2. Orders the parties to bear their own costs.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 26 February 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 29 JANUARY 1981 [1]

Mr President,
Members of the Court,

The applicant in the case on which I shall give my views today entered the service of the Commission as a temporary servant in Grade A 3 on a two-year contract which was concluded on 14 July 1975 and took effect on 15 August 1975. Initially he was employed as Head of the Administration and Personnel Division at the Joint Nuclear Research Centre in Ispra. From 16 March 1977 he worked at the Joint Nuclear Research Centre in Petten as Head of the Administration and Infrastructure Division. His original contract of employment was replaced on 26 May 1977 by a contract for an indefinite period concluded pursuant to the combined provisions of Articles 2 (d) and 8 of the Conditions of Employment of Other Servants. Clause 5 of that contract, which took effect on 1 November 1976, allowed employment to be terminated in accordance with Articles 47 to 50 of the Conditions of Employment of Other Servants; under those provisions the period of notice required depended on the length of service (one month for each year of service subject to a minimum of three months and a maximum of ten months). As the applicant's 12-year-old son, who was seriously ill with heart disease, needed to undergo an operation in the USA which in fact led to his death a few months later, the applicant was assigned to the Commission's delegation in Washington with effect from 15 February 1978 in order to enable him to stay near his son. During that period (in April 1978) he was the victim of a street assault and received severe gunshot wounds. This resulted in a partial permanent invalidity for which compensation calculated initially at 20% and later at 27% was paid to him in pursuance of Article 73 of the Staff Regulations.

1 — Translated from the German.

At the beginning of September 1978 the applicant resumed work in Petten. Several memoranda were sent to him during the course of that year criticizing the manner in which he was performing his duties, and he was subsequently notified by a letter dated 1 February 1979 from the Director-General of the Joint Research Centre that his employment was to be terminated with effect from 15 May 1979. His dismissal did not in fact take effect until 15 August 1979 because the applicant was sick and therefore his period of notice commenced running later in accordance with Article 47 (2) (a) of the Conditions of Employment of Other Servants.

The applicant submitted a complaint against his dismissal on 27 April 1979. This was rejected by a decision of 17 October 1979 notified to the applicant on 25 October 1979.

Thereupon the applicant appealed to the Court of Justice on 16 January 1980. His conclusions, as amended by his reply, request the Court to:

1. Annul the decision dismissing him notified by the letter of 1 February 1979 from the Director-General of the Joint Research Centre;

2. In the alternative,
   Order that the dismissal decision shall not take effect until the Council of Ministers has taken a decision on a proposal from the Commission to amend the Conditions of Employment of Other Servants (as regards the protection of dismissed temporary staff against the risks of unemployment, sickness and invalidity), or at least until the defendant has arranged for the applicant to be covered against such risks, and order that his contract shall meanwhile continue in force with retroactive effect from 15 August 1979;

3. In the further alternative,
   Order the defendant to adopt such measures as are necessary to enable the applicant to enjoy from the date on which his contract expires social protection in accordance with that laid down for temporary servants in the defendant's proposal for a regulation amending the Conditions of Employment of Other Servants or, at least, order the defendant to adopt the measures necessary to enable the applicant to enjoy from the above-mentioned date social protection in the form in which it will be provided by a Council regulation to be adopted as a result of the defendant's proposal;

4. In the still further alternative,
   Declare that the applicant should have been granted a period of notice of 10 months;

   Consequently, order the defendant to pay the applicant by way of compensation a sum equal to six and a half months' remuneration with interest thereon at the rate of 8% per annum from 15 August 1979;

5. In any event,
   Annul the decision rejecting the complaint submitted by the applicant on 27 April 1979.

The Commission contends that the Court should dismiss the application.

My views on the submissions of the parties are as follows:

1. It is common ground that the applicant's contract of employment was terminated because his employer came to the conclusion that the applicant was not sufficiently competent to perform the duties entrusted to him.

