the claims submitted at this latter stage change neither the cause nor the subject-matter of the complaint. This is particularly so when the administration, by remaining silent and having recourse to the procedure of implied rejection, has refused all consideration or discussion of the complaint.

3. In the case of an application for damages for failure to reinstate after the expiry of leave on personal grounds, the applicant cannot, in the absence of services rendered, claim payment of arrears of salary; he is nevertheless entitled to receive compensation for the actual damage he has suffered through the loss of this salary as a result of the unlawful conduct of the administration.
In principle, the compensation payable on that account should be equal to the net emoluments to which he would have been entitled subject, however, to deduction of the net earned income received for the same period while engaged in other employment.
In assessing the extent to which the administration must make good the loss, account must be taken of the lack of ordinary vigilance on the part of the person concerned which has helped to prolong the delay in reinstating him.

In Case 58/75

JACQUES HENRI SERGY, an official of the European Communities, residing at Woluwé — St. Lambert, represented by M. A. Pierson, Advocate at the Cour d'appel, Brussels, with an address for service in Luxembourg at the office of Georges Malotaux, 29 rue de Bragance,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Thomas F. Cusack, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser of the Commission, Bâtiment CFL, place de la Gare,

defendant,

Application for compensation for the damage suffered by the applicant as a result of the Commission's failure to reinstate him in a post in his category on completion of leave on personal grounds,

THE COURT (First Chamber)

composed of: A. O'Keeffe, President, A.M. Donner and J. Mertens de Wilmars, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments developed by the parties during the written procedure may be summarized as follows:

I — Facts and procedure,

The applicant, who is an official in Category A 6 assigned to the Directorate-General for Financial Control of the Commission, was at his request, granted leave on personal grounds from 1 June 1969 to 31 May 1972 pursuant to Article 40 (1) of the Staff Regulations of Officials.

At the end of that leave he informed the Director-General of Administration in writing that with effect from 1 June 1972 he was available to perform the duties corresponding to his grade. By letter of 19 June 1972, the Director of Personnel replied that he would, without fail, inform him as soon as possible of 'the first vacant post which would enable you to be reinstated'. Nine months later, in a second letter dated 27 March 1973 the Director of Personnel asked him to return a document, described as a 'single application', 'in order to enable consideration to be given to a post which would make it possible to reinstate you'; the applicant did so by letter of 28 April 1973. By letter of 22 May 1974, confirmed by telegram of 28 May 1974, a post of Administrator in career bracket A 7/A 6 was offered to and accepted by the applicant who resumed his duties on 15 August 1974.

Meanwhile he had managed to be re-engaged in 1973 by the administration in which he had originally served, the Ministry for Economic Affairs and Finance of the French Republic. When his leave on personal grounds came to an end, a dispute arose between the applicant and the latter administration about the conditions on which he could be released from his duties at the Ministry. The dispute resulted in his being recalled on the ground that he had left his post without permission. The applicant appealed against this decision before the competent French court.

On 9 December 1974, he submitted a complaint to the Commission under Article 90 (2) of the Staff Regulations of Officials and this was registered on 10 December 1974. The object of the complaint, which was 'against the decision reinstating him', was to secure the backdating to 1 July 1972 of the date on which his reinstatement took effect and the consequential revision of the applicant's career and the remuneration corresponding thereto and to obtain the grant of certain allowances. The complaint was based on the infringement by the Commission of Article 40 of the Staff Regulations of Officials, which, according to the applicant, requires reinstatement in the first post which falls vacant in the applicant's category and grade.

As the Commission did not reply to the complaint for over four months, the applicant brought proceedings before the Court against the implied decision rejecting it.

The application, dated 15 July 1975, was entered at the Court Registry on 7 July 1975.

