JUDGMENT OF THE COURT (FIRST CHAMBER)
5 MAY 1966[1]

Max Gutmann
v Commission of the EAEC

Joined Cases 18 and 35/65

Summary

1. *Officials — Disciplinary measures — Statement of reasons for — Cannot be supplemented by oral communication of the grounds of complaint alleged against the official concerned —Inadequacy of statement of reasons not justified by concern to protect the reputation of the official concerned*
(EAEC Staff Regulations, Articles 25, 86 and 88)

2. *Officials — Transfer — Discretionary powers of the administration — Transfer otherwise than in the interests of the service may constitute misuse of powers*
(EAEC Staff Regulations, Articles 25 and 29)

3. *Misuse of powers — Proof*

1. For disciplinary measures the grounds of complaint based on the conduct of the official concerned must be indicated, at least in brief, to enable the Court to exercise its power of review, in particular with regard to the seriousness of the offence.
Oral communication to the official concerned of the complaints alleged against him cannot be deemed to supplement the statement of reasons for a disciplinary measure since the Court cannot take it into account in assessing the considerations by which the administration was guided in its actions.
Any concern on the part of the administration to safeguard the reputation of an official who has been subjected to a disciplinary measure cannot be invoked to justify the inadequacy of the statement of reasons therefor, since the measure must remain confidential.

2. Transfer of an official in the interests of the service cannot constitute an act adversely affecting him and falls within the discretionary powers of the administration, which may arrange its departments and move its staff as required for the performance of the tasks assigned to it. However, a transfer may amount to a misuse of powers if it appears, on the basis of objective, relevant and consistent facts, to have been undertaken for purposes other than those stated.

3. Misuse of powers must be proved on the basis of objective, relevant and consistent sources of information.

In Joined Cases 18 and 35/65

MAX GUTMANN, an official of the EAEC, represented by Ernest Arendt, avocat-avoué, with an address for service in Luxembourg at 6 rue Willy-Goergen,

applicant,

1 — Language of the Case: French.

V

COMMISSION OF THE EUROPEAN ATOMIC ENERGY COMMUNITY, represented by its Legal Adviser, Maurice Prelle, acting as Agent, with an address for service in Luxembourg at the offices of the Secretariat of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application for:

— the annulment of a decision of the Commission of 5 February 1965, notified on 18 February 1965, dismissing a complaint by the applicant against two previous decisions relating to his suspension and transfer;

— the annulment of Vacancy Notice No V/IS/40/65, of a decision of the Commission of 20 and 21 January 1965 ordering that an inquiry 'within the disciplinary sphere' be continued, and of a decision of the Commission of 13 May 1965 suspending a final decision on the disciplinary measures pending the judgment of the Court on the first application for annulment;

— damages for non-material injury allegedly suffered by the applicant,

THE COURT (First Chamber)

composed of: L. Delvaux, President, A. Trabucchi and R. Lecourt (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

Mr Gutmann has been employed by Euratom since 1958, acting from 17 August 1960 as Head of Division for Press and Public Relations at the Joint Nuclear Research Centre, Ispra (hereinafter referred to as 'the JNRC'). On 3 July 1964 he was reprimanded for having charged:

— repairs to a personal camera to the Community;

— private telephone calls to the institution.

Prior to the reprimand an official inquiry was held and the applicant made no appeal to the Court in the matter.

On the same date (3 July 1964) Mr Mercereau, Deputy Director-General at the JNRC, sent the following letter to Mr Funck, Director-General in Brussels:

'In accordance with the powers delegated to me as appointing authority I have reprimanded Mr Gutmann.

Attached to this letter you will find copies of the relevant documents in the matter for inclusion in the official's personal file.
I have taken the administrative steps necessary to avoid a recurrence of such events and, on consideration, I do not think as things are at present that a transfer is necessary. However, I may find it necessary to request this should fresh lapses be found to have occurred.'
On 25 September 1964 Mr Gutmann was questioned by Mr Van der Valk, the head of security, on two points:
(1) Complaints about Mr Gutmann's running of the department and in particular his conduct as Head of Division in relation to his staff;
(2) Allegations that Mr Gutmann was misusing the staff and facilities of Euratom for private purposes, such as the purchase of a camera and films at the institution's expense.

At the start of the interview Mr Gutmann, replying to Mr Van der Valk, first stated that the reprimand concerned only, in his opinion, the private telephone calls and the camera, Mr Mercereau having told him that the other points would not be pressed.
On the same day (25 September 1964) the Director-General at the JNRC decided to suspend Mr Gutmann on full pay under the first paragraph of Article 88 of the Regulations. The reason for the decision was given as follows:
'The inquiry has revealed in Mr Gutmann's relationships with his staff, and in his general management, conduct inconsistent with his duties as Head of a Division; he must be suspended from his duties in order to allow these facts to be verified.'
The applicant's office at Ispra was sealed off and he was forbidden access to the Centre so that a full official inquiry could be held.
On 30 September 1964, the 258th meeting of the EAEC Commission approved the decision to suspend Mr Gutmann and ordered an inquiry to be held at the request of the Director of the JNRC, Ispra, 'on the ground of certain irregularities which have been established and of a complaint lodged by a Head of Division'.
On 9 December 1964 the Commission decided, at its 268th meeting, to 'transfer Mr Gutmann to another post in the interests of the service, and to appoint him to the vacant post of Principal Administrator A 5–A 4 in the library of the Information and Documentation Centre as from 16 December 1964' (minute of 14 December 1964), the vacancy notice for the post in question having appeared on 9 December 1964.
On 22 December 1964, Mr Gutmann was received in Brussels by the Director-General, Mr Funck, who gave him a note dated that day which read as follows:
'Subject: your transfer.
You are informed that the Commission at its meeting on 9 December 1964 has decided to transfer you in the interests of the service by appointing you to a post of Principal Administrator in the Directorate for Dissemination of Information, in the library service. The date on which you are to commence your new duties, which will not be later than the end of January, will be communicated to you later.
Signed: W. Funck, Director-General.'
Mr Funck then proceeded to hear Mr Gutmann state his case 'in accordance with Article 87 of the Regulations'. The main points covered in this hearing were those made during the interview of 25 September 1964.
On 5 January 1965, the applicant lodged an official complaint with the President under Article 90 of the Regulations, in which he requested:
'that a decision should first be given on my suspension, which expires on 26 January 1965, and that the decision to transfer me be postponed.'
On 11 January 1964 the applicant received a note signed 'W. Funck' to the following effect:
'Subject: your transfer.
With further reference to may note of 22 December 1964 which I delivered to you in person, you are requested to present yourself to Mr Suenner on Monday 25 January at 9 a.m. to take up your new post.'
On 18 January 1965 Mr Funck sent to the Commission the following note concerning Mr Gutmann's official position:
'1. Acting on the instructions of the Commission and in accordance with the requirements of Article 87 of the Regulations, I interviewed Mr Gutmann on 22 December 1964 assisted by Mr Prelle of

