probationary official automatically causes the provisions of the Conditions of Employment of Other Servants to cease to apply and, consequently, causes the contract of employment entered into on the basis thereof to cease to have effect.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 25 June 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 21 MAY 1981 [1]

Mr President,
Members of the Court,

1. The question to be decided in this case is whether or not a person having the status of a probationary official of a Community institution retains during the probationary period, on the understanding that they are in temporary abeyance, the rights deriving from his previous engagement as a member of the local staff of the same institution.

I shall begin with a brief chronological outline of the facts. By a contract dated 12 August 1974, Mr Hugues Desmedt, a Belgian citizen, was recruited by the Commission of the European Communities in Brussels as a member of the local staff for a fixed period of six months and was assigned to the post of storekeeper. The contract was renewed for an indefinite period on 13 February 1975. Shortly afterwards, Mr Desmedt participated in an internal competition (COM/C/8/75) to constitute a reserve of clerical assistants in Career Bracket C 5/C 4 and was entered on the list of suitable candidates. On 7 January 1977 he was appointed as a probationary official and assigned to the post of operator at the Computer Centre in Luxembourg.

Unfortunately for him, the outcome of the probationary period was unfavourable. The administration's report in Mr Desmedt's ability to perform the

1 — Translated from the Italian.

duties pertaining to his post, on his efficiency and conduct in the service, a report provided for in Article 34 (2) of the Staff Regulations, revealed numerous instances of inefficiency and recommended that he be dismissed. By decision of 20 June 1977, the appointing authority accordingly dismissed him with effect from 1 July 1977 (the period was subsequently extended to 16 July 1977).

On 15 September 1977, Mr Desmedt submitted a complaint against that decision which was rejected by the administration by letter of 20 March 1978 bearing the signature of a Commissioner, Mr Tugendhat. In the meantime, Mr Desmedt had instituted proceedings against the Commission before the Tribunal du Travail [Labour Tribunal], Brussels, by writ served on 15 December 1977, in which he claimed that his initial contract of employment as a member of the local staff had merely been suspended as a result of his engagement for a trial period as an operator at the Computer Centre and that accordingly he should be reinstated in his former post or awarded damages in lieu of notice. The Belgian court, by judgment of 20 March 1980, referred to the Court of Justice the following question for a preliminary ruling:

"Is the status of a probationary official of the European Communities, subject to the Staff Regulations of Officials published in the Official Journal of the European Communities of 28 September 1972, C 100, pp. 5 to 32, and in particular Article 34 (8) thereof, compatible or incompatible to that of a member of the local staff, subject to the private law of national legislation, as published in the same Official Journal of 28 September 1972, C 100, p. 80, Articles 79 to 81, that is, in the present case, as regards Belgian legislation, Article 37 of the Law of 3 July 1978 and the former Article 14 of the Consolidated Laws on Employment."

2. It is appropriate to emphasize at the outset that this Court, before which the present case has been brought on the basis of Article 177 of the EEC Treaty, is called upon to interpret rules of Community law and especially the provisions of secondary legislation which govern the Staff Regulations of Officials of the European Communities and determine the Conditions of Employment of Other Servants of the European Communities. The Court will not, however, have to concern itself with the interpretation of Belgian rules of labour law to the extent to which they are applicable to the duties performed by the plaintiff as a member of the local staff. This is so notwithstanding the fact that the final part of the question submitted by the national court expressly refers to rules of that kind. In other words, this Court will only have to determine, by reference to the legal system of the Community, what are the effects of the engagement of a person as a probationary official by one of the institutions on a previous employment relationship of a contractual nature which bound that person to the same institution.

3. It is worth considering briefly the legal system which applies to the probationary period of European officials. In this connexion, Article 34 (1) of the Staff Regulations lays down that "Officials other than those of Grades A 1 and A 2 shall serve a probationary

period before they can be established" and the first subparagraph of Article 34 (2) adds that a probationer whose work has not proved adequate for him to be established in his post is to be dismissed. The probationary period and subequent establishment (or dismissal) of the official constitute the final steps in the engagement procedure which is carried out in various stages and is governed by Chapter I of Title III of the Staff Regulations (Articles 27 to 34).

With regard to the legal system applicable to local staff, I would recall in the first place that according to Article 4 of the Conditions of Employment of Other Servants of the European Communities "local staff means staff engaged according to local practice for manual or service duties, assigned to a post not included in the list of posts appended to the section of the budget relating to each institution and paid from the total appropriations for the purpose under that section of the budget". Clearly, the concept of member of the local staff is linked to the duties performed, which must be tasks not provided for in the lists of posts appended to the budget. However, the aspect with which this dispute is most closely concerned is that of the manner of engagement which must be "according to local practice."