The written procedure followed the normal course. After hearing the report of the Judge-Rapporteur and the views of

the Advocate-General, the Court, First Chamber, decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The applicant claims that the Court should:

1. Declare the application to be well-founded;
   Order the reinstatement decision of 10 September 1974 to be amended as follows:
   — in Article 1, the date on which the reinstatement takes effect shall be fixed at 1 July 1972;
   — in Article 2, the applicant's seniority in Grade A 6 shall date from 1 August 1971 and he shall be classified in Step 1 of this grade when his reinstatement takes effect, with seniority from 15 March 1971;
   At the least, rule that the Commission of the European Communities shall be bound to fix the applicant's seniority and calculate his pension as set out above.
2. Loss of chances of promotion:
   Order the Commission of the European Communities to pay the applicant the sum of BF 70 000;
3. Loss of remuneration:
   (a) Loss of salary:
   Order the Commission of the European Comunities to pay the applicant the sum of BF 667 540;
   (b) Difference in salary:
   Order the Commission of the European Communities to pay the applicant the sum of BF 645 391;
   (c) Expenses incurred as a result of the delay in reinstatement:
   Order the Commission of the European Communities to pay him the sum of BF 144 500;
   (d) Take note that the applicant reserves the right to make a subsequent claim for compensation for the damage suffered as a result of being forced to give up his duties at the French Ministry for Economic Affairs and Finance;

The said sums shall be regarded as being subject to increase or reduction during the course of the proceedings and shall be increased by interest on the payments made by the applicant as from the dates on which they were made and on the compensation as from the date on which the applicant should have received it at the legal rate in Belgium of 6·5 % until 31 October 1974 and at 8 % as from 1 November 1974.

The Commission contends that the Court should:

Declare the action to be inadmissible;

alternatively, as to the substance:

(a) with regard to the applications for the amendment of the reinstatement decision of 10 September 1974 fix according to the rules of natural justice the date on which the applicant should have been reinstated and refer the case back for appropriate action by the Commission on the basis of a revision of the applicant's career, pension rights and remuneration;
(b) as regards the applications for orders for payment other than those concerning loss of remuneration, determine, accordingly, the proportion of the expenses incurred as a result of the delay in reinstatement which shall be borne by the defendant, if at all, and dismiss as unfounded the application referring to the loss of chances fo promotion;
(c) dismiss as unfounded the submissions and arguments of the applicant which seek that the Court shall note that he reserves the right to make a subsequent claim for compensation for the damage suffered as a result of being forced to give up his post in the French Administration;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. Facts

The parties express conflicting views on the question whether and to what extent the applicant, after the end of his leave, took various steps to be reinstated and whether, at the time when this was offered, he accepted it with alacrity.

2. Admissibility

The applicant contends that there can be no doubt about the admissibility of his application. The complaint of 9 December 1974, which was registered on 10 December 1974, was lodged within three months after the date, 10 September 1974, on which the reinstatement decision was taken, which meets the requirement laid down in Article 90 (2) of the Staff Regulations. The application was lodged within the period of three months from the end of the period prescribed for reply to the complaint and is therefore admissible. Article 90 does not, incidentally, appear to prescribe any specific period within an application for damages must be lodged.

The *Commission* is, however, undecided whether the reinstatement decision is really the administrative measure upon which the present proceedings, whether for annulment or for damages, turn, or whether earlier decisions in fact gave rise to the damage of which the applicant complains. If the second alternative applied, it ought to be impossible to avoid being time-barred by means of an application for damages based on administrative measures which have become definitive. In the Commission's view, the real basis for the application is the successive assignment of other persons to posts to which, on an objective assessment, the applicant could lay claim. These events took place between the date on which the leave on personal grounds ended (30 May 1972) and his actual reinstatement (15 August 1974), during which period the applicant took no action regarding them. Nor has the reinstatement decision of 10 September 1974 any particular connexion with the damage complained of by the applicant.

In the Commission's view, these facts provide three objections as to admissibility:

(a) Inasmuch as the application seeks to have the applicant's reinstatement backdated to 1 July 1972, it constitutes an application for partial annulment of the decision. But it was quite impossible to make that decision retroactive since it is unlawful to fill a post for a period before the post has become vacant. Since the reinstatement decision was valid and could not, in law, have the effect which the applicant seeks to ascribe to it, it has caused him no damage, so that an application for annulment brought against that decision is inadmissible and, in consequence, any action brought for damages which contests the legality of that measure is also inadmissible.