First and foremost, the applicant considers that assessment to be incorrect. He claims that since the Commission — which has the burden of proof in this matter — has produced insufficient evidence, his dismissal cannot be legally valid. The critical memorandum drafted by his superior in January 1978, to which particular importance appears to have been attached, can under no circumstances be sufficient. In the reply which he sent in February 1978 he refuted in detail the charges made against him and that reply has at no point been rejected. Furthermore, the memorandum was written a year before his dismissal, whereas under the terms of that memorandum the applicant was to be allowed a further chance to prove himself. This is clear from the final sentence of the memorandum which states: "Consequently, I urgently request you to take the division in hand and deal in an effective manner with the real problems". The memorandum cannot therefore be relied upon in order to justify his dismissal; instead, it should have been made clear to the applicant that his performance was still unsatisfactory at subsequent dates. For that purpose the memorandum of 5 October 1978 did not suffice because it did not contain any further explanations; furthermore, at that time the applicant had been back from the USA for only one month, a period which could not be considered sufficient to enable him to prove himself. Finally, the applicant criticizes the memorandum of January 1978 on the ground of incongruity. If he is to be criticized for lack of authority, it must not be overlooked that his superior contributed considerably thereto himself by frequently by-passing the applicant and dealing directly with his staff. Also, when the memorandum refers to the applicant's lack of management skills, the question arises why the appointing authority did not — in accordance with its duty of assistance — arrange for the applicant to attend appropriate training courses.

(a) The discussion of this issue must be prefaced by the general observation that for an employment relationship of the kind under consideration a right of dismissal is expressly provided for both in the Conditions of Employment of Other Servants (Article 47) and in the contract itself. That fact might prompt the Court to declare that dismissal is the normal method of ending such employment and to decide not only that the measure need not set out the reasons on which it is based — as the Court held in a previous case (judgment of 18 October 1977 in Case 25/68 *André Schertzer* v *European Parliament* [1977] ECR 1729) — but also that no factual justification need be given for it.

However, I do not consider that view to be justified. Regard must also be had to the fact that for permanent posts paid from research and investment appropriations the conditions laid down by the Staff Regulations were to a large extent replaced in 1976 by contractual conditions under Article 2 (d) of the Conditions of Employment of Other Servants. Consequently, it must be acknowledged that such employment affords a certain degree of security, particularly in administrative posts which are less affected by changes in research programmes, and the termination thereof must accordingly be regarded as an exception. Moreover, I also find convincing the remarks which Mr Advocate General Warner made on this issue in his opinion in Case 110/75 *(John Mills* v *European Investment Bank* [1976] ECR 972, at p. 980) where he took into account national law and a recommendation of the International

Labour Organization of 5 June 1963. Accordingly, it is also a principle of Community law that even where employment is terminated in accordance with the proper procedure it is still necessary to examine whether unfair dismissal has taken place. The dismissal may be regarded as fair only if valid reasons for it can be shown; those reasons may either be connected with the capacity or conduct of the employee or be based on the operational requirements of the employer. It seems that such considerations have also found expression in decisions of the Court. In that regard I have in mind not so much the situation which arose in Case 25/68 *(Schertzer* [1977] ECR 1729, at p. 1744), where the employment was for purposes of an essentially political nature and it could be said concerning the termination of that employment, which from the beginning was clearly unstable, that in view of the special characteristics of his post the employee must have been aware of the political factors and risks. However, it is worthy of note that the Court of Justice thought it right in its judgment of 17 November 1976 in Case 110/75 *(John Mills* v *European Investment Bank* [1976] ECR 1613, at p. 1623 et seq.) to examine the justification for the termination of the applicant's employment with the European Investment Bank, whereupon it was decided that a reduction in staff was warranted owing to a decrease in the work and that it was possible to take account of the merits of the persons concerned and their conduct in the department. It follows that, although the exercise of the power of dismissal is not expressly fettered by specific requirements, it is not sufficient for the employer simply to make a general reference to the interests of the service. Instead, it must be shown specifically and in detail that relevant, reasonable and valid reasons require the employment to be terminated.

In such a case, however, the employer is merely obliged to give a coherent explanation of the reasons for the dismissal. Where the dispute extends to the validity of the reasons stated the burden of proof falls not on the employer but on the employee since he is contesting the lawfulness of the dismissal. On this point reference should be made to the judgment of 8 July 1965 in Joined Cases 19 and 65/63 *Satya Prakash* v *Commission of the EAEC* [1965] ECR 533, at p. 554, and to the judgment of 17 March 1971 in Case 29/70 *Antonio Marcato* v *Commission of the European Communities* [1971] ECR 243, at p. 247. It is also important in this context to point out that in the *Mills* case the Court of Justice did not follow the view put forward by Mr Advocate General Warner that under Community law, as under the law of various Member States, the employer has the onus of proving the existence of the reasons for dismissal. However, that should not cast an unreasonable burden on the persons concerned. Since such contractual relationships fall within the province of public law (cf. Judgment of 16 December 1960 in Case 44/59 *Rudolf Pieter Marie Fiddelaar* v *Commission of the European Economic Community* [1960] ECR 535, at p. 543), the employer is surely under a duty to cooperate in establishing the facts in dispute, a consideration which greatly mitigates the rigour of the principle stated above. Furthermore, in such cases there are grounds in proceedings before the Court to have recourse to the right of the Court to require a clarification of the position and, if necessary, to raise certain evidence of its own motion.

