JUDGMENT OF THE COURT (SECOND CHAMBER)
27 OCTOBER 1977 [1]

Robert Giry
v Commission of the European Communities

Joined Cases 126/75, 34 and 92/76

In Joined Cases 126/75, 34 and 92/76,

ROBERT GIRY, an official of the Commission of the European Communities, residing at 37 B Chemin des Coudriers, Geneva, represented by Victor Biel, Advocate, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers at 18A rue des Glacis,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Raymond Baeyens, acting as Agent, assisted by Denise Sorasio-Allo, a member of the Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

Application for either the reinstatement of the applicant in accordance with the Staff Regulations of Officials on the expiry of his leave on personal grounds, together with compensation for the damage suffered by him as a result of his belated reinstatement or, in the event of his not being reinstated, compensation for the damage suffered by him on that account,

THE COURT (Second Chamber),

composed of: M. Sørensen, President of Chamber, P. Pescatore and Lord Mackenzie Stuart, Judges,

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

give the following

1 — Language of the Case: French.

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure, and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

1. The applicant, who was appointed as a Principal Administrator in Grade A 4 in the service of the Commission on 1 January 1961, was granted leave on personal grounds with effect from 12 October 1970, which was extended until 11 October 1973. During and even subsequent to this leave he occupied posts in the service of the United Nations (UN Conference on Trade and Development — 'UNCTAD').

By letter of 22 January 1973 he requested a measure terminating his service ('voluntary termination of service') pursuant to Regulation (EEC) No 2530/72 of the Council of 4 December 1972 introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of new Member States, and for the termination of service of officials of those Communities (OJ, English Special Edition 1972 (1-8. 12. 1972), p. 11); he added that he must be automatically reinstated on the expiry of his leave on 12 October 1973. The Commission refused this request on the ground that the regulation did not apply to officials on leave on personal grounds.

By letter of 26 April 1973, the applicant informed the Commission of his intention to apply for his reinstatement on 12 October 1973 and requested to be informed which post would be offered to him pursuant to Article 40 (4) (d) of the Staff Regulations of Officials.

On 11 July 1973 the head of the Establishment Division addressed a note to the head of the Recruiting, Appointments and Promotions Division asking him to include the applicant's file in the applications for posts in Career Bracket A 5/A 4.

The Commission's decision refusing the applicant 'voluntary termination of service' was contested by the action which he brought on 4 January 1974 in Case 1/74. In its judgment of 21 November 1974, [1974] ECR 1269, the Court found that the Commission had been entitled to refuse to apply Regulation (EEC) No 2530/72 to him. The Court added: 'Under Article 40 of the Staff Regulations an official has the right, on the expiry of his leave on personal grounds, to be reinstated in the first post corresponding to his grade which falls vacant, provided that he satisfies the requirements for that post'.

After the judgment, the applicant submitted, on 6 January 1975, a request to the Commission for a decision within the meaning of Article 90 (1) of the Staff Regulations for his reinstatement with retroactive effect to 12 October 1973. In the request the applicant *inter alia* drew the Commission's attention to the '... nonmaterial and pecuniary damage and damage to health ...' which he had suffered.

Neither this request nor a subsequent complaint of 3 July 1975 received any reply. The applicant thereupon appealed to the Court by application lodged on 19 December 1975 (Case126/75), *inter alia*

for his reinstatement and the annulment of all appointments to posts in Grade A 4 or Career Bracket A 5/A 4 made since 12 October 1973 in respect of which the Commission was unable to prove that the applicant did not possess the requisite qualifications.

On 21 April 1976, the applicant lodged a second application (Case 34/76) in which he sought the annulment of all appointments made to his detriment in Grade A 4 or Career Bracket A 5/A 4 between 8 April 1975 and the lodging of the application. This application was lodged in order to avoid the lapsing of his rights under Articles 90 and 91 of the Staff Regulations.

By order of 26 May 1976, the Court (Second Chamber) decided to join Cases 126/75 and 34/76 for the purposes of the procedure.

In a letter of 1 May 1976 the Commission invited the applicant to resume duty in a post which was vacant at the Directorate-General for Regional Policy. Reinstatement would take effect on the day on which he returned to duty and seniority would date from 12 October 1973.

The applicant's response to this was a letter dated 26 March 1976 in which he contested the legality of the offer of reinstatement. This letter was followed by further correspondence which did not result in any agreement.