(b) The letter of 30 May 1972, addressed by the applicant to the Commission at the end of his leave on personal grounds, must be treated as constituting a request within the meaning of Article 90 (1) of the Staff Regulations. Since that request elicited no express reply from the Commission within the period of 4 months provided for under Article 90 (1) of the Staff Regulations, it must be considered as the subject of an implied decision rejecting it against which a complaint ought to have been lodged within the three months. As this was not done, the applicant can no longer contest this decision or call it in question by an application for annulment or by an application for damages, both of which are out of time.

(c) In fact, the measures which were such as to affect the applicant adversely were the various decisions in which the appointing authority assigned to someone other than the applicant one of

the vacant posts in which, according to the applicant, he ought to have been reinstated. These decisions of appointment and promotion receive the same wide publicity as the vacant posts of which the applicant is aware, which justifies the assumption that he was also aware of these decisions. On each occasion the applicant was, accordingly, in the position provided for at the end of the second subparagraph of Article 90 (2) of the Staff Regulations and therefore he could and should have lodged a complaint in the three months following the date on which he received notification of the measure. Since he failed to do so, any application against those measures is inadmissible as out of time. Furthermore, the applicant cannot seek to surmount the inadmissibility of any application for annulment by means of an application for damages.

Finally, on the question of damages, the Commission raises an alternative and fourth objection as to admissibility. In its view, the application for damages is, in any event, inadmissible in respect of the conclusions seeking compensation (1) for expenses incurred as a result of the delay in reinstatement and (2) for having been forced to give up his duties at the French Ministry for Economic Affairs and Finance, because these heads of claim were not formulated in the complaint of 9 December 1974, because they are independent of the application for annulment, and because they are due to the applicant's special circumstances and are not the consequence of his belated reinstatement.

In his *reply,* the applicant's answer to the first submission of inadmissibility based on the impossibility of making the reinstatement decision retroactive is that the Commission cannot argue as though the post to which he was appointed by the decision of 10 September 1974 was the first vacant post in the applicant's category and grade, as required by Article 40 of the Staff Regulations. This is not the case and the application is, in consequence, rightly directed against the content of the decision taken by the appointing authority in so far as the effective date of reinstatement, fixed as 15 August 1974, takes no account of the damage suffered by the applicant owing to the infringement of Article 40 (d) of the Staff Regulations.

As regards the letter of 30 May 1972, it in no way constitutes a request within the meaning of Article 80 (1) of the Staff Regulations. In any case, it does not display any of the formal characteristics which a request was required to have before the Staff Regulations were amended on 16 July 1972. Moreover, it was not in the applicant's interests for him to insist on reinstatement irrespective of conditions.

As for the fact that he has not contested the appointments made in violation of his rights and of Article 40 of the Staff Regulations, the applicant points out that, as he did not, either during the leave on personal grounds or even after its expiry, receive the internal publications of the Commission, it was impossible for him to know what vancancies and appointments there were. It was only after his reinstatement that he carried out certain checks in the department responsible for notices of competition and vacancy notices and was able to ascertain the extent to which the Commission had infringed Article 40 (d) and to assess the damage suffered.

As regards the submission of inadmissibility raised in the alternative, the applicant observes, first, that it was physically impossible for the complaint of 9 December 1974 to call in aid the consequences of the French Ministerial Order of 7 January 1975 against which, incidentally, proceedings have been brought before the Tribunal Administratif, Paris. Moreover, the Staff Regulations in no way insist upon a prior administrative appeal in a case where the applicant is seeking payment of damages as the result of a wrongful act or

omission of the Administration. The Commission cannot claim that failure to comply with a procedural requirement of this kind could have caused it damage or compromised the working of the institutions. In fact, the complaint would have been rejected, even if there had been a reference to such damage, because the rejection was based, not on the quantum of damages but on the alleged absence of any right vested in the applicant.

In its *rejoinder,* the Commission states that, in contending that the reinstatement decision cannot constitute a measure adversely affecting the applicant, it does so on the basis of general considerations relating to the filling of posts and not on an interpretation of Article 40 (d) of the Staff Regulations. There is no need to do more than refer to the general rule prohibiting retroactive appointments (Article 3 of the Staff Regulations). There is nothing to justify the statement that the date on which the leave on personal grounds ends and the date on which the first post in which the person concerned is entitled to be reinstated falls vacant should be close. The time which elapses between the end of the leave and actual reinstatement depends exclusively on the existence of posts requiring to be filled.