(b) In view of the fact that in the present case the main ground for the termination of the applicant's employment was his unsuitability for the post entrusted to him, it must also be emphasized that the possibility of judicial review is in principle limited because such a question necessarily involves complex value-judgments.

On this point I refer to the judgment in Joined Cases 19 and 65/63 *Satya Prakash* [1965] ECR 533, at p. 551, where it was held that where a general value-judgment was involved the Court could not substitute its own assessment for that of the administration; it could merely check whether the facts taken into account appeared materially accurate and were logically compatible with that judgment. Similar dicta are to be found in the jugdment of 5 December 1963 in Joined Cases 35/62 and 16/63 *André Leroy* v *High Authority of the European Coal and Steel Community* [1963] ECR 197, at p. 203, and in the judgment of 8 July 1965 in Joined Cases 27 and 30/64 *Fulvio Fonzi* v *Commission of the European Atomic Energy Community* [1965] ECR 481, at p. 500. Also relevant on this point is the judgment of 17 March 1971 in Case 29/70 *Antonio Marcato* v *Commission of the European Communities* [1971] ECR 243, at p. 247, where it was emphasized that in Court proceedings involving an assessment of the competence of an official only obvious errors of fact could be pleaded. Finally, it was stated similarly in the judgment of 25 November 1976 in Case 122/75 *Berthold Küster* v *European Parliament* [1976] ECR 1685, at p. 1692, that in considering periodic reports the crucial factor in proceedings before the Court was whether there was evidence of patent errors or misuse of discretionary power.

(c) In the light of the principles discussed above the following conclusions may be made concerning the validity of the dismissal in the present case:

(aa) The memorandum of January 1978 from the applicant's superior is clearly of particular importance as it contains highly detailed criticisms. In that memorandum the applicant was criticized for failing to have the management skills needed to run a division of the type entrusted to him, as this required him to be familiar with the problems of the division, discuss them with the heads of the various groups and provide guidance in finding a solution thereto. Instead, it had been necessary for nearly all the affairs of the Infrastructure Division to come before the Director of the Research Centre. The applicant was further criticized for having concerned himself primarily with the less important matters and for having neglected the important ones such as, for example, matters appertaining to the budget and finance, the problems arising from relations with the Netherlands Centre for Nuclear Research and questions of health and safety.

Those criticisms can certainly not be regarded as having been refuted merely because no immediate and detailed response was received to the applicant's reply by memorandum of 8 February 1978. The explanation for this lies simply in the applicant's request in that memorandum "to do nothing else which might cause me even greater worries". As is clear from a memorandum of 28 February 1978, the applicant's superior complied with that request and reserved the right to return to the matters dealt with in the previous memorandum later.

In my view it may in fact be inferred from the applicant's memorandum of 8 February 1978, in which he attempted to show that he had been active in various

important areas, that at least some of the criticisms contained in the memorandum of January were not unjustified. In that regard I have in mind admissions which convey the distinct impression that the applicant relied too extensively on the initiative of one of his staff in the area of health protection and with regard to the high-flux reactor. I also draw attention to the applicant's assertion — regarding relations with the Netherlands Centre for Nuclear Reserach — that he had not been able to attend to that matter because he had not been introduced to the relevant liaison committee, a remark which certainly displays an attitude which is unfitting for an employee of his seniority and necessarily gives rise to the suspicion that his inaction was attributable to a lack of the necessary specialist knowledge in the field of finance law. Finally, the applicant does not altogether deny the criticism levelled at him that he lacked authority, but states that his superior undermined his authority by dealing directly with staff subordinate to the applicant. The applicant could in fact not prove that he was *systematically* by-passed. However, whilst that may have occurred in some instances and may possibly have been criticized by the Director-General of the Research Centre himself — again not proven however —, it is more probable, bearing in mind the undisputed heavy workload of the applicant's superior, who for that reason had attached great importance to filling the applicant's post quickly, that the explanation lies in the fact that his intervention was essential, which leads to the conclusion that the applicant lacked initiative and authority.