the Legal Department and Mr Bourgeois of the Directorate of Personnel and, at the request of Mr Gutmann, in the presence of Mr Caprioglio. I informed Mr Gutmann of the facts giving rise to the interview. During the interview he denied the substance of some of the facts and disputed the irregularity of the rest.

It therefore seems, on the facts available, that two courses of action are open to the Commission:

— either it can continue its investigation of the matter, bearing in mind that it has still not been possible to investigate very fully a number of points raised in the inquiry;

— or it can regard the disciplinary proceedings as closed.

It is therefore for the Commission, having regard to the suspension, to decide on its line of action in the disciplinary field.

Whatever its decision, it is obvious from the facts already available that there can be no question of Mr Gutmann's resuming his duties at Ispra for the reasons mentioned in paragraph 2, below.

2. In any event the Commission, acting in the interests of the service, has already settled Mr Gutmann's official position by deciding to transfer him to the Directorate for Information Services in Brussels. This occasioned a complaint to the Commission by Mr Gutmann under Article 90 of the Regulations seeking cancellation of his transfer to Brussels and claiming that the transfer was a punitive measure directly connected with the decision to suspend him. It should be noted that the institution's medical adviser has told me that Mrs Gutmann's doctor has informed him of the possible effects which the date of Mr Gutmann's assumption of duty may have on his wife's health.

Mr Gutmann's complaint does not seem justified in view of the facts, which may be summarized as follows:

— since early July 1964 when it was taking the official action necessary to prevent a recurrence of certain conduct which had already led to a reprimand's being addressed to Mr Gutmann, the institution's administration has been considering the possibility of a transfer;

— the reprimand issued on 3 July 1964 contributed to undermining Mr Gutmann's reputation as Head of Division;

— from all the information gathered since then, both from Mr Gutmann's colleagues and from various members of the staff of the institution, it appears that the nature of Mr Gutmann's relationship with his staff was making the atmosphere in his department intolerable and that clearly it was urgently necessary in the interests of the department that he be replaced as Head of Division.

In addition I have to inform the Commission that I communicated to Mr Gutmann in a note of 22 December 1964 the decision to transfer him and that in a letter of 11 January 1965 I invited him to take up his post in Brussels on 25 January.

As a result, my recommendation to the Commission must be that:

— the suspension imposed on Mr Gutmann be lifted as from the date when he commences his duties in Brussels;

— his complaint be dismissed on the above grounds.'

On 20 and 21 January 1965 the EAEC Commission held its 272nd meeting, the minutes of which contain the following passage:

'After considering a note of 18 January from the Directorate for Personnel and Administration the Commission approved the lifting of the suspension imposed on Mr Gutmann with effect from the time when he takes up his duties in Brussels.

It dismissed the appeal lodged by Mr Gutmann against his transfer to the library in the interests of the service and decided that the investigation with regard to disciplinary proceedings should continue.'

On 3 February 1965 a note was sent from Mr Ritter at Ispra to Mr Funck, saying in particular:

'The investigations I have been able to carry out have shown that Mr Gutmann's conduct vis-à-vis his staff and in the performance of his duties makes it impossible for him to continue to work at Ispra.

The problem first appeared when Mr Gutmann was given a reprimand last July, as I then informed you. At the time it still seemed possible that a transfer might not be absolutely necessary; subsequent events have shown otherwise.
Bearing in mind what has happened and the atmosphere in the department at present, my view remains unchanged.'
On 19 February 1965 the applicant received a letter dated 5 February 1965 signed by the Director-General for Personnel and Administration, Directorate of Personnel, Mr Funck, in which the EAEC Commission dismissed his appeal of 5 January 1965 in the following terms:
'In pursuance of Article 6 of the instructions set out in Circular No 7/64, I have to inform you that at its meeting of 20 and 21 January 1965 the Commission considered the complaint by you referred to above.
It has decided that the complaint cannot be entertained for the following reasons:
As regards your transfer:
The Commission has confirmed the decision, as stated in the note which I sent to you on 22 December 1964, to transfer you in the interests of the service. The Commission considers that the objections which you have expressed as regards the decision to transfer you are not borne out by the facts on which they are based; these may be summarized as follows:
— since early July 1964, when it was taking the official action necessary to prevent a recurrence of certain conduct which had already given rise to a reprimand's being addressed to you, the administration of the institution has been considering the possibility of a transfer;
— the reprimand issued on 3 July 1964 contributed to undermining your reputation as Head of Division;
— from all the information gathered since then, from your colleagues as well as from various members of staff at Ispra, it appears that the nature of your relationship with your staff was making the atmosphere in your department intolerable and that clearly it was urgent in the interests of the department that you be replaced as Head of Division.
As regards your suspension:
The Commission has declared that this should be terminated with effect from the the day on which you took up your duties in Brussels. 'In accordance with my note of 11 January 1965, you took up your duties in Brussels on 25 January 1965. Your suspension therefore ceased as from that date.'
On 8 March 1965, Mr Gutmann sent a memorandum stating that he could not accept the account given by the administration of his interview of 22 December with Mr Funck.
On 17 March 1965 Mr Gutmann sent the following note to Mr Funck:
'... I request that a full inquiry with evidence from both sides be held as soon as possible into the grounds for my suspension and transfer, its terms of reference being determined by the administration, and guaranteeing me complete objectivity and the fullest opportunity to state my defence.
My prestige and reputation have been seriously prejudiced by the publicty given to my suspension both in the note to all the staff at the Ispra Centre (EUR/CIS/1282/64 of 13 October) and in a statement made by a spokesman of Euratom ('Telegraaf' of 13 October 1964).
I am obliged, therefore, to make the above request, which will be followed by an appeal to the Court in accordance with Article 91 of the Staff Regulations if no action is taken by 29 March 1965.'
On 30 March 1965 Mr Gutmann lodged Application No 18/65 for the annulment of the decision of the Commission of 5 February 1965, notified on 18 February 1965, together with a request for damages.
On 13 April 1965 Mr Gutmann received from Mr Funck the following reply to his note of 17 March:
'In your note referred to above you requested that an inquiry be held with evidence from both sides into the grounds for your suspension and transfer, "on terms of reference determined by the administration."
As regards the *transfer*, an administrative measure adopted solely in the interests of the service, it resulted, as you are aware, from a set of circumstances established *by the documents which were communicated to you.* No inquiry whatsoever into the matter seems possible.