The applicant ought to have based his application on any illegality attaching to the assignment to other persons of the posts which he could have claimed. Although it is true that officials on leave on personal grounds do not receive the internal publications of the Commission, it is nevertheless strange that the applicant remained wholly unaware of publicity about vacant posts. Decisions of the Commission on the opening of the procedure for filling vacancies, whether by vacancy or by notice of competition, are in general terms and, inasmuch as they are liable to have an adverse effect, should, in consequence, have been the subject-matter of a complaint within the three months following the date of publication (first indent of Article 90 (2)). Decisions of appointment or promotion to the said posts should, in so far as they were measures affecting a specified person containing complaints against another person (second indent of Article 90 (2)), have been the subject-matter of a complaint within three months of the date on which that other person received notification thereof but in no case later than the date of publication. In the present case the applicant must have received notification of these notices an decisions. His claim for compensation is consequently timebarred and, therefore, inadmissible. Finally, as regards the alternative submission of inadmissibility, the Commission considers that no new claim (for damages or for annulment) which was not formulated in the complaint can be added at the time when the application is lodged. The same applies to the damage arising from the fact that he was forced to give up his duties at the French Ministry for Economic Affairs and Finance. As the Order of the Minister of Finance dated 7 January 1975 was subsequent to the complaint, it appears that the alleged damage had not even been incurred at the time when the complaint was lodged and that, therefore, it is extraneous to the present application.

3. The substance of the case

The applicant contends that, by not reinstating him in the first vacant post, the Commission infringed one of his rights and caused him various damages in connexion with (1) loss of seniority, (2) loos of chances of promotion and (3) loss of remuneration.

(1) With regard to loss of seniority, the applicant seeks compensation in kind by the fixing at 1 July 1972 the date on which the reinstatement takes effect, the fixing of seniority in Grade A 6 at 1 August 1971 and his classification on the date on which reinstatement takes effect in Step 1 of Grade A 6 with seniority from 15 March 1971.

(2) As regards the loss of chances of promotion, the applicant states that although there is nothing certain about promotion to a higher office, the loss of a chance of promotion constitutes a head of damage under which compensation may be claimed and, in the present case, covers the period from 1 March 1973 to 1 May 1975 and should be assessed at BF 70 000.

(3) The loss of remuneration includes first the loss of salary, namely BF 667 540, from 1 July 1972 to 31 August 1973, the date from which the applicant received his salary at the Directorate of Taxes at the French Ministry for Economic Affairs and Finance. In respect of the subsequent period it includes the difference between the French salary actually drawn from 1 September 1973 to 31 July 1974 and the European salary which he should have drawn during that period. This difference is BF 244 641.

The loss of salary also includes expenses incurred as a result of the delay in reinstatement, which, amongst other things, compelled the applicant to take up residence in Paris again. This loss is assessed at BF 144 500. Finally, the applicant seeks compensation for the non-material damage arising from the order to remove him from his post by the French Administration and for the material damage arising from the amounts which he owes to that administration.

The damage incurred can, however, only be determined finally and with certainty after the closure of the proceedings for annulment of the measures taken in his case brought before the Tribunal administratif, Paris.

In its *defence,* the Commission replies that the general principle of equivalence between benefits, which is the subject of special application in Article 40 of the Staff Regulations, makes it impossible for the damage which the applicant may have suffered as the result of belated reinstatement to be identical to the salary which he would have drawn if he had been re-engaged.