Furthermore, in this context memoranda of 6 September and 13 October 1978 from the applicant's former superiors in Ispra are of interest. These indicate — suggesting that the main criticisms contained in the memorandum of January 1978 are well founded — that it was also necessary to reprimand the applicant during his employment in Ispra for his poor judgment and lack of organizational talent and authority. These failings gave rise to difficulties regarding cooperation with his staff. It was therefore necessary to extend the applicant's probationary period and finally to look for another area of activity for him — the one in Petten in fact — where he was to be given a further chance.

(bb) The applicant also submits that in this case no account must be taken of the memorandum of January 1978 because the final sentence thereof, quoted above, indicated that the applicant was to be given a further chance. He maintains that, at the very least, it would have been necessary to prove that his performance was unsatisfactory after his return from the USA in the autumn of 1978. In my opinion that argument cannot be accepted.

On this point the Commission, which referred to the case-law on the dismissal of officials for incompetence (judgment of 21 October 1980 in Case 101/79 *Franco Vecchioli* v *Commission* [1980] ECR 3069), was correct in it submission that, for the purposes of such measures, it is the assessment of the person's career *as a whole* which is relevant. Furthermore, it must not be overlooked that the above-mentioned sentence merely expressed encouragement on the part of the applicant's immediate superior and that it was for the Director-General of the Research Centre as the competent appointing authority to reach a decision

on whether the applicant's employment should continue.

Equally crucial is the fact that the period of time which elapsed between the applicant's return from the USA in September 1978 and his dismissal from the service of the Commission was not inconsiderable, and that this period was also the subject of an unfavourable assessment which the applicant could not show to be patently incorrect. I do not derive that view from the memorandum of August 1978 from the applicant's superior, which — even before the applicant's resumption of his duties in Petten, that is to say even before the commencement of a final trial period — repeated in different terms the remarks made in the memorandum of January 1978 and stressed that it was not possible for the heads of section in Petten to cooperate with the applicant. Memoranda of 5 October and 13 November 1978, which were drafted after discussions with the applicant, also referred to the applicant's lack of authority, organizational ability and initiative. Furthermore, certain remarks made by the applicant himself must surely be of interest in this regard. This is true, for example, of his memorandum of 16 November 1978 requesting that since he was particularly gifted in the preparation of reports he should be otherwise employed and be assigned to advisory and research activities. That — and an impressive series of publications by the applicant — rather suggests a theoretical aptitude. A memorandum of 24 November 1978 from the applicant to the Director-General of the Research Centre should also be borne in mind. In it the applicant remarked that he and the recipient of the memorandum had arrived at different analyses and assessments regarding the applicant's situation and concluded with the hope that the Director-General of the Research Centre would respect his position. That remark reveals a certain lack of flexibility on the part of the applicant, which is surely open to criticism, and an astonishing lack of insight. Finally, also significant in that regard is the applicant's memorandum of 5 January 1979 in which he asked to be assigned to another post on the ground that he no longer had the confidence of his Director and it was impossible for him to continue to carry out the duties entrusted to him in such a climate of mistrust.

(cc) Consequently, in view of the fact that it can scarcely be said that the applicant has succeeded in disproving his superiors' unfavourable assessment of his competence and thus exposing the absence of valid reasons for the termination of his employment, little more need be said about the last point of his criticism, namely the incongruity of the assertions made by his superior.

On the evidence before the Court, the applicant's allegation that his authority was undermined owing to the fact that his superior systematically by-passed him in dealings with his subordinates cannot be accepted. With regard to the applicant's additional complaint that there was a wrongful failure to enrol him on appropriate management training courses, I do not think that a satisfactory situation could have been achieved in that manner, because he is also criticized for other inadequacies. Moreover, I am entirely in agreement with the Commission that when it recruited a person for a senior post following a competition it was entitled to assume that he would already possess the necessary management skills, particularly when the person concerned was formerly

head of personnel in a sizeable undertaking. The Commission could not be obliged to work towards an improvement in those skills itself and consider terminating the person's employment only when appropriate attempts had failed.

(d) Consequently, the dismissal certainly cannot be annulled on the ground that there were no valid reasons which could be taken into account in the interests of the service.

