OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 18 SEPTEMBER 1980

My Lords,

This action is brought under Article 91 of the Staff Regulations by a member of the Court's own staff. It is thus one of those rare but embarassing cases where the Court in its judicial capacity finds itself compelled to sit in judgment upon itself as an institution responsible for its own administration. To be judge in his own cause, and in circumstances moreover where all the *dramatis personae* are personally known to him, is a role that none of us would normally accept. But in this category of case we cannot, alas, escape it. I approach the case on the footing that, with one exception, my duty is to put out of my mind any knowledge I may have of the facts other than knowledge derived from the pleadings and the documents annexed to them. The one exception is that, after the hearing, there was, fortuitously, brought to the attention of the Members of the Court, in their administrative capacity, a fact which may be material and which was not mentioned during the proceedings in the case. That fact I feel unable to ignore and I will advert to it in due course.

The applicant is Mr H. G. F. L. Dautzenberg who is the Court's Chief Librarian. He is now aged 53. He joined the staff of the Court in 1963 at Grade A 6, was promoted to Grade A 5 in 1966 and to Grade A 4 in 1974.

The Library is one of two services making up the Library and Documentation Directorate of the Court, of which the head is an official of Grade A 2. The other service in that Directorate is the Documentation Service, which is headed by an official of Grade A 3, Miss Maggioni.

Miss Maggioni has had what has been described as a "lightning career". She joined the staff of the Court in 1969 at Grade A 6, was promoted to Grade A 5 in 1974, to Grade A 4 in 1976 and to Grade A 3 in 1978. She is now 41. Although Mr Dautzenberg acknowledges Miss Maggioni's merits, her promotion to Grade A 3 was a disappointment to him, because he had aspired to the A 3 vacancy which she was chosen to fill. He did not however challenge her promotion to it in any way.

Successive heads of the Library and Documentation Directorate (Mr Sperl and Mr Daig) have since 1976 pressed for the promotion of Mr Dautzenberg to Grade A 3. In so doing they have emphasized the excellence of his work, his age and his seniority, particularly in relation to the age and seniority of Miss Maggioni, the lack of balance inherent in having within the Directorate one service headed by an official of Grade A 3 and

the other headed by an official of Grade A 4, when the responsibilities of the latter are no less than those of the former, and also an incongruity arising from a decision of the Registrar dated 9 March 1966 and never revoked naming Mr Dautzenberg deputy head of the Directorate.

In its budget for 1979 the Court sought the "conversion" of three A 4 posts into A 3 posts, that of Mr Dautzenberg, that of the head of the Financial Service, Mr Fetler, and that of the head of the Personnel Service, Mr Koens. The budgetary authorities granted only one, without specifying which it should be.

On 21 March 1979 the Court, in its capacity as appointing authority for its officials of Category A, adopted a formal decision whereby, on the basis of Articles 45 and 46 of the Staff Regulations and of a proposal from the Registrar, it appointed Mr Fetler Head of Division as from 1 April 1979 and promoted him from Grade A 4 to Grade A 3. (A copy of the decision is annexed to the Defence.) Articles 45 and 46 of the Staff Regulations are, Your Lordships remember, about promotions. It does not appear from the papers that there was any prior decision allotting the new A 3 post to the Financial Service or that any notice of vacancy was published in respect of that post.

On 25 June 1979 Mr Dautzenberg lodged a complaint under Article 90 of the Staff Regulations against the decision of 21 March 1979. (A copy of the complaint is Annex 5 to the Application.) Mr Dautzenberg rested his complaint upon two grounds. The first was that, on the occasion of Miss Maggioni's promotion in 1978, Mr Sperl had told him that the Registrar had given an assurance that the next available A 3 post would be awarded to him. The Court's failure to act in accordance with that assurance infringed, so Mr Dautzenberg said, his legitimate expectations. The second ground was that the decision was unlawful because it cannot have been taken, Mr Dautzenberg was convinced, with full knowledge of the facts and arguments militating in favour of Mr Fetler and of himself respectively. Whilst he did not dispute Mr Fetler's merits, Mr Dautzenberg considered in particular that the Court should have taken into account that he had been recommended for promotion since 1976 whereas Mr Fetler had first been recommended for promotion only in 1978. On those grounds Mr Dautzenberg asked that the decision be annulled and that he be promoted to Grade A 3.