As regards the *suspension*, I would be grateful if you could inform me under which provision in the Regulations, other than Annex IX thereto, you contemplate the institution of inquiry of this nature; if under this Annex, the Commission will no doubt express its views thereon presently.

As for what you say in the penultimate paragraph of your letter, the 'Telegraaf' article to which you refer mentioned neither the name nor the status of the official in question, nor the facts, so that it seems at least questionable that it does in fact refer to you.

As for the note sent to all the staff at Ispra (EUR/CIS/1282/64 of 13 October 1964) it contains no reference prejudicial to your prestige or your reputation for it states, on the contrary, that suspension "does not itself constitute a punishment".'

Meanwhile on 24 March 1964 the vacancy notice for post No V/IS/40/65 appeared, dated 11 March 1965, concerning a post of Principal Administrator in career bracket A 5–A 4 at Ispra (Press and Public Relations Division), the post held by Mr Gutmann prior to his transfer.

On 13 May 1965 the Commission of the EAEC adopted the following decision:

'The Commission has decided in view of the similarity of subjectmatter between the case pending before the Court of Justice and the matter in which you stated your case to me on 22 December 1964, to postpone a decision in the disciplinary proceedings in the abovementioned matter until the Court has given its judgment in the appeal which you have brought.'

This decision was communicated to Mr Gutmann in a letter of 25 May 1965 signed by Mr Funck.

On 16 June 1965 Mr Gutmann lodged a triple application for the annulment of:

— Vacancy Notice No V/IS/40/65;
— the decision of the Commission of 20 and 21 January 1965 in so far as it decided to continue the investigation with regard to disciplinary proceedings;
— the decision of the Commission of 13 May 1965 to postpone a decision in the disciplinary proceedings until Judgment had been given by the Court in Case 18/65.

II — Conclusions of the parties

A — *In Case 18/65*

In his application Mr Gutmann claims that the Court should:

'I — Declare the application admissible;

II — On the substance declare it well-founded;
and accordingly:
Annul the decision of the Commission of the EAEC of 5 February 1965, notified to the applicant on 18 February 1965, on the ground of illegality, excess of powers, misuse of powers, violation of the rights of the defence, infringement of Articles 25, 29, 86 and 88 of the Regulations;

III — Declare that the defendant is bound to make good the non-material and material damage suffered by the applicant owing to the illegality of the contested decision and order the defendant to pay such damages and interest as the Court sees fit;

IV — Order the defendant to produce:
1. The applicant's original personal file in accordance with the terms of the final paragraph of Article 26 of the Staff Regulations;
2. The minutes of the inquiry referred to in the decision to suspend him dated 25 September 1964;
3. The minutes of the administrative inquiry concerned with the decision;
4. The minutes of the Commission's meetings of 9 December 1964, 20 and 21 January 1965, with all the documents, reports and other material considered by the Commission at its meetings, in so far as they concern the applicant;
5. The minutes of the hearing of the applicant conducted by Mr Van der Valk on 25 September 1965 and by Mr Funck on 22 December 1964;
6. The minutes of the administrative inquiry and the hearings of the applicant prior to the disciplinary action taken on 3 July 1964;

V — Place on record the fact that the

applicant reserves the right to offer any appropriate evidence to establish the facts alleged should the defendant contest them;

VI — Order the defendant to pay the costs of the application.'

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

'Declare the application unfounded;
Dismiss it; and
Order the applicant to pay the costs in accordance with the provisions of Article 70 of the Rules of Procedure of the Court;
As regards the requests for the production of documents made at head IV of the conclusions in the application:

— place on record the fact that the defendant produces the documents requested by the applicant at Nos 1, 3, 4 and 5 of the abovementioned passage in the conclusions;
— place on record the fact that no 'minutes' of the inquiry mentioned at point 2 exist;
— declare that there is no ground for ordering production of the documents (represented under No 6) which preceded the reprimand of 3 July 1964, as this does not concern the dispute;

subject to the usual reservations.'