These events were followed by a formal decision of the Commission of 29 July 1976, the recitals to which were worded as follows:

'Whereas on 26 April 1973 Mr Robert Giry requested to be reinstated in the service of the Commission on the expiry of this leave;

Whereas he was not reinstated on 12 October 1973;

Whereas the provisions of Article 4 of the Staff Regulations to the effect that no appointment or promotion shall be made for any purpose other than that of filling a vacant post prevent the reinstatement decision from having retroactive effect;

Whereas nevertheless it seems fair that the date of seniority in grade and step should be the date on which reinstatement should have taken place;'

The operative part of the decision read as follows:

'Article 1: Mr Robert Giry, who has been on unpaid leave on personal grounds since 12 October 1970, shall be reinstated with effect from 15 August 1976 in a post in Grade A 4 at the Directorate-General for Regional Policy.

Article 2: The grading of Mr Robert Giry shall be determined as follows as at 12 October 1973:

Grade A 4 (with seniority from 1 January 1967)

Step 6 (with seniority from 1 May 1973)

Article 3: The period from 12 October 1973 to 14 August 1976 shall, subject to contribution by the person concerned, count for the purposes of the pension scheme.'

In the letter communicating the decision to the applicant he was invited to supply the Commission with a statement of his earnings between 12 October 1973 and 15 August 1976 'in order to enable the Commission to calculate any financial loss suffered as the result of the delay in reinstatement.'

The applicant did not resume duty at the Commission. On 27 September 1976, he lodged the application in Case 92/76, in which he sought, *inter alia*, the annulment of the Commission's decision of 29 July 1976.

On 25 August 1976 the Commission submitted that it was unnecessary for Joined Cases 126/75 and 34/76 to proceed to judgment on the ground that those applications had ceased to have any purpose as a result of the Commission's decision of 29 July 1976 arranging for the reinstatement of the applicant.

By a document lodged on 3 November 1976 the Commission raised an objection of inadmissibility in Case 92/76 based on submissions relating to the procedure, the purpose and the substance of the application. By orders of 21 September and 17 December 1976, a decision on those objections was reserved for the final judgment.

By order of 17 December 1976 the Court (Second Chamber) also joined Case 92/76 to Joined Cases 126/75 and 34/76.

2. The written procedure followed the normal course.

The Court (Second Chamber), after hearing the views of the Advocate General, decided to open the oral procedure on the substance of the case without any preparatory inquiry.

II — Conclusions, submissions and arguments of the parties

The application in Case 126/75 (lodged on 12 January 1976)

1. In that application the applicant claims that the Court should:

— Rule that the implied decision of the Commission rejecting the applicant's request for the restoration of his grade, rights and salary on the expiration of his leave on personal grounds is contrary to the Staff Regulations and, consequently, rule that it is null and void;

— Rule that the implied decision of the Commission rejecting the complaint lodged against the implied decision rejecting the abovementioned request for a decision is contrary to the Staff Regulations and, consequently, rule that it is null and void;

— Rule that all appointments to posts of Grade A 4 or Career Bracket A 5/A 4 made by the Commission since 12 October 1973 were made in violation of the right of the person concerned to be reinstated in the first vacancy in a post in his category or grade and, consequently, rule that they are null and void, except for those for which the Commission shall have proved that the person concerned did not possess the required abilities; in accordance with Article 90 (2) such nullity shall, for appointments notified to the persons concerned before 7 April 1975, be limited to the effects as against the applicant, whereas for appointments notified to the persons concerned after 7 April 1975 such nullity shall be complete and effective as against all persons;

— Rule that the Commission had a duty under the Staff Regulations to reinstate the applicant on 12 October 1973;

— Rule that in not complying with this duty the Commission has committed an act of serious maladministration and must in consequence indemnify the applicant in respect of all damage suffered;

— Consequently order the Commission to pay the applicant:

(a) salary appropriate to Grade A 4, Step 6, with all the allowances to which he was entitled, for eighteen months and twenty days corresponding to the period from 12 October 1973 to 30 April 1975, the date on which the applicant should have advanced to Step 7;

(b) salary appropriate to Grade A 4, Step 7, with all the allowances to which he was entitled, for a period equal to that between 1 May 1975 and the date of the delivery of judgment;

(c) the severance grant referred to in Article 12 of Annex VIII calculated at the date of judgment as if the person concerned had in fact been reinstated as from 12 October 1973;

(d) the allowances laid down by Annex IV during the period referred to therein, the seniority of the applicant being calculated as for the severance grant;

— Order the Commission to pay the costs.