On 5 October 1979 the Court, as appointing authority, adopted a decision rejecting Mr Dautzenberg's complaint (Annex 7 to the Application). The reasons given in the preamble to the decision for rejecting his first ground of complaint were that Article 45 provided that promotion should be by decision of the appointing authority, that, even if assurances as to his prospects of promotion had been given to him by his immediate superior or by the Registrar, such assurances could not bind the appointing authority, and that Mr Dautzenberg must have known this. The reasons given for rejecting his second ground were:

"En attribuant une promotion, l'Autorité investie du Pouvoir de Nomination fixe

son choix compte tenu de l'examen comparatif des mérites de chaque candidat et de leur rapport de notation.

Dans le cas présent, l'Autorité Investie du Pouvoir de Nomination a fait un choix en conformité avec ces principes, tenant compte de l'ensemble de la carrière des intéressés, des exigences des différents services et de tous les aspects qu'impliquait le choix à faire."

On 8 January 1980 Mr Dautzenberg commenced the present action. (From now on I propose to refer to the Court in its capacity as appointing authority and as defendant in the action as "the Defendant" to distinguish it from the Court acting in its judicial capacity).

In his Application and again in his Reply Mr Dautzenberg put forward the same claims as in his complaint, viz. that the decision of 21 March 1979 should be annulled and that he should be promoted to Grade A 3.

In limine, however, he made what was at first sight a rather ambiguously worded application for the production of documents. It was however explained on his behalf to be an application for production of the papers placed before the Defendant in 1978 and in 1979, on the basis of which the Defendant decided to promote on the first occasion Miss Maggioni and on the second Mr Fetler. Your Lordships did not grant that application and much of the argument put forward on Mr Dautzenberg's behalf at the hearing was directed to that circumstance. In my opinion Your Lordships were right not to grant the application. The papers relating to Miss Maggioni's promotion could not be relevant since her promotion is not in issue in the action. As to those relating to Mr Fetler's promotion, the application for their production was made on the footing that the question in the case was whether the Defendant had correctly applied Article 45 of the Staff Regulations, i.e. had given proper consideration to the comparative merits of Mr Fetler and Mr Dautzenberg. For the reasons that will appear in a moment I do not think that that is the question.

In the Application, the Defence and the Reply the parties developed arguments on the two points raised by Mr Dautzenberg's complaint and by the reasoning in the Defendant's decision rejecting it, i.e. first whether Mr Dautzenberg's legitimate expectations had been infringed and secondly whether there had been a proper application of Article 45.

On the first point those arguments added little that was new. On behalf of Mr Dautzenberg it was submitted that the Defendant's interpretation of the concept of "legitimate expectations" was too narrow and in particular that it overlooked the extent to which, in the minds of officials of the Defendant, the Registrar incarnates its authority. In my opinion, however, there can be no doubt that, except perhaps in circumstances such as to give rise to an estoppel (which the circumstances of this case as pleaded do not) an assurance given by the Registrar cannot bind the Defendant in the exercise of its powers as appointing authority.

On the second point a new contention was advanced by the Defendant in its Rejoinder. This was that the Defendant, when it found that the budgetary authorities had granted only one of the three "conversions" of A 4 posts into A 3 posts that it had sought, and that those authorities had not specified to which service the post should belong, was confronted

with a choice, not so much between three officials as between three services. It had to decide which of those services most urgently required to have as its head, having regard to his responsibilities, an official of Grade A 3. That contention was placed in the forefront of the Defendant's argument at the hearing.