In his reply the *applicant* claims that the Court should:

'I — Order that document No 123 (file VIII) be withdrawn from his personal file on the ground that it lacks the applicant's signature required by Article 26 of the Regulations;

II — Preliminary requests:

A — Request for the production of documents:
Before proceeding any further with the case and before commencement of the hearing on the substance of the application, declare that the defendant must produce the following documents and material:

1. The minutes of the administrative inquiry and the hearings of the applicant which preceded the disciplinary action of 3 July 1964, together with the file of the entire disciplinary proceedings;
2. The documents (memoranda, minutes or any other relevant material) establishing various instances of "irregular conduct" of which the applicant is alleged to have been guilty and the "complaint" lodged by a Head of Division;
3. The report of the administrative inquiry led by Inspector Lacroix and referred to in the statement of defence, page 3, final paragraph;

B — Questions to be put to the defendant:
Before proceeding any further with the case and before commencement of the hearing on the substance of the application, order the defendant to answer the following questions:

1. What are the alleged facts which constituted the basis for the decision to suspend the applicant taken on 25 September 1964?
2. When and how did these facts come to the notice of the authorities?
3. Are these facts merely "alleged" or has proof of them been adduced?
4. What are the consequences envisaged by the Commission's decision of 30 September 1964 (statement of defence, Schedule 2 *ter*) according to which Mr Van der Valk is to continue his inquiry and report to the Commission as soon as possible?
5. What are the consequences envisaged by the Commission's decision of 20 and 21 January 1965 (statement of the defendant, Schedule 2 *bis*) to the effect that 'the inquiry within the disciplinary sphere should be continued'?
6. Is the inquiry within the disciplinary sphere now complete? If not, what is the approximate date by which the Commission thinks it can bring this disciplinary inquiry to a close?
7. Why was the transfer decided upon on 9 December 1964 and originally fixed for 16 December 1964 postponed to 25 January 1965?

III — The substance:

A — As regards the documents produced by the defendant:
Declare that the factual evidence contained in documents Nos 3, 13, 14, 15, 15, 17, 18a, 18b of 18c annexed to the statement of defence, will not be taken into account because the examination of, and statements made by, third parties were included in contravention of the principle that both parties must be heard and of the rights of the defence and that the circumstances did not ensure their objectivity and veracity;
Alternatively:
Place on record that the applicant formally contests the facts alleged against him in these statement of third parties; allow him to bring evidence to refute them;
Place on record that the applicant does not accept as a valid and true account of the interview held on 25 September 1964 that drawn up by Mr Van der Valk exclusively and without any prior notification; place on record that the applicant had no knowledge of this document until he read the statement of defence lodged on 30 April 1965;

B — As regards the suspension:
(a) Declare that the administration had known of the "serious matters alleged" against the applicant since before 3 July 1964, the date of the reprimand, and that these are therefore covered by that reprimand;
(b) Hold that no measure of inquiry in order to clarify the "serious matters alleged" was adopted, either between 3 July 1964 and 25 September 1964, the date of the suspension, or after 25 September 1964;
Accordingly, declare that this "allegation of serious matters" has no genuine proof or indication of proof to support it;
(c) Declare that between 3 July 1964, the date of the reprimand, and 25 September 1964, the date of the suspension, no new *ground* for complaint had arisen to justify the suspension;
Accordingly, annul the decision to suspend him on the ground of infringement of Articles 25, 88, and 86(3) of the Staff Regulations;

C — As regards the transfer of 9 December 1964:
(a) Declare that no proof of "fresh lapses" brought to the defendant's notice early in December 1964 and leading the defendant to the conclusion that the applicant's conduct in the department made it impossible for him to continue in his post, has been adduced;
(b) Declare that the facts which led to the decision to transfer him are identical with those alleged against him as the ground for his suspension;
(c) Declare that the transfer in the interests of the service consequent upon the alleged breaches of conduct was decided upon without the applicant's having been heard beforehand;
As a consequence, annul the decision to transfer him:
— for infringement of Articles 4, 24, 25, 45(2), 86 (3) and 87 of the Staff Regulations;
— for being incompatible with the suspension still in force on 9 December 1964;
— for infringement of the rights of the defence;
— for infringement of the general duty to assist officials, keep them informed, and have regard to their personal circumstances;

D — As regards the application for damages for a wrongful act or omission:
Declare that the defendant's behaviour towards the applicant amounts to a series of wrongful acts or omissions and that the defendant is bound to compensate him for the non-material and material damage thus caused;
Order the defendant to pay such

damages and interest as the Court sees fit to award;

IV — As to costs:

Order the defendant to pay the costs of the application;

V — Application for cases to be joined:

Order the present application and that lodged by the applicant on 16 June 1965 which appears on the Register as Case No 35/65 to be joined on the ground of similarity of subject-matter.'

In its rejoinder the *defendant* contends that the Court should:

'Find for the conclusions set out in its statement of defence;

Declare that the preliminary requests made by the applicant are neither admissible nor relevant; dismiss them and proceed with the oral arguments;

Declare that the information contained in documents Nos 3, 10, 14, 15, 16, 17, 18a, 18b and 18c, annexed to the statement of defence, was properly obtained, no rule that both parties must be heard nor any right of the defendant being involved where an institution is collecting information from within its own departments on the running of the latter for the purposes of administration and not disciplinary action;

Declare that none of the heads of the application in paragraph III, B and C (pp. 41 and 42) of the reply is admissible, relevant, or well-founded either in law or in fact; dismiss them;

Reject on the ground of inadmissibility, as raising fresh issues, the requests for the annulment of the suspension on 25 September 1964 and the transfer on 9 February 1965, which were not set out in the original application and for which the time-limit for bringing an appeal imposed by Article 91 of the Staff Regulations has expired;

Subject to the usual reservations.'

B — *In Case 36/65*

The *applicant* claims that the Court should:

'1. Join this application to that lodged on 30 March 1965 and entered in the Register as Case No 18/65, on the ground of similarity of subject-matter;

2. Declare this application admissible;

3. On the substance, declare it well-founded;

   (a) Accordingly, annul Vacancy Notice V/IS/40/65 concerning the vacant post of Principal Administrator in career bracket A5–A4 at Ispra (Press and Public Relations Division), following the annulment of the decision of transfer in Case 18/65;

   (b) Annul the decision of the Commission of the European Atomic Energy Community of 20 and 21 January 1965, and the decision of the Commission of the EAEC of 13 May 1965, on the ground that they infringe Articles 88 and 25 of the Staff Regulations, and for misuse of powers;

   (c) Declare that the said decisions of 20 and 21 January and 13 May 1965 constitute a wrongful act or omission;

   order the defendant to pay the applicant damages as settled by the Court, as compensation for the non-material damage caused to him;

4. Order the defendant to pay all the costs of the application.'

The *defendant* contends that the Court should:

'Declare the application admissible as to form but not well-founded;

Dismiss it;

Order the applicant to pay the costs, subject to the requirements of Article 70 of the Rules of Procedure.'