2. According to the applicant, Article 40 (4) (d) of the Staff Regulations means that reinstatement on the expiry of leave on personal grounds imposes a duty both on the official and on the Commission. The judgment of the Court in Case 1/74 confirms this view. The article in question makes no provision for the leave to be prolonged beyond two extensions unless an official refuses the first post offered to him.

On the expiry of the applicant's leave on personal grounds, there were a large number of posts vacant in Grade 4 or Career Bracket A 5/A 4, for which the applicant was suitable — a number of them in the Directorate-General where the applicant was serving before his leave. The Commission's decision of 14 January 1970, headed 'Leave on Personal Grounds' and published in *Staff Courier* No 103 of 27 February 1970, established a presumption that the official was fit to occupy vacant posts in his grade in his original Directorate-General or department.

Consequently, all appointments to posts in Grade A 4 or Career Bracket A 5/A 4 made since 12 October 1973 constitute an infringement of the applicant's rights in the absence of proof by the Commission that in each case he did not satisfy the requirements for the post and that the official actually appointed satisfied the requirements laid down in the vacancy notice. As those appointments were neither brought to his notice nor published in any document available to him, the applicant is still entitled to ask for their annulment in so far as they prevent his appointment to one of the posts with effect from 12 October 1973.

The applicant considers that the Court can neither reinstate him nor order the Commission to reinstate him, hence the wording of the first five paragraphs of his conclusions.

He further asserts that the Commission has wrongfully dismissed him. Calculation of the damage suffered as a result must be based on the Commission's duty to reinstate him in his grade, rights and salary with effect from 12 October 1973. This is the background against which the sixth paragraph of the applicant's conclusions must be viewed.

With regard to subparagraph (d) of that paragraph, the applicant points out that Annex IV to the Staff Regulations is mentioned in Articles 41 and 50, which deal with the cases where the Commission is authorized to terminate an official's service unilaterally for reasons other than misconduct or incapacity. But Annex IV has a wider purpose since it was adopted as the basis for the allowances granted to officials removed from the staff at the time of the merger of the executives and of the enlargement of the Community. In a case of wrongful dismissal, the allowance granted to an official who is the victim of it must be at least equal to the most favourable settlement for the official concerned under the four schemes for the reduction of staff.

The application in Case 34/76 (lodged on 21 April 1976)

1. The applicant claims that the Court should:

— Rule that the implied decision rejecting the complaint of 3 October 1975 is null and void;

— Rule that all appointments to posts of Grade A 4 or Career Bracket A 5/A 4 made between 8 April 1975 and the date when this application was lodged were made in breach of the applicant's right to be reinstated;
— Consequently, rule that the said appointments are null and void;
— Rule, in the event of the Commission's disputing the applicant's claim, that the latter must prove in each case that the applicant did not have the qualifications laid down for the vacant posts;
— Order the Commission to pay the costs.

2. In his complaint of 3 July 1975, registered on 7 July, the applicant sought, *inter alia*, the annulment *erga omnes* of the appointments notified to those concerned 'less than three months prior to the registration of this application and all appointments which were notified to those concerned after such registration'. It is against the implied rejection of that request that the applicant brought the application in Case 126/75.

By his complaint of 3 October 1975 the applicant requested the annulment 'of all appointments to a post in Grade A 4 or Career Bracket A 5/A 4 notified to those concerned between 7 July and 6 October 1975'. It was against the implied rejection of this complaint by the Commission that the applicant lodged the application in Case 34/76.

The Commission's application for a declaration that Joined Cases 126/75 and 34/76 should not proceed to judgment (lodged on 25 August 1976)

1. The Commission claims that the Court should:
— Declare that the applications have lost their purpose and that there is no need for the cases to proceed to judgment.

2. The Commission contends that the purpose of these applications no longer exists since its decision of 29 July 1976 concerning the reinstatement of the applicant must be regarded as giving him full satisfaction.

The applicant's observations on the application for a declaration that the cases should not proceed to judgment (lodged on 17 September 1976)

1. The applicant contends that the Court should:
— Forthwith dismiss the submission of the Commission that the cases should not proceed to judgment;
— Order the Commission to pay the costs of this procedural issue;

Alternatively
— Defer a decision until the final judgment and,
— In that case reserve the costs.