A court called upon to calculate the loss actually suffered and to fix the damages cannot, in consequence, ignore the behaviour of the applicant and must take account of the extent to which this behaviour was a contributory factor. A party who has suffered damage as the result of the illegal and/or wrongful action of another must in particular take all the steps necessary, within reason, in order to mitigate his loss and to exercise all due diligence to obtain compensation, in particular where compensation for a 'continuing loss' is involved. In the defendant's view, the applicant specifically contributed in part to his financial loss in failing to exercise normal and reasonable diligence in enforcing his rights. This is demonstrated, in particular, by the fact that, with the exception of his letter of 30 May 1972, the applicant, until his reinstatement, at no time asserted his rights in writing or made use of the procedures for bringing proceedings for infringement of his rights provided for under Articles 25 and 90 of the Staff Regulations. Furthermore, when the Administration asked him, on 27 March 1973, to complete a form for the purpose of finding a post corresponding to his qualifications, he merely returned the form without comment and, when the Directorate-General for Financial Control received the applicant's request for reinstatement it had to make repeated requests for a reply.

In assessing the damage, the Commission suggests that this should be based on the date on which the applicant, on his own evidence, established the Commission's failure to reinstate him and asked to be reinstated in his original administration in France. Since the applicant was reinstated in his original administration on 1 September 1973, the Commission considers that he established that failure on or about 1

July 1973. If an initial request had been submitted on that date, in accordance with Article 90 of the Staff Regulations, the applicant should, in view of the periods prescribed for complaint and appeal and assuming the absence of a reply from the Commission, have brought proceedings before the Court not later than 1 September 1974. There can, therefore, be no question of compensation for any financial loss suffered after 1 July 1973 and this still leaves open for consideration the period from 1 June 1972 to 1 July 1973 when the applicant was also inactive. As regards the various heads of claim, the Commission contends that that which refers to the loss of chances of promotion must, in any case, be dismissed because of the impossibility of making a firm assessment of the existence of such chances and of evaluating them in financial terms. The claim based on damage suffered as a result of being forced to give up his duties in the French Administration should also be dismissed since the Commission cannot be blamed for the loss suffered and is in no way liable for it. The Commission is, in fact, under no legal obligation to the applicant to ask the French Administration for his release and it is not customary for national administrations, including that of France, to require such steps to be taken.

The *applicant* replies that the argument of the Commission endows the Administration with an arbitrary discretion at all times to decide when an official shall return to duty without being under any obligation to compensate him if the waiting period is longer than expressly provided for by the Staff Regulations.

As regards the applicant's alleged lack of diligence, he states that he is not normally bound to take the slightest step or in any way seek to be reinstated in his post since, under the Staff Regulations, this is an obligation imposed on the Administration. The applicant accepts that, as the party suffering damage, he was under a duty to keep the loss to a minimum. This is precisely what he did when he rejoined his original administration on less favourable financial terms.

Moreover, contrary to what the Commission states, he was not required to make use of the procedure of request/complaint/appeal laid down in Articles 25 and 90 of the Staff Regulations when he established the Administration's failure to act. As he was in the position described in Article 40 (d) of the Staff Regulations, he could only await the offer of a vacant post. As regards the loss of chances of promotion, the applicant claims that, in view of his eleven months' seniority in Grade A 6 at the time of his departure on leave, he has suffered a delay of twenty-six months and fifteen days, and not ten and a half months before being promoted to the 'higher grade'. During that time, 206 posts in that career bracket were advertised.

In its rejoinder the Commission contends that the applicant's letter of 30 May 1972 must be examined, first, from the point of view of admissibility and, secondly, from the point of view of the quantum of financial loss actually suffered. If the letter had to be regarded as a request within the meaning of Article 90 of the Staff Regulations, the implied rejection of his request was not made the subject-matter of a timely complaint, which means that the application is inadmissible. If it did not constitute a request within the meaning of Article 90 of the Staff Regulations, it was the only sign of diligence on the part of the applicant.

As regards the loss of chances of promotion, the Commission contests the applicant's calculation and stresses the fact that, finally, those chances of promotion depend on a series of variable factors and, for an official with the

applicant's qualifications and experience, the chances are, statistically speaking, only one in nine during any year.

During the oral procedure on 20 May 1976 the parties developed the arguments put forward during the written procedure.

The Commission stated that it admitted that the applicant could have been reinstated in a post which became vacant at the time when his leave on personal grounds ended. As regards compensation for the damage caused, it considers nevertheless that the applicant should also bear part of it because his lack of diligence contributed to the damage.

The applicant replies that he did not need to be diligent because the Staff Regulations do not require him to request his reinstatement.