III — Summary of the arguments and submissions of the parties

A — *The legality of the Commission's decision of 5 February 1965, notified on 18 February 1965, rejecting the appeal made by Mr Gutmann on 5 January 1965 against his suspension and transfer*

1. The suspension

   (a) *Complaint of infringement of Article 25 of the Staff Regulations*

The *applicant* claims that no reasons are

given for the decision, which merely reproduces the text of Article 38 of the Staff Regulations.
The *defendant* contests this claim and says that in the text of the decision reference is expressly made to the inquiry carried out, to the applicant's behaviour with regard to his staff, to the management of his department and to the suspension's being a necessary but temporary measure which had to be taken in order 'to clarify the facts.'
It recalls that on the day the measure was adopted it was explained to the applicant by the Head of the Security Service.

(b) *Complaint of infringement of Article 88 of the Staff Regulations*

The *applicant* claims that the suspension was in reality a disciplinary measure, and that this was proved by the facts set out in the file (lack of objectivity in the inquiry). He stresses that the two conditions imposed for all disciplinary proceedings were not satisfied: serious misconduct was not established, nor could it be, owing to the suspension of the disciplinary proceedings and the failure to conduct a genuine inquiry; and the avoidance of publicity (press references, reply by spokesman etc.) was not ensured.
The *defendant* replies that the facts alleged are capable of constituting sufficient reasons for the suspension, which is purely a means of preserving the *status quo;* there is no provision in Article 88 concerning the publicity to be given to measures taken under it, and furthermore no specific publicity has occurred, the circular of 13 October being intended solely to reduce tension, as is shown by the fact that no names were mentioned and by the statement that the measure adopted does not in itself constitute disciplinary action.
Lastly, it explains that the spokesman, whose statement could be taken as more or less favourable by his hearers, could not have intended replying to the reference in the papers, since the article complained of itself referred to the spokesman's statements.
The defendant does not think that the complaint relating to the alleged publication of the disciplinary measure is relevant to the argument as to legality.

(c) *Complaint of infringement of Article 86 (3) of the Staff Regulations*

The *applicant* invokes the rule *non bis in idem*, saying that the events which led to his suspension have already been the basis of the reprimand which he had received. If this is not so, he is unaware of the fresh misdemeanour alleged against him; any such would in any case be difficult to prove, he claims, bearing in mind the dates on the various documents contained in the file, and the truth of the allegation would not be apparent unless the file of the disciplinary proceedings concerning the reprimand were first consulted.
The *defendant* replies that there are two distinct measures and that the facts alleged in each instance are not the same, as the Commission did not maintain in the disciplinary proceedings its allegations of abuse of authority as motivating the reprimand.

2. The decision of transfer

(a) *Complaint of infringement of Article 86 (3) of the Staff Regulations*

Here, too, there is a breach of the rule *non bis in idem*, according to the applicant, in that the transfer is, he claims, a disciplinary measure. He asks what facts could have given rise to it if not those already forming the basis of the reprimand and suspension.
The *defendant* generally refutes the allegation that the transfer is a concealed disciplinary measure and draws the conclusion in particular that it cannot therefore violate the rule *non bis in idem.*
It refers to the requirements of the interests of the service as described in the letter from Mr Funck to the applicant of 19 February 1965.

(b) *Complaint of infringement of Article 88 of the Staff Regulations*

The *applicant* states that the order to transfer him came during the suspension imposed on him, that the two measures are incom-

patible, since their combination amounts to a failure to observe the general duty to safeguard the interests of officials (Fürsorgepflicht) owed by the administration to all its officials, particularly where they have already been the subject of severe measures.
The *defendant* considers that the course of action to be adopted in the interests of the service may become apparent during a period of suspension just as at any other time in an official's career, and that no provision prevents the necessary administrative, as opposed to disciplinary, measures from being taken.
It explains further that any official may be transferred, particularly to a place where he has already worked for two years and which offers housing and educational facilities for children.
Lastly, it recalls that the Director-General for Administration allowed the applicant a month and a half in which to start his new employment.

(c) *Complaint as to statement of reasons*

Relying on various documents in the file, the *applicant* complains that the reasons given are false or inaccurate in view of the facts which led up to the transfer and that they were based on the effects of the reprimand on his relationship with his staff.
The *defendant*, in replying, likewise refers to the file, emphasizing that a reprimand 'despite the supposed confidentiality and secrecy of disciplinary measures' cannot avoid becoming known in one way or another.

(d) *Complaint of infringement of Articles 4 and 29 of the Staff Regulations*

The *applicant* believes that the fact that the transfer came at the same time as the posting of the vacancy notice in Brussels for the post to which he was transferred without having applied for it proves that the Staff Regulations were infringed.
The *defendant* replies that Article 29 of the Staff Regulations in no way prohibits an institution from filling a vacant post on the same day as the vacancy notice for it is posted, or from deciding to transfer to another post an official who has not applied for it.
The *applicant* states that he was transferred to a non-existent post and that no serious work has been required of him for some time.
The *defendant* replies that after the inevitable period of adjustment the applicant is at present occupied in performing the duties for which the department in which he is employed is responsible.

(e) *Complaint of infringement of Article 110 of the Staff Regulations and of the provisions concerning vacancy notices*

The *applicant* points out that the vacancy notice advertising the Brussels post to which he was transferred was posted without prior notification to the Staff Committee and gave no precise indication of the nature of the duties or the closing date for applications.
The *defendant* replies that Article 110 of the Staff Regulations does not require the Staff Committee to be notified in respect of general provisions; that the lack of precision is due merely to a simplification of the procedure in order to obtain a quick result, and that the Staff Regulations do not require a closing date to be fixed for receipt of applications.

(f) *Complaint of infringement of Article 25 of the Staff Regulations*

The *applicant* complains of the absence of the statement of reasons on which the contested decision is based, and of the claim that it was taken in the interests of the service, which is unfounded, as the file shows.
The *defendant* replies that the only decisions which need state the reasons on which they are based are those adversely affecting an official—not a case in which a transfer is made in the interests of the service.