2. The applicant's next claim — although not repeated in his reply — is to the effect that, because his employment was terminated for imcompetence, it was necessary to observe Article 51 of the Staff Regulations, which provides that the reasons on which the dismissal is based are to be communicated and an opportunity given to make any comments thereon. Furthermore, the decision to dismiss him should have been taken in accordance with the disciplinary procedure laid down by Annex IX to the Staff Regulations, involving in particular the intervention of the Disciplinary Board. That procedure should at least have been considered, according to the applicant, because the system established by Article 2 (d) of the Conditions of Employment of Other Servants replaced the conditions laid down by the Staff Regulations and because to a large extent such staff — in any event this is so in the applicant's case — performed for an indefinite period the same duties as Community officials.

However, I agree with the Commission that the applicant's view cannot be accepted on this point either and that the dismissal procedure cannot be declared defective in reliance upon the provisions cited above.

It is quite clear that there can be no question of a *direct* application of the provisions referred to. As their wording indicates, they are quite plainly intended for *officials.* Article 11 of the Conditions of Employment of Other Servants does indeed make some reference to the Staff Regulations of Officials. It does not, however, cite Article 51 of the Staff Regulations, just as in Article 49 of the Conditions of Employment of Other Servants — in the case of dismissal on disciplinary grounds — no reference is made to the procedure laid down by Annex XI to the Staff Regulations.

Nor can there be any question of an application by analogy in reliance upon the principle of equal treatment. It is not in fact relevant whether certain servants and officials carry out similar duties; the crucial point is rather that officials enjoy a degree of security of employment which is not to be found in the case of other servants and that that difference in their respective situations permits differential treatment as regards the termination of employment.

However, in so far as the issue in this case is merely whether the rights of the defence were observed in the case of the applicant, that is to say whether account was taken of a principle which the Court has held to be of general application, at least where a serious violation of the rights of the individual is in issue, there are scarcely grounds for criticism. As early as the end of 1977 and the beginning of 1978 the applicant's attention was drawn to the unsatisfactory level of his performance (cf. in particular the memorandum of January 1978 which has already been considered in detail) and, in addition, he received critical memoranda on 5 October and 13 November 1978. The applicant was able to express his views thereon in several

conversations with his superiors and also in a number of written statements already referred to. It is therefore clear that he was sufficiently informed of his alleged inadequacies, that he was able to defend himself and accordingly that the procedure preceding his dismissal took its proper course.

3. In his third and final submission the applicant relies on a number of general principles such as the duty of assistance and the principles of equity and social security, and alleges a wrongful omission on the part of the Commission and a misuse of its power of dismissal.

The applicant takes the view — this point has already arisen in another context — that the termination of his employment on the ground of his alleged lack of management skills should be regarded as unlawful because the Commission, in breach of its duty of assistance, failed to enrol the applicant on a special management course. In any event, the period of notice given was too short because it was equal only to the minimum period provided for by Article 47 of the Conditions of Employment of Other Servants. Finally, he argues that his dismissal could not be ordered, or at least could not take effect, until rules had also been adopted for the Community ensuring cover on termination of employment against the risk of unemployment, sickness and invalidity. At the very least, the Commission is obliged in his particular case to take steps to cover him against such risks.

(a) Bearing in mind what I have already stated elsewhere, it is clear that the applicant's views on the first point cannot be accepted. There is no need in that regard to examine in detail the scope of the duty of assistance on which the applicant relies. That duty applies by virtue of Article 24 of the Staff Regulations and, pursuant to Article 11 of the Conditions of Employment of Other Servants, must also be applied where a person's employment is governed by those conditions. Even if it were accepted that by virtue of that duty the employer is obliged to provide further training, it would be significant that in the applicant's case it was not merely a question of further training but of first providing him with the qualifications needed for the performance of certain duties for which a person of his rank had to accept responsibility. It cannot, however, be one of the employer's duties to ensure that the basic qualifications for the performance of the contract of employment are first obtained. Rather, the employer may assume that a person who applies for a particular post and after a preliminary examination is found to be suitable, essentially possesses the necessary capabilities and does not first need to acquire them by special training measures. Furthermore, the applicant was criticized not only for his lack of management skills but also for other inadequacies. Consequently, even his participation in management courses would probably not have guaranteed that he would have performed his duties in a satisfactory manner. There can therefore be no question of a misuse of the power of dismissal on the ground that there was a breach of the duty of assistance.

(b) For the purpose of determining the period of notice, Article 47 of the

Conditions of Employment of Other Servants provides that where the contract is for an indefinite period — as in this case — employment is to terminate at the end of the period of notice stipulated in the contract. In the case of servants referred to by Article 2 (d), this period may not be less than one month for each completed year of service, subject to a minimum of three months and a maximum of 10 months. Accordingly, the second paragraph of Clause 5 of the contract concluded with the applicant on 26 May 1977 reads as follows: "The period of notice required shall be one month for each year of service completed, provided that such notice shall not be less than three months or more than 10 months".

