OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 10 December 1991 *

Mr President,
Members of the Court,

1. In this appeal Mr Antonino Pitrone asks the Court to set aside the judgment delivered on 23 October 1990 [1] by the Court of First Instance of the European Communities.

2. That judgment dismissed Mr Pitrone's application for annulment of the decision of 11 November 1987 appointing Mr Walker to the post of Head of Specialized Department XXI-01 of the Commission and reinstatement of the applicant as the person responsible for data processing in Directorate-General XXI.

3. Mr Pitrone, an administrator with the Commission from 1973, took over responsibility for the data processing work of the Customs Union Service from 6 February 1984. On 20 February 1984 he was appointed 'Information Systems Manager'.

4. On 20 November 1984 Mr Pitrone was appointed coordinator of the project on the development of computerized administrative procedures ('the CD project').

5. In November 1985 the Directorate-General of the Customs Union Service instituted a recruitment procedure for the post of technical manager of the CD project, to work 'in cooperation with the project coordinator, with overall responsibility for the CD project'.

6. On 23 April 1986 the Directorate-General for Customs Union and Indirect Taxation (DG XXI) was set up.

7. On 1 July 1986 Mr Walker was recruited as a temporary employee in Grade A 4 on a five-year contract as Technical Manager of the CD project, under the responsibility of Mr Pitrone.

8. By memorandum No 6458 of 6 November 1986 Mr Klein, the Director-General of DG XXI, assigned to the appellant duties including the finalization of the legislation relating to the harmonized system, the combined nomenclature and the integrated customs tariff of the European Communities (Taric). This legislation was to enter into force on 1 January 1988.

9. Mr Pitrone had asked for and obtained a statement that he would only be 'temporarily' responsible for these new tasks.

10. The memorandum added that Mr Walker would temporarily assume Mr Pitrone's responsibility for the coordi-

* Original language: French.
1 — Case T-46/89 [1990] ECR II-577.

nation of the CD project, and that Mr Strack was temporarily appointed Information Systems Manager in place of Mr Pitrone.

11. Following a change in the organizational structure of DG XXI, Mr Walker was, by a decision of 11 November 1987, appointed to the new post of person responsible for computerization and data processing, which was directly attached to the Director-General.

12. In a memorandum to the Director-General of 9 February 1988 Mr Pitrone, having completed his work on the implementation of the Taric, asked to return to his former duties as CD Project Coordinator and Information Systems Manager.

13. On 11 February 1988 the appellant, in complaint No 19/88, sought annulment of the decision of 11 November 1987 appointing Mr Walker and his own reinstatement as the person responsible for data processing. In a separate complaint, No 18/88, he requested true copies of all the documents concerning the appointment of Mr Walker.

14. In memorandum No 1181 of 17 February 1988 from the Director-General of DG XXI, Mr Pitrone was informed that his request for reinstatement was rejected, that the post of CD Project Coordinator had been abolished, and that Mr Walker had been appointed Head of the new specialized computer department.

15. On 16 May 1988 Mr Pitrone lodged a complaint through official channels against the abovementioned memorandum of 17 February 1988, and repeated his request for reinstatement in his former position.

16. The two administrative complaints of 11 February 1988 were rejected by the Commission on 7 July 1988. The complaint of 16 May 1988 was impliedly rejected.

17. By application of 7 October 1988 Mr Pitrone brought an action before the Court of Justice, pursuant to Article 91 of the Staff Regulations of Officials of the European Communities, for the annulment of the decision of 11 November 1987 appointing Mr Walker to the post of Head of Specialized Department XXI-01 and his own reinstatement as the person responsible for data processing in DG XXI.

18. Following the establishment of the Court of First Instance, the case was remitted to that court by an order of the Court of Justice of 15 November 1989.

19. The application was dismissed in the aforesaid judgment, which the Court is now asked to set aside.

20. Mr Pitrone had based his application to the Court of First Instance on seven pleas. As the Commission points out, without this being disputed by the appellant, he has only maintained four of them in his appeal.

21. While in one of the pleas Mr Pitrone argues that the decision of 11 November 1987 appointing Mr Walker as person

responsible for computerization and data processing was intrinsically unlawful, the other three relate to the effect of memorandum No 6458 of 6 November 1986, which in his opinion had the consequence that he did not cease to occupy the post assigned to Mr Walker by the challenged decision.

22. It is thus necessary to consider first of all the pleas relating to the effect and consequences of the memorandum of 6 November 1986, since it is clear that if on 11 November 1987 Mr Pitrone was still the holder of the post assigned to Mr Walker, the decision appointing Mr Walker to a post which was not vacant could not have been lawful.