2. The applicant states, first, that the application for a declaration that the cases should not proceed to judgment is premature; because the applicant was on leave, he was informed of the Commission's decision of 29 July 1976 only by a telephone message from his lawyer on 14 September 1976. The application for a declaration that the cases should not proceed to judgment was lodged on 25 August 1976; at the time when the Commission was drawing up that application it could not therefore have known whether the applicant was or was not accepting his reinstatement.

The applicant claims, secondly, that the application for a declaration that the cases should not proceed to judgment is without foundation in law: the Commission has not correctly applied Article 40 (4) (d) of the Staff Regulations.

The application in Case 92/76 (lodged on 27 September 1976)

1. The applicant repeats the first five paragraphs of his conclusions in Case 126/75 and that relating to costs, except that in the case of the third paragraph of

those conclusions he claims that the appointments in question were made in breach of Article 4 of the Staff Regulations. With respect to subparagraphs (a) and (b) of the sixth paragraph of his conclusions in Case 126/75, the applicant now requests that legal interest on account of delay in payment be added to his salary.

The applicant continues his conclusions by claiming that the Commission should be ordered to pay to him:

— Damages of FB 1 500 000 to cover the pecuniary damage suffered in relation to his career;

and

— Damages of FB 1 000 000 for the non-material damage suffered by the applicant;

and

unless it has unconditionally reinstated the person concerned, before judgment is delivered, as from 12 October 1973 in his grade, rights and remuneration, order the Commission to pay him damage for wrongful dismissal made up of the three following components:

— The allowances laid down in Annex IV to the Staff Regulations, calculated on the date on which judgment is delivered, taking account of the compulsory reinstatement of the applicant on 12 October 1973;
— Either the severance grant laid down in Article 12 of Annex VIII to the Staff Regulations, if the applicant's seniority is at that time less than 10 years, taking account of the abovementioned compulsory reinstatement, or, if this should not be the case, at the end of the period during which the allowances laid down in Annex IV shall have been paid, a pension in respect of seniority on the conditions laid down in the last paragraph of Article 50; and
— The resettlement allowance provided under Article 6 of Annex VII to the Staff Regulations.

Finally, the applicant claims that the Court should:

— Declare that the decision of 29 July 1976 infringes the Staff Regulations in that it reinstated him only as from 15 August 1976 and not from 12 October 1973 and, in consequence, declare that it is null and void.

2. The applicant states that the wording of Article 40 of the Staff Regulations which applies to his reinstatement is that in force at the time when leave on personal grounds was granted and not, therefore, the wording at present in force. He bases this argument on the fact that, by letter of 18 November 1970, the Director-General of Personnel and Administration had explained to him that '... your administrative position is governed by Article 40 of the Staff Regulations of Officials, a copy of which is attached...'. In consequence this wording has contractual force and its subsequent amendment cannot be invoked against the applicant.

The applicant claims that it is clear from that article that an official must, without fail, be reinstated on the expiry of his leave on personal grounds, subject to two conditions: that there is a post in his category or service corresponding to his grade, and that he does not decline that post. In the latest version of Article 40 the first of those two conditions is made more precise by the insertion of the words 'provided that he satisfies the requirements for that post'. This addition was implied in the previous wording. Since the two conditions referred to are fulfilled the applicant has been automatically reinstated *de jure* since 12 October 1973 and, by virtue of Article 62 of the Staff Regulations, has been entitled to his remuneration since that date. It is true that the Commission has suffered some damage by being deprived of the services of one of its officials, but the blame for this falls entirely on the Directorate-General of Personnel and Administration.

By its decision of 29 July 1976 the Commission ceased to object to the applicant's actual reinstatement. The Commission simply refuses to recognize its faults and to compensate the applicant.

According to the second recital of the decision the applicant was not reinstated on 12 October 1973. On this point, the applicant states that, as the Commission did not reinstate him with effect from that date, and the Commission has only itself to blame for the delay, it must suffer the consequences and make good all damage suffered by the applicant.

There are two reasons why the interpretation of Article 4 of the Staff Regulations, contained in the third recital to the decision, is wrong. In the first place, the present case is not concerned with either an appointment or a promotion but with the assignment of an official compulsorily reinstated in accordance with Article 40. Moreover, on 12 October 1973, there was a large number of vacancies which the applicant was eligible to fill.

Furthermore the decision of 29 July 1976 contained no reference to the following: (1) the opinion of the Court in its judgment in Case 1/74; (2) the applicant's request of 6 January 1975 for a decision; and (3) his subsequent complaint of 3 July 1975.