Thus it may be seen that the period of notice is of a precisely determined length. Whilst the above-mentioned clause of the contract — in pursuance of Article 47 of the Conditions of Employment of Other Servants — also refers to a minimum and maximum period, the intention is merely to define the limits of the period of notice where calculation of the length of service produces a period of notice of less than three months or more than 10 months; in no way is it, however, intended to confer discretion permitting the particular circumstances of the case to be taken into account.

Since it is common ground in this case that the period of notice was correctly calculated on the basis of the above-mentioned clause of the contract and since the applicant was also unable to show, for instance by citing examples of national law, that a calculation on that basis may be challenged in principle — his reference to the judgment of 22 June 1967 in Case 12/66 *Alfred Williams* v *Commission of the EAEC* [1967] ECR 153, at p. 167, clearly does not assist the applicant in the present case — there are certainly no grounds to grant his alternative claim for a declaration that he should have been given a period of notice of 10 months.

(c) However, greater problems are raised by the third point concerning social security (sickness and invalidity insurance and cover against unemployment) for the applicant — who is apparently still unemployed — after the termination of his employment with the Commission.

The applicant takes the view that the compensation which he received pursuant to Article 73 of the Staff Regulations on account of the partial permanent invalidity caused by an assault in the USA and the severance grant paid to him pursuant to Article 39 (2) of the Conditions of Employment of Other Servants should in any event not be taken into account in this context. Those payments, to which the Commission referred in its defence, are clearly not intended to compensate for the absence of social security. On the other hand, the rule laid down by the third paragraph of Article 28 of the Conditions of Employment of Other Servants must be regarded as totally inadequate, for there provision is made merely for benefits under the sickness scheme to continue for not more than 60 days after the expiry of a contract. In any event, the applicant says that it is significant that in June 1979 the Commission submitted to the Council proposals for amendments to the Conditions of Employment of Other Servants with a view to improving social security (Official Journal 1979, C 191, p. 9). The following two articles were to be inserted into the Conditions:

"Article 28a

A former member of the temporary staff who after the expiry of his contract is eligible for unemployment benefit or who would be eligible if he were not suffering from incapacity for work shall be covered against sickness and maternity risks under the compulsory social security scheme of the country in which he establishes his residence as regards:

— The allowances provided for by that scheme in the event of incapacity for work,

— Payments other than those allowances, provided for by the scheme in the event of sickness or maternity.

Where the former member of the temporary staff is entitled to the benefits referred to in the second indent of the foregoing paragraph, his dependants shall be entitled to the same benefits.

The control, payment and reimbursement procedures shall be similar to those described in the second sentence of Article 28b.

Article 28b

A former member of the temporary staff shall be entitled to unemployment benefit under the compulsory unemployment insurance scheme in the Community country in which he establishes his residence. He shall be subject to the control and payment procedures laid down by the scheme; the institution shall reimburse the scheme for the sum paid in benefits."

In this regard it must first be observed that the applicant's arguments concerning the compensation paid under Article 73 of the Staff Regulations and the nature of the severance grant are valid. Moreover, the following observations must be made:

(aa) If I am not mistaken, the applicant's main argument is to the effect that until adequate social security can be arranged for Community servants whose employment is to be terminated, a right of dismissal may not be exercised or, at least, the dismissal may temporarily not take effect.

It seems to me, however, that that view is debatable for several reasons.

In its generality the argument certainly goes too far. It would remove the possibility of terminating employment even where requirements of social security as envisaged by the applicant do not arise because the person concerned is able to find new employment immediately. It would in any event be intolerable that the valid exercise of a right provided for by law and contract should depend on when and whether the official concerned finds other employment with adequate social security.

Furthermore, the applicant was not able to show that his argument was correct. For that purpose his references to the very general principles of equity, the duty of assistance and social security are indeed scarcely sufficient. It must also be significant that the argument was advanced in relation to conditions of employment which do not provide for such a connexion between the right of dismissal and social security. Any person entering employment on those terms did so with knowledge of that situation — regarded by the applicant as a deficiency — and, consequently, it scarcely seems justifiable to permit reliance upon that "deficiency" for the purpose of preventing the termination of a contractual relationship of that nature.