The Advocate-General delivered his opinion at the hearing on 24 June 1976.

Law

1 The applicant complains of the Commission's delay in reinstating him in a post in his category and grade at the end of leave on personal grounds which expired on 31 May 1972 and seeks compensation for the damage which he claims to have suffered as a result.

2 Despite its ambiguous terms, the application may be regarded as seeking, first, the partial annulment of the Commission's decision of 10 September 1974, reinstating the applicant in a post in his category and grade with effect from 15 August 1974 and, secondly, the award of damages under various heads.

Application for annulment

Admissibility

3 The defendant contests the admissibility of the application on the ground that the contested decision is not the cause of the alleged damage, which was the result of earlier decisions by which, in disregard of the obligation to reinstate the applicant, vacancies which arose after his leave on personal grounds had ended were filled.

4 While complaining of the delay in reinstating him, the applicant does not contest the legality of the disputed decision in so far as it reinstates him, but only in so far as it fails to make certain provisions, especially as regards the date on which it takes effect and the backdating of seniority in grade and step, which would have cancelled the effects of that delay.

5 His interest in seeking annulment is the obligation which might as a result be imposed on the appointing authority to make the reinstatement subject to different and more favourable conditions.

6 The application is admissible.

The substance of the case

7 It is apparent from the file that, in the circumstances described in the account of the facts given in the present judgment, when his leave on personal grounds ended on 31 May 1972 the applicant made himself available to the Commission for the purpose of being reinstated in a post corresponding to his category and grade in accordance with Article 40 (4) (d) of the Staff Regulations of Officials.

8 His reinstatement was only given effect by a decision of 10 September 1974 which, moreover, provides that it shall take effect on 15 August 1974 (Article 1) and that the applicant shall be classified in Grade A 6 with seniority as from 15 September 1973 and in Step 1 of that grade with seniority as from 1 May 1973.

9 The reason for the two lastmentioned dates is the fact that, when leave on personal grounds was granted to him the applicant had 11 months' seniority in Grade A 6 and 15 months' in Step 1 of that grade and that these two periods were incorporated in the decision by reference to the date on which his reinstatement took effect, 15 August 1974.

10 The applicant contests the selection of these dates and claims especially that the backdating of seniority should have been based not on the actual date of his reinstatement but the date on which, as required by Article 40 of the Staff Regulations, he was required to be reinstated.

11 Article 40 (4) (d) of the Staff Regulations in the version applicable at the date (1 June 1972) on which the applicant's leave on personal grounds ended provided that 'on the expiry of his leave an official must be reinstated in the first post corresponding to his grade which falls vacant in his category or service. If he declines the post offered to him, he shall retain his right to reinstatement when the next vacancy ... occurs'.

12 By Regulation No 1473/62 of the Council of 30 June 1972, which came into force on 1 July 1972, this provision was supplemented by the inclusion of the words 'provided that he satisfies the requirements for that post'.

13 This addition is not, however, such as to alter the assessment of the defendant's conduct since all it does is to confirm a discretion which, in the interests of the service, the administrative authority has in any case to exercise.

14 During the oral procedure the defendant acknowledged that various posts capable of being filled by the applicant fell vacant shortly after the expiry of the leave on personal grounds.

15 In consequence, by failing to reinstate the applicant until more than two years had elapsed, the defendant is in breach of Article 40 (4) (d) of the Staff Regulations.

16 By bringing to an end, albeit belatedly, a situation which was contrary to the law, the defendant was under a duty to expunge, in so far as possible, the consequences of its illegal conduct.

17 Although the basic rule laid down in Article 4 of the Staff Regulations that a post shall be filled only if it is vacant prevents the decision of reinstatement from having retroactive effect, the situation could be restored to legality, at least in part, by antedating seniority in grade and step 11 and 15 months prior, not to the date when the applicant was reinstated but to the date when he should have been reinstated.

18 It is clear from the list of vacancies produced by the applicant that, although many posts in Grade A 6/A 7 have been filled since 1 July 1972 these posts were of a very different kind, so that it cannot be taken for granted that each of them corresponded to the applicant's abilities.