Finally, the applicant requests the Commission to amend its decision by supplying references, deleting the second and third recitals, substituting 15 August 1976 for 12 October 1973 in Article 1 of the decision, and deleting Article 3. The applicant requests the Court to annul the decision if the Commission fails to amend it accordingly.

With respect to the material and non-material damage which the applicant claims to have suffered, he states that in refusing his reinstatement, the Commission prevented the advancement of his career. In view of the dispute which has arisen, he has not submitted an application for vacancies since October 1973. However, he did apply for a post as Head of Division VIII C2 (Industrial Cooperation, Trade Promotion and Regional Cooperation) and he believes that it would be difficult to find a candidate for this post with anything like the same capabilities as himself. Nevertheless he was not considered for this post on account of Article 40 of the Staff Regulations. He considers that this incident shows that if he had been reinstated in accordance with the Staff Regulations he would, at the latest by June 1975, have received promotion to Grade A 3 and at the end of his career would have reached at least the last career step in Grade A 2. An actuarial calculation shows that the material damage represented by the difference in salary between the two career brackets is more than FB 1 500 000. If this is increased by the non-material damage resulting from undergrading, the total reaches approximately FB 2 500 000.

The defence in Joined Cases 126/75 and 34/76 (lodged on 25 October 1976)

1. The Commission claims that the Court should:

- Rule that, on the expiry of his leave on personal grounds, the applicant ought to have been reinstated in the first vacant post provided that he satisfied the requirements for the post:
- Rule that any subsequent decision taken by the Commission to reinstate the applicant, embodying provisions comparable to those contained in the decision of 29 July 1976 and accompanied if necessary by the payment of a differential allowance, must be considered to give full satisfaction to the applicant;
- Dismiss the applicant's remaining conclusions as without foundation.

The Commission leaves it to the wisdom of the Court to determine

the period to be taken into account in relation to seniority, pension rights and any differential allowance.

2. The Commission does not dispute that it was late in applying Article 40 (4) (d) of the Staff Regulations.

That provision does not, however, provide for automatic reinstatement of an official on leave on personal grounds on the date on which the leave expires. It is clear from Article 40 (2) that the duration of leave on personal grounds is to be interpreted only as prohibiting the institution from granting a further extension to an official who wants it. The person concerned has a right to be reinstated on the expiry of the leave granted to him but this is subject to two conditions: the existence of a vacant post and the possession by the official of the requirements for the post. Until he is reinstated, an official remains in the position of being on leave on personal grounds even if there is a long period of time between the end of the period for which leave was requested and reinstatement. The applicant was therefore still on leave on personal grounds and the Commission cannot understand what interest he has in claiming the contrary.

With regard to the applicant's conclusion that the Commission was bound under the Staff Regulations to reinstate the applicant on 12 October 1973, the Commission contends that it was under an obligation to reinstate the applicant in the first vacancy for which he satisfied the requirements on the expiry of his leave on personal grounds.

With regard to the consequences to be drawn from this statement of the position the Commission distinguishes between two situations which the applicant appears to contemplate: one where he envisages a refusal on the part of the Commission to reinstate him and seeks compensation for it and the other in which he tries to persuade the Court to provide the conditions which he believes to be necessary for such reinstatement.

With regard to the first situation, the Commission states that, despite the delays which marked the procedure for reinstatement of the applicant, it did not, in principle, contemplate refusing to follow it. In its view, therefore, the whole of the applicant's conclusions for the purpose of obtaining compensation for a wrongful dismissal are wholly without foundation or even relevance not only when viewed in the light of the new developments which have occurred since the applications were lodged but even more because those conclusions can be considered only as an alternative request for compensation failing a reinstatement which includes sufficient compensation for any damage suffered. In any event, the applicant's claims are without foundation, since the general principles of public service law make it impossible for a salary to be paid to an official who was not in service during the material period and, since, moreover, he has supplied no evidence proving the existence and the extent of the damage allegedly suffered.

With regard to the second possibility, the Commission emphasizes that it is for the applicant to prove that he satisfied the requirements for the posts which he seeks to have annulled. The Commission does not however dispute that the applicant might have satisfied the requirements for some among the whole series of posts declared vacant since that date. What it does dispute, however, is the legal basis of the claim, in the light both of its value for the applicant and of the fact that it is out of proportion to the aim pursued; the applicant would derive no advantage whatever from the annulment of any of the appointments concerned and certainly no greater benefit compared with the conditions under which the Commission is in a position to reinstate him. The Commission considers that even a

belated reinstatement of the applicant may, under the provisions of the Staff Regulations, be accompanied by full compensation for any damage suffered.

