of the decision, without reviving in the meantime the right of the applicant to receive the salary corresponding to the post which he held at the time of the dismissal and from which he has been justifiably removed.

The Court has decided to join Case 49/72, which has already been discussed above, with Case 46/72, not only because both of them call for discussion of the same procedural requirements in decisions taken with regard to illegal activity carried on, at least in part, by mutual arrangement between the two officials concerned, but also because the applicant in the latter Case 46/72 appeals to your justice for a less severe punishment, because he considers that the different disciplinary measure although less severe in his case, is not in due proportion with the established

lesser degree of seriousness of the facts imputed to him.

Given the substantial identity of the pleas for annulment of a procedural nature invoked by the two applicants, I will proceed to their joint examination, in which the function of the Court will become all the more apparent as it involves itself in an affair completely impregnated with illegal activity, to see whether the rights of defence of the applicant have been infringed in any respect and to ensure that procedure, the 'shield of justice', has indeed been observed in its essential requirements.

First of all several brief observations must be made on admissibility.

A single question was raised on this matter, relating to that part of the submissions in Case 46/72 which concerns the annulment of the decision adopted on 11 January 1972 by the Director of Personnel suspending Mr De Greef from his duties and withholding part of his salary. On this matter it is sufficient to notice that, as appears from the fourth paragraph of Article 88 of the Staff Regulations, the provisional withholding of part of an official's salary is strictly linked with the existence of a valid disciplinary measure effected after disciplinary proceedings. Thus it can be observed very briefly indeed that it was pointless for the applicant to submit an express request (since he did not bring before the Court an emergency procedure aimed at suspending provisionally the implementation of the contested decision) and equally pointless for the Commission to maintain its plea of inadmissibility, basing itself on the erroneous supposition that a decision as to the withholding of his salary could remain effective even if the disciplinary measure imposed had to be definitively annulled.

As for the merits, in the first place the applicants claim that the contested decision infringes the second paragraph of Article 87, of the Regulations and Article 5 of the Commission's decision of 26 February 1971 relating to the exercise of the powers conferred by the Staff Regulations on the appointing authority.

Article 87, in prescribing that disciplinary measures other than written warnings or reprimands shall be ordered by the appointing authority after the disciplinary procedure provided in Annex IX, has been completed, provides that the procedure itself shall be initiated by such authority 'after hearing the official concerned'.

In order to allow each institution to meet the requirements of 'decentralizing' a part of the duties imposed on the appointing authority, the Regulations provide in Article 2 that each institution shall determine who within it shall exercise such powers. Such a requirement is especially acute in the case of an institution having as many staff as the Commission. That is why the latter, by a decision of 26 February 1971, carried out the distribution of the powers conferred on it by the Regulations by means of a detailed and exhaustive enumeration of such powers and the notification from time to time of the body competent to exercise them. The principle which inspired the Commission in making such distribution is obviously to be found in the fact that it retains for itself the powers which it considered bear an especial importance and complexity and it distributes the others according to the importance of such functions between the member of the Commission competent to deal with administrative questions, the Director-General of Personnel and Administration or the Assistant Director-General for the officials who live in Luxembourg, or else the Director of Personnel or the Heads of Division of the abovementioned Directorate-General.

Article 5 of this decision, referring to Article 87, second paragraph, second sentence, of the Regulations and specifying in particular the preliminary hearing and the initiation of the disciplinary procedure confers on the Director of Personnel the exercise of such powers in respect of officials in

grades C and D not resident in Luxembourg.

In the case in issue, as regards the applicants, officials in these two grades, it was the Head of the Division of Individual Rights, at the request of the Director of Personnel made on 22 December 1971 who conducted the preliminary hearing provided for by the second paragraph of Article 87, of the Regulations. The applicants claim that the Director of Personnel did not have the power to delegate to another subordinate official the power directly conferred on him by the Commission; moreover, the Commission itself is obliged, until there is a decision to the contrary, to observe the rules it has adopted on this matter, and for that reason the proceedings are completely defective, rendering illegal the decision which concluded them.

The Commission's defence does not appear acceptable on this matter. In substance it claims that, since the second paragraph of Article 87, does not reserve exclusively to the appointing authority the power to hear the persons concerned,[1] Article 5 of the above — cited decision of the Commission, by designating the Director of Personnel as the authority with the power to conduct such hearing, does not mean that he has to conduct it in person.

Nevertheless it is difficult to admit as a general rule that, in the cases where there is no express designation of the authority competent to carry out a precise duty (and for that reason only) that such a power can be exercised on a normal basis by officials other than those expressly designated by the appointing authority.