Articles 79 to 81 of the Conditions of Employment outline the essential features of the legal rules applicable to local staff which may be summarized as follows: local staff are engaged on a contractual basis; each institution determines in accordance with its own rules "the conditions of employment of local staff, in particular: (a) the manner of their engagement and termination of their contract; (b) their leave; and (c) their remuneration". However those conditions must be determined "in accordance with current rules and practice in the place where they are to perform their duties." The Community institution's social security obligations are assimilated to those imposed on employers under the law of the place of employment. With regard to disputes between the institution and a member of the local staff, they are to be submitted to the competent court in accordance with the laws of the place where the servant performs his duties. This seems to be in conformity with the general criterion laid down by Article 183 of the EEC Treaty according to which "save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States."

The system of rules governing the employment relationship of members of the local staff is therefore "hybrid" in nature inasmuch as it is derived from Community and national sources. It is true that the engagement of local staff in accordance with Article 4 of the Conditions of Employment of Other Servants must be in confirmity with local practice and that the rules laid down in those Conditions of Employment, as well as the provisions adopted by the institutions engaging the member of the local staff, are referred to in the individual contract of employment with the result that the system of rules may be seen essentially as a national one governed by private law which, in relations between institution and the members of its local staff, makes the binding force of Community rules

dependent on its being recognized in the contract. I do not however rule out the possibility that different conclusions may be arrived at by giving prominence to the fact that the system of rules in question has been laid down in advance unilaterally and in a general manner for all the employment relationships of local staff, by the Community and, within the Community, by every Community institution concerned. If this line of reasoning is adopted, the function of the law of the place of employment appears to be in the first place to set a limit to the rule-making powers conferred on the institutions (thus taking precedence over any conflicting provisions adopted by them), and, secondly, to settle all questions which are not covered by Community rules. However, no matter which way the problem of classification is resolved, there is no doubt in my mind that the provisions on local staff adopted by each institution form part of those rules and that accordingly it is necessary in the present case also to take account of the rules adopted by the Commission on 14 May 1971 laying down the conditions of employment of its own local staff serving in Brussels.

4. It is now time to consider the question submitted by the Belgian court. It asks whether the mere suspension of the status of a member of the local staff following engagement for a trial period by the same Community institution is compatible with the status of a probationary official. To the extent to which the provisions contained in the Staff Regulations on the probationary period are taken as a basis, the answer must be in the affirmative. The legal rules governing the probationary period do not strike me as at all incompatible with keeping a pre-existing employment relationship in abeyance during that period. To the contrary, the temporary nature and the uncertain outcome of the probationary period justify, from the point of view of safeguarding the worker (the criterion on which the rules of labour law are based in every legal system), a solution which consists in not terminating prematurely and definitively a pre-existing employment relationship but in merely suspending it. If we then look at the general principles of the system governing the European Public Service, we find that the only principle which may be of relevance is the official's duty of allegiance to the institution which is expressed in Articles 11 to 19 of the Staff Regulations. I do not believe, however, that the retention of the pre-existing relationship can be regarded as conflicting with the duty of allegiance where, as in this case, the dormant relationship subsists with the same institution as the one in which the official is required to spend his probationary period. A situation of this kind rules out any conflict, even a potential one, between the interests of the administration and the keeping in abeyance of the original relationship. It might be possible to go so far as to state that the probationary official's interest in keeping his pre-existing relationship in a dormant state coincides with that of the administration in maintaining a link with a person who, in his capacity as a member of the local staff, has acquired specific experience in the performance of his duties.

Secondly, it is necessary to take account of the provisions of the Conditions of Employment of Other Servants and, in particular, of those applicable to local staff. None of these provisions, however, lays down, directly or indirectly, that the keeping in abeyance of the status of a

member of the local staff is incompatible with the status of a probationary official. Even in that case, the incompatibility might, in an abstract sense, be viewed in terms of the duty of allegiance but this time with reference to the status of a member of the local staff and no longer to that of an official. In my opinion, however, to accept the status of a probationary official does not involve, in a case such as the one in point, a breach of that duty. The consideration referred to above is applicable, namely that the probationary official is employed by the same institution which engaged him as a member of the local staff.

Thirdly, it is necessary to examine the rules adopted by the Commission laying down the conditions of employment of its local staff serving in Brussels. It is significant that provision for suspending the performance of the contract is made by more than one article, (Articles 12 (4), 22 (1) (a) and 22 (a) (1)) and that in particular Article 12 (4) envisages such suspension "in the cases provided for in the Belgian law relating to contracts of work or employment" and lists a series of specific instances (as shown by the use of the adverbial phrase "in particular"). That provision contains an unequivocal reference to the law of the place of employment and provides for the suspension, for the benefit of members of the local staff, of their contract of employment whenever such suspension is permitted under the Belgian legal system. The assessment of this issue in the present case is of course a matter for the court hearing the main action.

5. On the basis of all the considerations which I have discussed, I propose that the Court should give the following answer to the questions submitted by the Tribunal du Travail, Brussels, by judgment of 20 March 1980:

Under the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities, there is nothing to prevent a worker bound to a Community institution by a contractual realtionship as a member of the local staff and subsequently appointed as a probationary official in the same institution from keeping his former status in abeyance during the probationary period. Under the Rules laying down the conditions of employment of local staff of the Commission serving in Brussels, the suspension in question must be deemed to be permissible whenever it is allowed by the law of the place of employment.