On the basis of the information available to it, the Commission takes the view that the only damage suffered by the applicant relates to the loss of normal advancement in his career. It takes the view that, in accordance with the judgment of the Court of 1 July 1976 in Case 58/75 *Sergy* v *Commission* [1976] ECR 1139, a decision to reinstate him in the terms of that of 29 July 1976 is sufficient to make good the whole of this damage. As for the remainder of the claim the Commission contends that the applications contain nothing capable of proving that further damage occurred.

Finally, the Commission points out that the delays which ensued in reinstating him after 1 March 1976, the date on which the first offer was made to the applicant, can no longer be blamed on the Commission.

The objection of inadmissibility submitted by the Commission in Case 92/76 (lodged on 3 November 1976)

1. The Commission claims that the Court should:
- Dismiss the application as inadmissible;
- Order the applicant to pay the costs.

2. The Commission first asks the Court to ignore all references to the correspondence exchanged and the contacts made in the course of attempts at conciliation between the applicant's lawyer and the officers of the Commission and to refrain from taking any notice of any document relating to them produced by the applicant at any stage of the proceedings.

The Commission considers this application to be inadmissible on several grounds.

That part of the conclusions which has already appeared in the applications relating to Cases 126/75 and 34/76 is invalid for inadmissibility (judgment of the Court of 10 July 1975 in Joined Cases 4 and 30/74, *Scuppa* v *Commission* [1975] ECR 919); the application was not preceded by a complaint within the meaning of Article 91 (2) of the Staff Regulations; the decision of 29 July 1976 was without effect since the person whom it concerned refused to take advantage of it; and the applicant has no legal interest in bringing the action because he has only to withhold his consent to prevent the decision in question from having any binding effect. The Commission emphasizes in this respect that it will be taking steps to withdraw the decision. The legal effect of such a withdrawal is the same as that of annulment by the Court.

The applicant's observations on the objection of inadmissibility submitted by the Commission in Case 92/76 (lodged on 7 December 1976)

1. The applicant claims that the Court should:
- Rule that the objection of inadmissibility is without foundation;
- Order the defendant to pay the costs of the action.

The applicant argues that, because the decision of 29 July 1976 constitutes an express decision rejecting in part his complaint of 3 July 1975, the application is admissible within the meaning of Article 91 (2) of the Staff Regulations. Nevertheless, in order to protect his rights, whatever the outcome, the applicant submitted, on 28 October 1976, a complaint under Article 90 (2), which was registered on 3 November.

Again, by replying to his complaint of 3 July 1975, the Commission annulled its implied rejection of 7 November 1975. This once more raises the problem of the application of 12 January 1976, whose main object was to seek such annulment.

However, in the present state of the proceedings, this application cannot be withdrawn, at least until the objection of inadmissibility in Case 92/76 is set aside. Accordingly, Application 92/76 can if necessary take the place of that of 12 January 1976. Therefore it must repeat the substance of the arguments and conclusions of the latter application.

With regard to the alleged want of legal interest, the applicant argues that the application was not brought against the post offered, which he formally accepted, but against the terms and conditions attached by the Commission to the proposed reinstatement and against the implied rejection of all the other heads of claim which were submitted in the request for a decision of 6 January 1975 and in the subsequent complaint of 3 July 1975. The application seeks the annulment of the decision of 29 July 1976 only because this is the only legal means of obtaining an alteration in the conditions of reinstatement.

In any case the decision of 29 July 1976 does not have the significance given it by the defence. In addition to the offer of the post it contains at least one decision which from then on was bound to harm the applicant. It laid down that he was to be reinstated in a post in his category or grade only with effect from 15 August 1976.

The reply in Joined Cases 126/75 and 34/76 (lodged on 19 January 1977)

1. The applicant repeats the conclusions which he put forward in Case 92/76 with the exception of that referring to the annulment of the decision of 29 July 1976 and that referring to the severance grant.