19 In these circumstances, in view both of the discretion vested in the administrative authority and of the right granted to an official to decline the first offer of reinstatement, it seems appropriate to accept that in the normal course of events the applicant should have been reinstated by 15 August 1972.

20 The defendant contends that the alleged delay is in part due to the wrongful omission of the applicant in failing to draw the authority's attention to the fact that he was not being reinstated within the normal time.

21 It will be necessary to examine whether this possibility is such as to affect the assessment of the claim for damages but, in the context of an application for annulment, there is no need to take it into account for the purposes of determining the normal date on which the defendant was required to comply with Article 40 of the Staff Regulations.

22 In these circumstances the defendant, in fixing, by the contested decision, the date of classification according to seniority in grade and step at respectively 15 September and 1 May 1973, was in breach of Article 40 of the Staff Regulations and of the rule requiring it to remedy so far as possible the consequences of a belated application of that provision.

23 The decision must, to that extent, be annulled and, for the purpose of giving effect to this judgment, it will be for the defendant to determine the applicant's seniority in grade and step and to calculate his pension as if the irregularity which has been found had not occurred.

24 The Court accordingly expects this seniority in grade and step to be fixed at, respectively, 11 and 15 months from 15 August 1972.

The claim for damages

25 The applicant further seeks an order for the payment to him by the defendant, by way of compensation for the damage which he claims to have suffered as the consequence of the alleged delay, of various sums under the following headings.

1. loss of salary from 1 July 1972 to 31 August 1973: BF 667 540
2. difference between the salary to which the applicant would have been entitled as an official of the Community and the salary which he received as a French official from 1 September 1973 to 31 July 1974: Bf 244 641
3. loss of chances of promotion: BF 70 000
4. expenses incurred as a result of the delay in reinstatement: BF 144 500

26 In addition, the applicant reserves the right to obtain compensation for any damage which may be caused him owing to the fact that, because he was forced to give up his office in the French Administration without having arranged in advance for his secondment or resignation in order to comply with the offer of reinstatement in a Commission post, he was dismissed by the said administration; the legality of that dismissal is, however, the subject-matter of proceedings before the French administrative courts.

Admissibility

27 According to the defendant, the claim for damages is inadmissible because the decision of reinstatement is not illegal and, in consequence, cannot constitute a measure capable of engendering a claim for compensation.

28 It has already been established that the illegality attaching to the decision of reinstatement consists both in in the delay in taking the decision and in the failure to compensate for that delay.

29 This illegality is such as to cause damage to the applicant, so that the submission of inadmissibility must be dismissed.

30 The defendant further claims that two of the various heads of damage are inadmissible, specifically that relating to expenses incurred BF 144 500 and that relating to the reservation arising from the applicant's dismissal by the French Minister of Finance, on the ground that, contrary to the requirements of Articles 90 and 91 of the Staff Regulations, no mention was made of those claims in the complaint addressed to the defendant on 9 December 1974.

31 Under Article 91 of the Staff Regulations an appeal to the Court of Justice shall lie only if the appointing authority has previously had a complaint submitted to it and the complaint has been rejected by a decision.

32 The object of that provision is to enable and encourage an amicable settlement of difference which has arisen between officials or servants and the administration; in order to comply with this requirement it is essential that the administration be in a position to know the complaints or requests of the person concerned.

33 On the other hand, it is not the purpose of that provision to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claims submitted at that stage change neither the cause nor the subject-matter of the complaint.

34 This is particularly so when the administration, by remaining silent and having recourse to the procedure of implied rejection, has refused all consideration or discussion of the complaint.

35 Moreover, in his complaint, the applicant, after setting out his grounds for complaint, claimed that his belated reinstatement was causing him considerable damage 'the main constituents' of which he went on to enumerate.

36 In these circumstances, the additional factors which are alleged to stem from the conduct for which the administration is criticized and to be directed to the question of compensation for the damage which the applicant claims to have suffered on that account may be submitted for consideration by the Court.

The substance of the case

37 The measures which the defendant will have to take in order to give effect to this judgment, in so far as it partially annuls the decision of 10 September 1974, will only in part compensate for the damage suffered by the applicant.