(bb) Also out of the question, in my view, is the claim that the dismissal should be prevented from taking effect until the defendant has arranged cover in respect of the risks referred to by the applicant, or indeed that the defendant should be ordered to take measures similar to those envisaged in the proposal for a regulation.

It must first be observed that it is not possible for the Commission to arrange such cover. For that purpose a legislative basis is required which so far has been wanting and which the Commission cannot provide itself because the adoption thereof falls within the competence of the Council. It is a separate issue whether the Commission may be criticized for a wrongful omission because it failed to make a proposal similar to the one which it has now submitted at an earlier date, for example when Article 2 (d) of the Conditions of Employment of Other Servants was originally adopted. However, that could not have the result of deferring the coming into effect of a dismissal notified in 1979; at best, without affecting the validity of the dismissal, it might lead to the award of compensation.

Moreover, in my view it is also clear that the defendant cannot be ordered to take measures similar to those envisaged in its proposal for a regulation. A draft, which is not certain to be adopted in its original form, does not constitute a legal provision and cannot therefore be the basis for benefits of any kind. If, however, the applicant is seeking to attain that legal consequence by means of compensation *in specie* in reliance upon a wrongful omission by the Commission, it must be said that he has not shown sufficiently clearly that the social protection which he considers necessary on the termination of employment governed by Community law could only assume the precise form which it takes in the Commission's proposal for a regulation.

(cc) In his reply the applicant pleaded an alternative claim for an order requiring the Commission to take steps to ensure that as from the termination of his employment he enjoys the social protection to be granted by a future Council regulation. Quite apart from the question of the admissibility of such an amendment to the pleadings in the reply, that claim cannot be granted.

It is indeed doubtful whether such a "contingent" order which takes account of provisions which may be adopted at a future date and would not permit immediate enforcement is at all conceivable. In any event, the claim discloses no interest capable of legal protection. If at some date rules such as those envisaged by the applicant are adopted and the applicant fulfils the requirements laid down therein for the conferment of benefits, it may naturally be assumed that he will receive those benefits without the Court's needing at this point to prompt the competent Community institutions to apply the rules.

(dd) Consequently, there now only remains to be considered the question already mentioned of whether the Commission may be criticized for a wrongful omission because it did not endeavour to supplement at an earlier date the Conditions of Employment of Other Servants along the lines of its proposal of June 1979 and whether on that basis the applicant may be granted compensation which will by and large place him in the position in which he would have been if a social security scheme, which compelling reasons of principle require after the termination of a contract of employment, had been introduced in good time.

In this regard it must be borne in mind that in principle such an order might be possible even though it was not expressly applied for. For one thing, it is possible to take the view that such claim is implied by the wording of the applicant's pleadings. Furthermore, it should be remembered that the Court of Justice has repeatedly proceeded on the basis of the principle that in disputes involving pecuniary claims, in which the Court has unlimited jurisdiction, it may award compensation of its own motion. In that connexion I refer to the judgment of 9 July 1980 in Case 23/69 (*Fiehn* v *Commission* [1970] ECR 547, at p. 559) or to the judgment of 5 June 1980 in Case 24/79 (*Oberthür* v *Commission* [1980] ECR 1743).

So far as concerns the main problem at issue here — that is to say, whether social protection of the kind envisaged by the applicant must be regarded as an essential requirement on the termination of insecure employment —, the line of argument put forward by the applicant does not appear to be particularly helpful or convincing. That is true of his reference to the very general principle of equity which was not shown to be relevant to the precise area with which the Court is concerned in this case. It is also true of the duty of assistance which, even going beyond the wording of Article 24 of the Staff Regulations, has never been regarded under Community law as having such far-reaching consequences in the field of social security and concerning which — in so far as national law is concerned — an interpretation to that effect was not proven. It is also true of the principle of social security, on which point the applicant confined himself to the claim that social security existed in all the Member States and that it was the aim of the Community to ensure social progress and social protection, in which case it might have been expected that — with the aid of a detailed study of comparative law — it would be shown that a certain level of social protection on the termination of insecure employment could be established as a common principle of the laws of the Member States or at least of the most progressive.

However, if we ignore that fact and endeavour to clarify the position ourselves, it must first be observed that under the labour law of the Member States no principle may be discerned which requires the employer to arrange cover against the risk of sickness or invalidity even beyond the period of employment. This seems in general to be a matter for the employee himself, except in cases where unemployment insurance or social assistance intervenes.