In his view the interpretation placed by the Commission on Article 40 (4) (d) of the Staff Regulations produces the absurd result that the article prevents the Commission from extending an official's leave on personal grounds only if he asks for it, while, on the other hand, it empowers the administration, as it sees fit, to keep an official who has asked for his reinstatement indefinitely on unpaid leave. Moreover, such an interpretation conflicts with the general principle of law that no one may found an argument on his own wrong-doing.

The applicant agrees that the three cases cover two possibilities: the Commission's refusal to reinstate him or the fulfilment of the conditions necessary for the correct application of the Staff Regulations. In his application of 12 January 1976, however, he could act only on the basis of the first alternative because, by its implied rejection of the applicant's complaint of 3 July 1973, the Commission had dismissed him from its service.

The applicant states that, if he obtains the annulment of the implied decisions rejecting the complaint, which constitute wrongful dismissal, and a decision of the Court ruling that the Commission had and still has the obligation to reinstate him with effect from 12 October 1973, he is prepared to consider the compensation which he claimed in his application in Case 126/75 as an alternative to his reinstatement in grade, rights and salary as from the expiry of his leave on personal grounds. In either event, provision must also be made for compensation for non-material damage and for the applicant's loss of advancement in his career. He therefore maintains the substance of his conclusions but, in response to the Commission's request, he leaves it to choose between compensation for wrongful dismissal, which has taken place, and reinstatement in accordance with the Staff Regulations.

With regard to his application for annulment of appointments, the applicant recalls that the Commission recognized that the Personnel Directorate ought to have included the applicant's file in the applications for posts in

Career Bracket A 5/A 4 in Directorates General II, III, IV, VIII, XI and XVI. But the applicant's application form was not included in the list of applications for any post. The applicant accordingly requests that these applications should now be considered under the supervision of the Court.

With regard to the Commission's argument that the application for annulment of appointments is disproportionate to the objective sought, the applicant replies that, while it is true that only one post is required for his reinstatement, it is not for him to choose between the posts vacant on the expiry of his leave on personal grounds. Because of this he requests that all appointments made since that date be reconsidered.

With regard to his alleged entitlement to salary during leave on personal grounds the applicant contends that there is nothing in the Staff Regulations which permits remuneration received for an outside activity to be deducted from this salary. The position is different in the case of family allowances, the overlapping of which is prohibited under Article 67 of the Staff Regulations. The outside activities of officials of the Commission are governed by the third paragraph [sic] of Article 12 of the Staff Regulations. No provision is made therein for a statement of outside earnings or for any deduction whatsoever from the salary of the official concerned. Moreover the work performed by the applicant in UNCTAD must be regarded as having been authorized within the meaning of Article 12. In this connexion he states that the Commission authorized him to do this work during his leave on personal grounds. The conclusion may therefore be drawn that the authorization to work as an inter-regional adviser in UNCTAD, which was granted to the applicant along with his leave on personal grounds, was, by implication, renewed until his actual return to work at the Commission.

With regard, again, to his entitlement to salary, the applicant argues that Article 55 of the Staff Regulations provides that an official shall be paid for being at all times at the disposal of his institution. If the latter has no work for him this does not deprive him of the right to receive his salary. This is, incidentally, the position under Luxembourg law.

The applicant further comments that the facts underlying Case 58/75, *Sergy*, were different from those in the present case: Mr. Sergy merely notified the administration at the Commission that he was at its disposal and he accepted his reinstatement and complained only at a later date.

As regards his reinstatement the applicant suggests that, to preserve existing rights, the Commission should allow him to resume his duties forthwith, for example in the post offered by the Commission but that this resumption shall not constitute acceptance of the terms and conditions on which the Commission made its offer.

The applicant adds that the post now offered by the Commission is not the first vacant post within the meaning of Article 40. Thus the applicant's return to duty in that post can only imply acceptance of a transfer in the interests of the service to that post dating from the first vacancy which arose within the meaning of Article 40, in which the applicant continues to claim reinstatement as from 12 October 1973.

Defence in Case 92/76 (lodged on 31 January 1977)

The Commission claims that the Court should:

- Dismiss the application as inadmissible and in any case without foundation;
- Order the applicant to pay the costs.

With regard to the steps taken by the applicant to secure his reinstatement, the

Commission states that, apart from his letter of 26 April 1973 and the requests and complaints pursuant to Article 90 of the Staff Regulations, the applicant was throughout 1973 and 1974 concerned only with securing the termination of his service. It was only in his request of 6 January 1975 that he tried once more to be reinstated.