The contention is in my opinion well-founded in law. The Staff Regulations do not in terms provide for the "conversion" of posts. What is loosely called the "conversion" of a post consists strictly speaking, I think, in the deletion of a post from the list referred to in Article 6 of the Staff Regulations and the insertion in that list of a new post in a higher grade. That new post then falls to be filled in accordance with the procedure laid down in Articles 4 and 29 — see Case 21/68 *Huybrechts* v *Commission* [1969] ECR 85. Before that procedure can be embarked upon, however, the duties attaching to the new post must be determined. Where the duties attaching to each of several existing posts would in themselves justify their being transferred to the new post, the choice between them must be made by reference to the degree of responsibility appertaining to them respectively and not by reference to the respective merits of their current incumbents — see Case 25/77 *De Roubaix* v *Commission* [1978] ECR 1081 (particularly paragraphs 19 and 20 of the judgment and my opinion at pp. 1094-1095), the decision in which was foreshadowed by a dictum of the Court in Case 90/74 *Deboeck* v *Commission* [1975] 2 ECR 1123 (paragraphs 9 and 10 of the judgment, and see my opinion at p. 1146). Thus Article 45 can come into play only after the duties attaching to the new post have been determined, if the appointing authority decides under Article 29 (1) (a) to fill the new post by promotion and if there are several candidates for it.

It was suggested on behalf of the Defendant that those principles had been adhered to here, even if the procedure may have been somewhat telescoped. The documents do not however bear that out. The decision of 21 March 1979 merely appoints Mr Fetler Head of Division and promotes him to Grade A 3 without mentioning the Financial Service. The preamble to the decision of 5 October 1979, whilst it mentions the "exigences des différents services", does so only after having referred to "l'examen comparatif des mérites de chaque candidat" and to "l'ensemble de la carrière des intéressés", and before going on to refer to "tous les aspects qu'impliquait le choix à faire", thereby strongly suggesting that the distinction between the relevance of the needs of the various services and the relevance of the merits of each candidate was not present to the minds of its authors. Most significantly the arguments in the material part of the Defence totally overlook that distinction. The inference is irresistible that it was only when they came to draft the Rejoinder that the Defendant's advisers woke up to what the law really was.

That being so this action must, in my opinion, succeed, because it is impossible to be sure that, if the Defendant had

addressed itself to the right questions in the right order, the outcome would have been the same.

What relief then should Your Lordships grant Mr Dautzenberg? Your Lordships clearly cannot, acting in a judicial capacity, promote him to Grade A 3 as he asks. Nor am I convinced that it is necessary in the circumstances to impose upon Mr Fetler the hardship of having his promotion annulled. It is here that the item of information that I mentioned at the outset as having come to our notice fortuitously since the hearing may be relevant. That item of information is that there is available to the Defendant a vacant A 3 post, which is at present assigned to the Information Service, but which is not needed for that Service at present. It is not of course for me to say this afternoon whether that post could, much less that it should, be transferred to the Library. What is clear, in my opinion, is that the case should go back to the Defendant, as appointing authority, for reconsideration. That result can be achieved by annulling its decision of 5 October 1979, which will require it to consider Mr Dautzenberg's complaint afresh. In that connexion it is relevant to bear in mind that that decision is not merely confirmatory of a previous decision and so not open to challenge. It is the only decision of the Defendant addressed to Mr Dautzenberg and, moreover, its only reasoned decision in the whole case. Cases 33 & 75/79 *Kuhner* v *Commission* (28 May 1980 — not yet reported) are, in my opinion, in that respect distinguishable.

In the result I am of the opinion that Your Lordships should:

(1) Declare void the Defendant's decision of 5 October 1979 rejecting Mr Dautzenberg's complaint and remit the case to the Defendant for further consideration;

(2) Order the Defendant to pay the costs of the action.