However, as regards insurance against the risk of unemployment the position seems to be rather different. Admittedly there is no general principle in the laws of the Member States which requires that all persons seeking employment should be insured in that way and receive assistance if they are unsuccessful in their efforts. None the less, the laws of all the Member States — pursuant to the European Code of Social Security of 16 April 1964 — provide that employed persons are to be insured in that way and are to enjoy on certain conditions protection guaranteeing a reasonable income for a certain period on termination of their employment. Moreover, that also applies to persons employed in the public service in so far as they do not

enjoy security of employment. In the Member States of the Community, they are covered either by the general scheme of unemployment insurance (or a branch of it) or by a similarly organized scheme.

Consequently, it would have been natural to lay down equivalent rules for Community servants in so far as their employment was not permanent, particularly since the national schemes do not as a rule — with the exception of pure *social assistance*, which is not equivalent and so does not concern us here — extend to unemployed former Community servants, owing to the particular conditions which they lay down (completion of a certain period of employment within the country concerned, payment of insurance contributions for social security or unemployment benefit). The fact that there is no protection of that kind for Community servants can in my view be regarded as nothing less than an intolerable lacuna. There would have been cause to close that lacuna, at least from 1976, when there was a considereable extension of employment on a contractual basis to areas such as administration where such a need is not immediately apparent. If this had been undertaken in good time, a satisfactory solution could no doubt have been found despite all the technical difficulties outlined in the oral procedure. The fact that no action was taken can, having regard to the standard which social security law has now attained in all the Member States, only be described as a serious deficiency and, consequently, as a wrongful omission on the part of the responsible Community institutions. In dealing with the specific cases which arise, the necessary consequences must now be attached to that omission by awarding appropriate compensation.

As far as the assessment of compensation in the present case is concerned, we have heard that the applicant is apparently still unemployed and that under Belgian law he has not been able to take out *voluntary* insurance against the risk of unemployment. In this regard the Court has a certain degree of discretion in the exercise of which it may assume that Community rules would be modelled on the common principles of national law and may thus rely on certain criteria to be derived from those principles.

One important criterion under national law is that the conferment of benefits is subject to completion of a certain period of employment or of affiliation to the unemployment insurance scheme. The periods in question — the minimum period of employment varies between 75 and 600 days and the period of affiliation to the social security scheme between 26 weeks and two years — warrant the immediate conclusion that the applicant, who was in the service of the Community for approximately three and a half years, cannot be allowed to remain without compensation even though he was previously self-employed.

It is also significant that the laws of most Member States provide that the insured person is himself to make contributions and hence make payments in order to protect himself against the risk of unemployment. Any future Community scheme may also be expected to involve such payments; consequently, this must likewise be taken into account in assessing the amount of compensation.

Finally, it is also important to mention that unemployment benefit is paid only for a limited period — varying between six and 18 months but generally about one year — and that it usually represents a certain percentage of the individual's previous salary — in the Federal Republic of Germany, for example, 68% of the previous remuneration, in Luxembourg 80% of the final gross salary subject to certain upper limits, in Denmark 90% of final income. Clearly, account must also be taken of such considerations.

In view of the foregoing the view might be taken in the present case, which concerns a former servant in Grade A 3 commanding a relatively high salary, that compensation amounting to roughly 80% of his final annual basic salary is appropriate. However, I hesitate to propose at this point that judgment should be given to that effect. An essential requirement for such a judgment is that the applicant should actually have been unemployed following his dismissal from the service of the Community. A further requirement is that he should have endeavoured to find other employment without success, in which regard it must also be considered that before entering the service of the Community he was a self-employed business consultant. The present proceedings have not yet sufficiently clarified those points. Further clarification should be sought and then, following a declaration of principle that a wrongful omission on the part of the institutions has occurred, a settlement by mutual agreement may be achieved. Consequently, I propose that the Court should merely give a partial and interlocutory judgment.

4. I therefore conclude by proposing that the Court should decide that none of the claims pleaded by the applicant is well founded; however, it should also declare as a matter of principle that there has been a wrongful omission on the part of the institutions because a scheme for protection against the risk of unemployment on termination of employment on a contractual basis was not introduced into Community law in good time. However, liability to pay compensation amounting to 80% of the applicant's final annual basic salary can only arise if it is proved beyond doubt that following the termination of his employment the applicant was unemployed for at least one year and endeavoured without success to find appropriate employment. A period should be specified within which the applicant is to furnish such proof. The parties would then have to inform the Court of the state of their dispute and of any settlement which may be reached on the question of compensation. Accordingly, costs may be reserved for the time being.