By designating an official on the basis of the post he occupies rather than by name, as an authority competent to carry out a specific function, the Commission has exercised the discretionary power conferred on it in a general manner by Article 2 of the Regulations and did so by an act of a legislative character and even constituting a limitation on its own powers. That does not mean at all that the Commission has also transferred to the designated officials the power of sub-delegating the exercise of the functions conferred on them.

On a general basis the Commission's argument seems unacceptable because it does not comply with the object of the decision considered above, which is designed to bring about the distribution of the powers. To admit as a general rule the power of officials to sub-delegate their powers where the Regulations do not expressly confer them on the appointing authority, in addition to contravening the generally accepted principle of 'delgatus delegare non potest', would lead moreover to consequences unacceptable in another respect. Where is the limit of its exercise? The Commission offers us not criterion. Even as regards the internal distribution of the powers of the institutions, it is inadmissible to accept criteria which do not satisfy the need for certainty in the law.

It may be recalled that an argument similar to the one criticized here was put forward by the defendant in Case 48/70 (Bernardi v European Parliament) on the power to appoint on an interim basis, concerning which Article 7 (2) does not specifically designate the competent authority. Such an argument was not accepted by the Court, which on the contrary ascribed a decisive and exclusive value to the designation of the authority competent in this respect; such designation being carried out by a general decision of the President's office of the Parliament on the basis of Article 2 of the Regulations.

Nevertheless that does not mean, in the case in issue, that the ground of illegality involved by the applicants is well founded.

While accepting that rules relating even to internal powers of the Community

1 — *Translator's note:* The authentic English text appears to do so; the other language versions do not.

bodies have to be interpreted strictly, especially in disciplinary matters, considerations of order and logic and practice force one to observe a clear distinction between the manifestations of intention of the body concerned, constituting the expressions of a power to deliberate and involving value judgments and the existence of a certain margin of discretion, and purely ancillary activities within the sphere of the administrative procedure. The former, by reason of the binding nature they have for the institution, cannot be delegated at the behest of individual officials to whom their exercise has been entrusted, whereas purely ancillary activities do not necessarily have to be carried out by the body to which they are entrusted, even if they have always to be exercised under its responsibility.

Such a distinction leads one to admit that an official nominated by the appointing authority to take a decision can confer on a sufficiently qualified subordinate the performance of a purely ancillary activity, which is merely a preliminary in relation to the decision itself. This power corresponds to the requirements imposed in reality in the running of every administration, without leading on the other hand to a dangerous confusion in the distribution of the powers to make decisions.

In the case in issue, the Director of Personnel, who had the power to decide when to commence a disciplinary procedure in respect of the applicants, delegated to the Head of the Division of Individual Rights the performance of a preparatory phase of the above-mentioned decision, i.e. the preliminary hearing of the parties concerned. The Head of the Division of Individual Rights must be considered as properly qualified for the task entrusted to him. The duties of the Head of Division were limited to informing the officials concerned of the results arrived at by the bodies which had made reports on them, and to drawing up minutes of the statements made by the parties, which were then submitted to the authority competent to decide on the opening of disciplinary proceedings. Furthermore it can be seen that this delegation of a function not having a decisive effect (and which in the case in issue amounted merely to fact-finding) to an official other than the one specified in the Commission's decision of 26 February 1971, cannot harm the officials concerned, who have in particular during the disciplinary procedure the fullest opportunity both to establish their point of view even as to the minutes of their preliminary hearing, and to correct and complete the statements they had made.

Even the criticism relating to violation of the rights of the defence is linked to the same factors discussed above, and consequently it must be disregarded. It can be seen from the report relating to the hearing of the applicants, conducted by Mr De Groote, that he particularly explained to the two persons concerned (interviewed separately) the contents and the conclusions arrived at by the administrative authorities which had made inquiries about them. Each of the two persons concerned had the opportunity to put forward his observations on the matter, and that is what each did. This was all accurately explained in the report presented by Mr De Groote to the Director of Personnel and it is on the basis of the minutes (not contested as such) that the Director decided to open disciplinary proceedings in respect of the two applicants.

This method of procedure seems to comply perfectly with the criteria of good administration and cannot harm the ability to defend and to contradict, which had to be guaranteed in the disciplinary procedure subsequently undertaken.

The applicant in Case 46/72 invokes in additions, as a separate ground, the objection that there was an erroneous appraisal of the facts, and he refers to the words 'exortion' and 'fraud' used with regard to him in the first stage of the disciplinary procedure.

The fact that at a preliminary stage in this procedure, in documents concerning the applicant in Case 46/72 words were used to describe the behaviour of the officials concerned (taken from the report of the 'security office' and quoted in the abovementioned minutes) which are not really apt to describe their behaviour in legal terms, does not cause them any harm, since the text of the decision concluding the procedure in respect of them makes no reference to such words.