(g) *Complaint of misuse of powers*

The *applicant* complains that the allegations of fact and the file of the case disclose that the decision to transfer him was taken in order to avoid having to take a new formal disciplinary measure and to evade the necessity for observing the rights of the defence.
The *defendant* considers that the applicant is seeking the benefit of the guarantees

provided for in disciplinary matters whilst the transfer does not come within the province of the latter, even though the decision to transfer him was taken on the same day as the decision to reprimand him.
It recalls that the applicant was, moreover, heard on two occasions.

(h) *Complaint of infringement of Article 45 (2) of the Staff Regulations*

The *applicant* claims that the transfer effected an alteration in his service without the holding of a competition.
The *defendant* replies that the Regulations set up only one true service ('cadre'), the linguistic service, which is not relevant to this case.

B — *The prejudicial character of the suspension and transfer decisions*

The *applicant* claims that the file reveals the existence of wrongful acts involving the liability of the Community, especially in the posting up of the contested decisions at Ispra; the applicant considers that his reputation and honour have been seriously impeached.
The *defendant* says that the suspension declaration was never posted up and that the decision of transfer was posted up as part of the monthly table of movements of personnel.

C — *The legality of Vacancy Notice V/IS/40/65*

The *applicant* claims that the vacancy notice is illegal as a direct consequence of the illegality of the transfer decision.
The *defendant*, denying that the transfer decision is illegal, disputes the illegality of the vacancy notice.

D — *Legality of the Commission's decision of 20 and 21 January 1965 and 13 May 1965 concerning the disciplinary action with regard to the applicant*

(a) *Complaint of violation of the rule* non bis in idem

The *applicant* points out that this is, in his opinion, yet another instance of a breach of the rule *non bis in idem*, and that the proof of this lies in the documents annexed to the file of the case. He asks whether it is possible for a single factor to be quoted simultaneously as serious misconduct justifying suspension, and as requiring a transfer in the interests of the service—which would lead to confusion between the natures of the two measures.
The *defendant* replies that different facts have given rise to two measures of differing nature and that only one disciplinary measure was taken by the administration: the reprimand of 3 July 1964.

(b) *Complaint of infringement of the third paragraph of Article 88 of the Staff Regulations*

The *applicant* recalls that the first sentence of the third paragraph of Article 88 obliges the administration to make a final decision on the position of a suspended official within four months and that the second sentence, providing for the contrary case, is by way of an exception and envisages the possibility of the administration's finding it impossible to act within the said period.
He considers that since 25 September 1964 the administration has made no effort, as the file shows.
He explains the decision of 13 May 1965 to postpone a ruling in the disciplinary proceedings by the fact that Application 18/65 had been lodged and by the desire to conceal the disciplinary nature of the transfer.
The *defendant* contends that Mr Gutmann, whose salary was not withheld, falls outside the ambit of this provision, which refers to a four months' time-limit for the sole purpose of restoring to the official, after this period has elapsed, his salary in full, when this has been partially or totally withheld during his suspension.

(c) *Complaint of infringement of Article 25 of the Staff Regulations*

The *applicant* complains that he did not receive nor was he given an opportunity to see within a reasonable time various documents in his file, and that no genuine inquiry was held; he has put forward formal con-

clusions in this respect.
The *defendant* replies that at the preliminary stage in disciplinary proceedings there is 'no duty to communicate to the official concerned any documents or information at all' and that Article 87 of the Staff Regulations only requires that the official be heard before action is taken, so that he may know what is being alleged against him.

'Communication' of the documents in the file does not mean, according to the defendant, that copies of them must be provided. It confirms the genuine nature of its investigation.

(d) *Misuse of powers*

The *applicant* sees evidence of misuse of powers in a number of aspects of the case and particularly in:
— the continuance and suspension of the disciplinary proceedings after his refusal to accept the decision to transfer him, and after he had lodged Application 18/65;
— the reasons given for the decisions and the irregularities and delays in procedure;
— the unsupported accusations made against him.

The *defendant* repeats that the sole aim of the transfer was to safeguard the proper functioning of the service and that it is free to adopt disciplinary measures whenever it sees fit, since the suspension does not affect the official financially.
The postponement of a decision in the disciplinary proceedings is explained by the wish to take a decision in a calm atmosphere after a settlement had been reached in Case 18/65.

E — *The prejudicial nature of the decisions of 20 and 21 January 1965 and 13 May 1965*

The *applicant* requests compensation for the non-material damage caused by the contested decisions, which amount to wrongful acts or omissions.
The *defendant* opposes this request on the ground that the wrongful acts or omissions and the damage have not been proved.

IV — Procedure

Cases 18 and 35/65 were joined by Order of 8 July 1965. Acting on a request made within the purview of Case 18/65 the President of the Second Chamber made an order on 8 April 1965 that no further action be taken with regard to Vacancy Notice V/IS/40/65, dated 19 March 1965, advertising 'the vacant post of Principal Administrator in career bracket A 5–A 4 at Ispra (Press and Public Relations Division)', the post corresponding to that previously occupied by the applicant.
The parties referred to the Court the procedural issue of the admissibility of two written statements by possible witnesses, taken by the defendant and annexed to its rejoinder.
After an exchange of written observations the issue was settled between the parties.
The oral proceedings, fixed initially for 1 December 1965, were postponed to 9 February 1966 at the request of the parties whose representatives had not been able to reach an agreement.
On 3 February 1966 the First Chamber requested the defendant 'to lodge by the evening of 7 February any documents missing from the applicant's personal file to make it complete, including the full record of the disciplinary proceedings and in particular the minutes of the official inquiry and of the interviews with the applicant prior to the disciplinary measures of 3 July 1964.'
On 7 February 1966 the defendant submitted additional documents.
In the course of the hearing on 9 February 1966 the applicant complained that certain documents relating to his first reprimand were still missing from his file, in particular those establishing the nature of the 'inconclusive' proofs referred to by Mr Ritter in his memorandum to the applicant of 17 June 1964.
In the course of the same hearing he stated that the Commission had not given the Court details of the 'complaint lodged by a Head of Division' to which reference is made in the decision of 30 September 1964 (258th meeting) ordering an inquiry.