23. It should be noted at the outset that the Court of First Instance clearly stated *in findings of fact which are final and binding on the Court of Justice* that Mr Pitrone had never held the post of Head of Specialized Department assigned to Mr Walker, as this was a *new* post established following a change in the organizational structure of DG XXI.[2] Mr Pitrone cannot therefore validly maintain before this Court that 'on 11 November 1987 a temporary employee was appointed to a post which was still occupied in law by an official'.[3]

24. It follows that the pleas based on the effect of the memorandum of 6 November 1986 — which refers to a different post from that assigned to Mr Walker by the decision of 11 November 1987 — are of no relevance in assessing the lawfulness of the latter decision. That assessment will therefore be made solely with regard to the plea based on the alleged breach of Article 4 of the Staff Regulations.

25. With respect to Mr Pitrone's request for reinstatement, three pleas are put forward.

26. The first plea argues that there were breaches of Articles 5, 7, 86 and 89 and Annex IX of the Staff Regulations.[4] Mr Pitrone contends in effect firstly that the memorandum of 6 November 1986 was not an 'assignment' to another post and he therefore still continued in his previous post with responsibility for data processing in DG XXI, and secondly that the refusal to reinstate him in that post was a disguised disciplinary measure.

27. The question whether the memorandum of 6 November 1986 is an 'assignment' within the meaning of Article 7 of the Staff Regulations concerns the classification of that document as a matter of law. It is therefore a question of law which is subject to review by the Court.[5]

28. The Court held in the *Hecq* judgment[6] that assignment of 'a temporary task' to an

2 — ... the applicant never held the post of Head of Specialized Department XXI-01, but that of the person responsible for data processing in DG XXI, as he admits in his reply; judgment of the Court of First Instance, cited above, paragraph 27; see also the text of the decision of 11 November 1987, in Annex I to the response: three units are established, directly attached to the Director-General: — Specialized Department XXI-01 computerization and data processing will take over some of the tasks of former division XXI/A/3 ... Mr Walker ... is ... appointed Head of the new Specialized Department XXI-01.

3 — Page 4 of the appeal.

4 — On disciplinary proceedings.

5 — See on this point the Opinion of Mr Advocate General Tesauro in the Schwedler case, paragraph 2 (Case C-132/90 P [1991] ECR 5745).

6 — Judgment of 7 March 1990, paragraphs 10 to 16 (Joined Cases C-116/88 and C-149/88 [1990] ECR I-599, at p. 625).

official by a memorandum from his hierarchical superior is a lawful assignment if it is done in the interests of the service and in conformity with the principle of assignment to an equivalent post. Mr Pitrone has not shown that these conditions were not complied with by the appointing authority.

29. Moreover, the appellant cannot maintain that the memorandum of 6 November 1986 was not an 'assignment' by relying on *facts* subsequent to that memorandum, such as the failure to refer to the memorandum in a certificate delivered at the Commission or an incorrect entry in his personal file.

30. In support of the contention that the refusal to return him to his previous duties constituted a disguised disciplinary measure, he maintains that he suffered enforced idleness from 11 November 1987 to 31 October 1988, when he was reassigned to the division for 'relations with State-trading countries in Europe'.

31. This circumstance was not raised in the Court of First Instance. In any event, it is a point of fact which the Court of Justice cannot examine.

32. The first plea must therefore be rejected.

33. The second plea relies on a breach of the principle of protection of legitimate expectations in that, according to Mr Pitrone, his hierarchical superiors had undertaken to reinstate him in his post.

34. In this respect, the Court of First Instance has already made a definitive finding that

'examination of the terms of the Director-General's memorandum of 6 November 1986 does not permit the conclusion that it could constitute a precise assurance that the applicant could return to his former post'.[7]

35. The second plea, which is one of pure fact, must thus be declared inadmissible.

36. The third plea alleges a breach 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.'

37. The appellant argues that if the memorandum of 6 November 1986 were to be interpreted as implying that the post he occupied was vacant, it would be void because the grounds on which it was based were not stated.

38. If the memorandum were to be interpreted as such a decision, that decision, as

7 — Paragraph 43 of the judgment of the Court of First Instance.

the Court of First Instance found,[8] was not challenged by the appellant within the proper period in accordance with Articles 90 and 91 of the Staff Regulations, and can thus no longer be appealed against.

39. This plea must therefore be rejected.

40. In his final plea Mr Pitrone argues that the appointment on 11 November 1987 of Mr Walker, a temporary employee, as Head of Specialized Department XXI-01 was contrary to Article 4 of the Staff Regulations, which provides that no appointment shall be made for any purpose other than that of filling a vacant post and that a vacant post must be notified to the staff once the appointing authority decides that the vacancy is to be filled. Mr Pitrone claims that in this case there was no vacant post, since the post was still occupied by himself.

41. As the Commission has pointed out, the Court of First Instance dismissed this plea primarily on the ground that Article 4 applies only to posts occupied by officials of the Communities and does not apply by analogy to temporary staff.[9]

42. This last plea is unfounded and must thus be rejected.

43. Consequently, in my opinion, the appeal should be dismissed, and the applicant ordered to pay the costs in accordance with Articles 69(2) and 122 of the Rules of Procedure.

8 — Paragraph 61 of the judgment of the Court of First Instance.

9 — Paragraph 26 of the judgment of the Court of First Instance.