Moreover, the seriousness of the illegal act certainly does not derive from the terminological description used in the statement of the facts. It is these facts that count, in their existence and their effects. Thus it is obvious that a possibly inexact appraisal of the facts alleged, which is found at the beginning of the disciplinary proceedings, could not in any way vitiate the validity of the final decision, since the latter is based on precise elements of fact and their correct appraisal. One of the functions of the disciplinary procedure is to ascertain the relevance and evaluate correctly the facts on which the competent authority has decided to commence proceedings.

So I must submit that the criticisms made by the applicants, both with regard to Article 5 of the decision and the second paragraph of Article 87, of the Staff Regulations, and with regard to the rights of defence of the officials in relation to the application of the said second paragraph of Article 87, should be dismissed.

The applicants also invoke an infringement of Article 8 and 9 of Annex IX of the Regulations on the ground that the opinion of the Disciplinary Board was signed by its Chairman, which makes one think that the Chairman might have participated in the Board's decision, contrary to the principle prescribed by the first paragraph of Article 8. This provision, if read with Article 9, shows (it is contended) that the Regulations meant to make a clear distinction between the chairman and the members of the Disciplinary Board. In particular it can be seen from these Articles that the opinion of the Disciplinary Board must not be signed by the chairman.

It does not follow from the minutes of the Disciplinary Board's decision of 7 March 1972 that the chairman voted. Moreover, one cannot even presume that he participated in any way, since the members of the Board reached their decision unanimously and in any case there was no question of any necessity for an intervention by the chairman in the decisionmaking process of the disciplinary body.

The chairman's signature at the foot of the Board's opinion only gives evidence of his participation in the procedure and does not constitute in any respect a proof of the irregularity pleaded by the applicants. Such irregularity, even if it was established, would certainly not be sufficient to invalidate the decision subsequently made by the appointing authority.

The applicant in Case 46/72 attacks the decision for having imposed on him a disciplinary measure out of all proportion to the seriousness of his offences.

While not disputing the facts attributed to him, he adduces an interpretation of them tending to diminish the seriousness of his misconduct. He seeks to dissociate his behaviour, as to the aims pursued and as to the effects, from that of Drescig, claiming that he had asked solely in the interests of Miss Oger and had gained no pecuniary benefit for himself.

For this reason, he claims that the disciplinary measure inflicted on him is excessive in relation to the relative seriousness of his responsibility, and considering the disciplinary measure imposed on Drescig for a far greater misconduct.

It does not follow that by this criticism De Greef wished to raise the plea of misuse of powers. In default of a legal formulation adduced by the person

concerned, the Court can nevertheless itself define to which of the grounds of action provided by the Treaty is to be attributed to the defect invoked by the applicant in the light of the arguments he has developed. I rather think that the applicant by this plea simply meant to ask the Court to reduce 'ex aequo et bono' the disciplinary measure imposed on him.

However that may be, in the absence of any factor from which there might be inferred the existence of a misuse of powers to the detriment of the applicant, and apart from cases where there is a serious and obvious disproportion between the imputed act and the disciplinary measure imposed, one cannot question the exercise of the discretionary power enjoyed by the administrative authority in its appraisal of the seriousness of the disciplinary measure appropriate to the official's misconduct.

It is true that the applicant criticizes the defendant for having improperly appraised the facts, because the latter did not take into account that the applicant did not benefit in the slightest (and had no intention of doing so) from the sum paid by the person concerned to obtain a post in the Commission's departments. But such a point is completely unfounded because, whilst it does not appear that the contested decision contains anything to refute this point, the fact that De Greef actively and on his own initiative participated, even without financial gain, in a series of acts having a clearly illegal aim and such as to damage the reputation of the institution to which he belonged, constitutes a serious offence which fully justifies the disciplinary measure imposed.

I said at the beginning that fortunately the Court did not have to embark upon investigations into the very unseemly facts in this case. We do not therefore wish to draw any inferences about the different aims which the parties sought in putting into effect the common plan contrary to the requirements of dignity and honesty imposed on officials of the European Institutions. But it is certain that there is proof beyond all doubt of the joint participation necessary to attain a result consciously desired by both of them. In this context the Court does not have to examine the relative suitability of the measures adopted, and if the Commission decided to impose less severe measures on De Greef, it is not for the Court to comment on this; but still less can the Court impose a further discrimination between those jointly responsible for the illegal transaction.

Thus in my opinion the two actions should be dismissed.

The costs will be dealt with in the normal way prescribed by the Rules of Procedure for actions by officials which are dismissed by the Court.