Grounds of judgment

The application for annulment of the decision of the Commission of the EAEC of 5 February 1965, notified on 18 February 1965, rejecting the applicant's complaint concerning two previous decisions to suspend and to transfer him

A distinction must be drawn with regard to the decision of 5 February between the factors relating to suspension and those relating to transfer. In so far as this decision concerns the decision of 25 September 1964 to suspend the applicant it must be deemed to incorporate the statement of reasons given in the latter. Since a decision to suspend an official is an act adversely affecting him it must, in accordance with Article 25, state the reasons on which it is based.

This statement of reasons must comply with the requirements of the first paragraph of Article 88 of the Staff Regulations which do not permit the appointing authority to suspend an official unless serious misconduct is alleged, whether this amounts to failure to carry out his official duties or to a breach of law.

The decision of 25 September 1964 is limited to a statement that 'the inquiry carried out has revealed in Mr Gutmann's relationships with his staff and in the general management of his department, conduct inconsistent with his duties as Head of a Division', and that 'he must be suspended from his duties in order to allow these facts to be elucidated'.

This brief and vague statement of reasons contains no precise indication capable of amounting to an allegation of serious misconduct. Nothing therein makes it possible to deduce the nature and gravity of the 'conduct' described. The complaints concerning 'Mr Gutmann's relationships with his staff' are not explained even briefly in such a way as to enable the Court to carry out its review, in particular as regards the degree of seriousness of the misconduct.

Even if the applicant was informed orally of the complaints alleged against him this cannot be deemed to supplement the statement of reasons, since the Court cannot take it into account in assessing the considerations by which the administration was guided in its action.

Any concern on the part of the administration to safeguard the applicant's reputation cannot justify the brevity of the decision, since the latter had in any case to be treated as confidential.

It is therefore appropriate to annul the decision of 5 February 1965 rejecting the applicant's complaint in so far as it confirms the decision of 25 September 1964 suspending him, and there is no necessity to examine the other grounds put forward by the applicant.

The decision of 5 February 1965 rejecting his complaint has also to be examined in so far as it confirms the decision of 9 December 1964 to transfer him, of which he was notified on 22 December 1964.

As the transfer decision of 9 December 1964 was based on the interests of the service there was no need to state the reasons therefor. If such a decision is indeed taken on that basis, it cannot constitute an act adversely affecting an official and falls within the discretionary powers of the administration, which may arrange its departments and move its staff as required for the performance of the tasks assigned to it.

On the other hand, such a decision may amount to a misuse of powers if it appears, on the basis of objective, relevant and consistent facts, to have been taken for purposes other than those stated.

The documents produced show that after various irregularities had been found in the applicant's conduct he was reprimanded on 3 July 1964.

By a decision of the Director-General of the JNRC dated 25 September 1964 the applicant was suspended from duty, banned from the Centre and his office was sealed off, on the ground that a fresh inquiry had 'brought to light' in Mr Gutmann's relationship with his subordinates and in the management of his department conduct inconsistent with his duties. Approving this step on 30 September 1964, the Commission ordered an inquiry based on certain irregularities 'which have been established' and a 'complaint lodged by a Head of Division'.

As a consequence of these serious charges, which were stated to have been 'established', and of the special measures, the Commission decided on 9 December 1964 to transfer Mr Gutmann from Ispra to Brussels 'in the interests of the service' and published on the same day the vacancy notice for a post of Principal Administrator in the library.

However, despite the statement on 3 July 1964 to the effect that the possibility of a transfer would depend on 'fresh lapses' being 'found to have occurred' (letter from the Deputy-Director of the JNRC to the Director-General, Mr Funck) and the statement of 30 September 1964 to the effect that 'certain irregularities' had been 'established', this complaint was no longer quoted in support of the transfer when Mr Funck sent the applicant the letter of 5 February 1965 informing him of the grounds for the Commission's rejection of his complaints against the decision to transfer him.

The applicant was in fact told that his complaint had been rejected on the ground that, first, since July 1964 the Commission 'had been considering the possibility of a transfer', and secondly, that the decision reprimanding him 'had contributed to

undermining your reputation' as Head of Division, and finally that 'the nature of [your] relationship with [your] staff was making the atmosphere in [your] department intolerable'. So, having first decided to treat the transfer as not arising out of the reprimand, the Commission then proceeded to adopt the measure in connexion with the reprimand.

Whilst making the adoption of this measure subject to a finding of fresh misconduct, it seems later to have set this condition aside. Instead it relied on a complaint with regard to the applicant's difficult relationships with his staff. Whilst these relationships can only have been unfavourably influenced by the effects of disciplinary action against a Head of Division for highly reprehensible conduct, those effects were nevertheless discernable when, on 3 July 1964, the Deputy-Director of the JNRC took the view that they were not sufficient to justify a transfer.

The publicity which was in fact—though doubtless unintentionally—given to the applicant's reprimand, to the sealing off of his office and to the other special precautions taken by the Commission, which became common knowledge, could not but worsen the relationship between the applicant and his staff.

Reports on the applicant described him, some months before the events in question, as fulfilling his duties with 'perfect tact' and maintaining 'good' relationships with his staff. The immediate contradiction between the grounds given in the letter of 19 February 1965 and his reports is obvious.

The Court has not been able to assess the value of the evidence produced because the conditions under which the statements were taken by the Commission's security service while the case was in progress do not enable the Court to exercise its powers of review.

The variations and discrepancies described above, together with circumstances such as the timing of the publication of the vacancy notice simultaneously with the transfer of the applicant to the vacant post, the long period of inactivity, not seriously contested, forced on the applicant after taking up his new post and the general circumstances of the case, together amount to a series of objective facts leading to the conclusion that in transferring Mr Gutmann the administration was not exercising its powers for the purpose prescribed for such a measure by the Staff Regulations.