38 It is therefore necessary to consider the various claims submitted for additional compensation.

39 Although, in the absence of any services rendered, the applicant cannot claim payment of arrears of salary, he is entitled to receive compensation for the actual damage he has suffered through the loss of this salary as a result of the unlawful conduct of the defendant.

40 In principle, the compensation payable on that account should be equal to the net emoluments to which he would have been entitled, subject however to deduction of the net earned income received for the same period while engaged in other employment.

41 At the same time, consideration must be given to the question whether, as the defendant maintains, the applicant is not, on account of his conduct, partially responsible for the damage suffered.

42 The parties disagree on the facts concerning the personal approaches which the applicant made with a view to his reinstatement after it became evident that this was taking time.

43 It is clear from the file that, at the end of his leave, on 30 May 1972, the applicant notified his wish to be reinstated; that, on 19 June 1972, the administration informed him that he would be notified of 'the first vacancy which would enable you to be reinstated'; and that, nine months later, in April 1973, he replied within a reasonable time to a request for information which had been sent to him.

44 Nevertheless, it seems that during this latter period or shortly afterwards he took steps with a view to being re-engaged as an official in the French Ministry of Finance and that he was in fact re-engaged since he was remunerated as such from 1 September 1973.

45 It is not easy to understand why the applicant who, without doubt, had to take a number of official steps in order to secure his re-employment in the French administration, in which he had been employed before he entered the service of the Communities in 1964, did not take similar steps, traces of which would surely be bound to be in evidence, in order to expedite his reinstatement.

46 The absence during the whole of that period of any official request or protest indicates, at the very least, a lack of ordinary vigilance likely to help to prolong the delay of which he complains.

47 This fact must be taken into account in assessing the extent to which the defendant must make good the damage.

48 In these circumstances and in view of the redress provided by the finding of annulment, justice will be done by ordering the Community to pay to the

applicant damages equal to the loss of net salary suffered from 15 August 1972 to 31 August 1973, together with legal interest, and by dismissing the remainder of the claim.

49 The figure, namely BF 667 540, submitted by the applicant as representing loss of salary from 1 July 1972 to 31 August 1973, has not been contested by the defendant.

50 It must, however, be reduced by the equivalent of a month and a half's salary since the normal date for reinstatement has been fixed above at 15 August 1972.

51 The Commission must therefore be ordered to pay to the applicant the sum of BF 667 540 minus 65 754 = 601 786 together with legal interest at 8 % from 9 December 1974, the date of the complaint lodged by the applicant.

Costs

52 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.

53 The defendant has not succeeded in its defence.

54 It must therefore be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the decision of the Commission of 10 September 1974 in so far as it lays down the dates from which the applicant's seniority in grade and step is to be reckoned;**

2. Orders the Commission to pay to the applicant the sum of BF 601 786 together with interest at 8 % from 9 December 1974;

3. Orders the defendant to bear the costs.

O'Keeffe Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 1 July 1976.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 24 JUNE 1976 [1]

Mr President,
Members of the Court,

Under Article 40 of the Staff Regulations an official may be granted unpaid leave on personal grounds. It is, however, provided that another person may be appointed to the post occupied by the official. Article 40 (4) (d) in the version which is contained in the regulation of 18 December 1961 and which is the material one in this case provides:

'On the expiry of his leave an official must be reinstated in the first post corresponding to his grade which falls vacant in his category or service ...

Regulation No 1473/72 of 30 June 1972 added:

'provided that he satisfies the requirements for that post.'

After the present applicant had worked for some time in the Directorate-General for Financial Control as an official in Grade A 6 he was granted leave on personal grounds by several decisions between 1 June 1969 and 31 May 1972. During his leave another person was appointed to the post he occupied. Shortly before the end of his leave the applicant informed the Directorate General in a letter dated 30 May 1972 that as from 1 June 1972 he would again be available to the Commission. He was not immediately reinstated, although during the period after the applicant's leave terminated a whole series of A 6 posts became available and although the applicant, as he explained, continually contacted the Commission either personally or by telephone. In a letter from the Directorate-General for Personnel and Administration of 27 March 1973 the applicant was simply

1 – Translated from the German.