Accordingly the decision of 5 February 1965 rejecting the applicant's complaint must be annulled on the ground of misuse of powers in so far as it confirms the decision of 9 December 1964 to transfer him.

The claim concerning Vacancy Notice No V/IS/40/65

The vacancy of post No V/IS/40/65 could not have been declared until after the unlawful transfer of the applicant, who occupied the post.

Since the vacancy notice was not designed to fill a post which had properly fallen vacant, it must be declared null and void.

The complaint concerning the decision of the Commission of the EAEC of 20 and 21 January 1965, and the decision of the Commission of the EAEC of 13 May 1965

The applicant alleges that the rule *non bis in idem* was violated by the decision of 20 and 21 January 1965.

This rule prohibits not only the imposition of two disciplinary measures for a single offence, but also the holding of disciplinary proceedings more than once with regard to a single set of facts.

It must therefore be ascertained from the file of the case as it stands whether the fresh disciplinary proceedings were based on facts other than those which gave rise to the reprimand of 3 July 1964, against which no complaint or appeal was made by the applicant.

The file shows that the administration's main complaints were, in both cases, the applicant's behaviour towards his colleagues and alleged misuse of the facilities provided by the department. In spite of the Court's request the defendant has failed to produce all the information required for an examination of the file of the disciplinary proceedings relating to the reprimand. In particular it has not explained the 'inconclusive ... investigations' made with regard to the misuse of the department's facilities (memorandum from Ritter to Gutmann of 17 June 1964). In addition it has given the Court no precise information concerning the 'complaint lodged by a Head of Division' referred to in the Commission's decision of 30 September 1964 (258th meeting) ordering an inquiry to be held. The Court must therefore confine its consideration to the actual contents of the file.

It must be said then that the somewhat vague list of complaints given in the later disciplinary inquiry makes it difficult to distinguish these complaints from those raised earlier at the time of the inquiry which preceded the reprimand.

In an application against a decision ordering the opening of an inquiry into allegations which may prove serious, though how serious no one can yet say, it is desirable, before the Court rules on the application, to allow the Commission an opportunity to explain why the facts were not covered by the earlier disciplinary

measure. Judgment on this head of the application must therefore be suspended until the documents missing from the file have been produced, in particular all the documents and minutes referred to in the Ritter Memorandum of 17 June 1964 (especially the documents which show the nature of the 'inconclusive' investigations) and the 'complaint lodged by a Head of Division' referred to by the Commission in its decision of 30 September 1964 (258th meeting) ordering an inquiry.

Three months is sufficient to enable the Commission to produce those documents.

The decision of 13 May 1965 by the Commission of the EAEC postponing a decision in the disciplinary proceedings pending the judgment of the Court on the first application for annulment is based on the decision of 20 and 21 January 1965, judgment on which has just been suspended.

Judgment must be postponed on the application for annulment of the decision of 13 May 1965 until the period of three months allowed to the Commission for the production of the abovementioned documents has elapsed.

The request for damages

The applicant seeks compensation for the material and non-material damage which he has suffered as a result of the disputed decisions.

The non-material damage is, in the light of the present proceedings and the reprimand given on 3 July 1964 without being disputed, made good by the annulment of the said decisions.

Material damage has not been proved; in particular the applicant has received his salary during the period of his suspension and his removal expenses on transfer.

The request for damages must therefore be rejected.

The subsidiary conclusions

There is now no need to give separate judgment on the request for an inquiry and for the production of documents, since the contents of the file and the omissions from it have either provided a basis for the Court to exercise its power of review or have necessitated suspension of judgment pending the production of certain documents.

The applicant requests that document No 123/8, which does not bear his signature be withdrawn from his personal file.

The wording of the second paragraph of Article 26 of the Staff Regulations is explicit and must be complied with particularly when a document contained in an official's file is unfavourable to him.

Accordingly it is appropriate to order that document No 123/8 be withdrawn from the applicant's personal file.

Costs

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading. The defendant has been unsuccessful in its main pleadings.

Under Article 69 (3) the Court may order one party to pay costs which the Court considers that party to have unreasonably caused the opposite party to incur.

Judgment has been partially suspended pending production of certain documents in the defendant's possession, and not produced during the proceedings.

The costs of the application for the interim measure, reserved by an order of 8 April 1965, must be borne by the Commission, since the application for the suspension of operation made in Case 18/65 was directed against the vacancy notice annulled in the present case.

The defendant must accordingly pay the entire costs of the action.

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 annexed to the Treaty establishing the EAEC;
Having regard to Articles 4, 24, 25, 29, 45, 86, 87, 88 and 110 of the Staff Regulations of Officials of the EAEC;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Annuls the decision of the Commission of the EAEC of 5 February 1965 rejecting Mr Gutmann's complaint against two previous decisions suspending and transferring him;**

2. **Annuls Vacancy Notice V/IS/40/65;**

3. **Orders the Commission of the EAEC to withdraw document No 123/8 from the applicant's personal file;**

4. **Suspends judgment on the application for the annulment of the decisions of 20 and 21 January 1965 and 13 May 1965 by the Commission of the EAEC regarding the continuance and the suspension of fresh disciplinary proceedings; orders the Commission to produce within three months all the items missing from the file, in particular all the documents and minutes referred to in the Ritter memorandum of 17 June 1964 (especially the documents establishing the nature of the 'inconclusive' investigations) and the 'complaint lodged by a Head of Division' referred to by the Commission in its decision of 30 September 1964 ordering an inquiry;**

5. **Refers the case back to the Commission for execution of this judgment;**

6. **Rejects the claim for compensation and the remainder of Mr Gutmann's subsidiary pleas;**

7. **Orders the Commission of the EAEC to pay all the costs so far incurred in the proceedings, including those in the application for the adoption of an interim measure; and reserves judgment on the remaining costs.**

Luxembourg, 5 May 1966

Delvaux Trabucchi Lecourt

A. Van Houtte L. Delvaux

Registrar President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 MARCH 1966[1]

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1 — Translated from the German.