As regards the efforts by its officers to see to the reinstatement of the applicant, the Commission states that if there was any want of administrative action, it was strictly confined to the year 1975.

The Commission's decision of 29 July 1976 is correct. It did not necessarily have to cover the Court's judgment in Case 1/74 or the applicant's request for a decision of 6 January 1975 and his complaint of 3 July 1975; a decision of the competent authority cannot have its legal basis in an official's appeal through official channels or, in this specific case, in the judgment of the Court which it cannot be the purpose of the decision to carry out since it refers to a dispute which has no connexion with the point governed by that decision and which, moreover, results in the dismissal of the applicant's claims.

The Commission claims that, by virtue of Article 3 of the decision, it correctly applied Article 83 (2) of the Staff Regulations and Article 3 of Annex VIII thereto.

As for the date of the applicant's reinstatement the Commission emphasizes that it is not in a position to take a decision which would reinstate the applicant as from 12 October 1973.

The Commission reiterates that the present wording of the Staff Regulations applies to an official who was on leave on personal grounds on 30 June 1972, the date when that wording was adopted, but that this has little bearing on the substance of the dispute. Nor is the Commission able to accept the existence of a contractual relationship in the position of an official governed by the provisions of the Staff Regulations.

In the Commission's view the first paragraph of Article 4 of the Staff Regulations is of general application since it covers promotions as well as appointments and because, moreover, it is reinforced by Article 40 (4) (d) which, in the specific case of leave on personal grounds, provides for reinstatement in the 'first post... which falls vacant'. In any case the first paragraph of Article 4 embodies a basic rule of the law of the Community public service, as the Court declared in its judgment in Case 58/75, *Sergy*.

On the question of the application for damages, the Commission states that a lawful decision cannot amount to a wrongful act and, in consequence, create a right to compensation. The decision of 29 July 1976 could only have resulted in compensating for the whole of any damage to the applicant and he has not alleged any damage other than or additional to that inflicted on him by that decision.

The rejoinder in Joined Cases 126/75 and 34/76 (lodged on 14 March 1977)

The Commission claims that the Court should:

- Rule that, on the expiry of his leave on personal grounds, the applicant ought to have been reinstated in the first vacancy provided that he satisfied the requirements for the post;
- Rule that, in order to regularize the position in law it is for the defendant to arrange for the reinstatement of the applicant and the fixing of his seniority and pension rights as though the wrongful act had never been committed;
- Dismiss the remainder of the applicant's conclusions as being in part inadmissible and in any case unfounded.

The Commission contends that the applications of the applicant concerning 'pecuniary damage suffered in respect of his career' and the 'non-material damage suffered' are inadmissible because they were submitted only at the reply stage.

The Commission also regards as inadmissible the applications for annulment of appointments made more than three months before the applicant's first application to that effect unless he can produce evidence to prove that he was not in a position to know of them in time and in particular that he had no access to administrative publications containing vacancy notices.

The Commission begins by stating that, in regard to the substance, it is no longer at present bound either by the offer made to the applicant on 1 March 1976 or by the decision of 29 July 1976 to reinstate him which, for want of actual acceptance by the person concerned, has become ineffective.

The Commission states that it has never laid down as a condition precedent to the applicant's reinstatement that he must undertake to refrain from contesting the arrangements made. Similarly, it states that it is settled in case-law that a servant may be heard to impugn a measure, even if it has been taken at his request, and refers to the judgment in Case 58/75, *Sergy*, in which the Court annulled in part a decision for reinstatement at the end of leave on personal grounds.

In any case it is impossible to settle the dispute even in part by a resumption of work 'to preserve existing rights', as the applicant suggested, if only because the formal decision for reinstatement must of necessity comprise a number of elements relating in particular to its effective date and the determination of the applicant's seniority.

Before considering the applicant's action for annulment the Commission states that he now appears to be putting forward his reinstatement as his main objective.

It points out that its offer to calculate the applicant's seniority as though he had been at work since 12 October 1973 cannot be extended to the period which has elapsed since his refusal to accept this offer since any damage suffered since then is entirely his own fault.

As regards the annulment of appointments made before 7 April 1975, even assuming that the applicant can adduce proof that he was not aware of them in time, the only way in which his claims can be satisfied is by compensation, since the protection of rights acquired by third parties imposes a limit on the consequences of annulling individual administrative measures.

With regard to appointments made since 7 April 1975, the Commission contends that, even on the assumption that the Court sees fit to uphold the applicant's claims, it would be prevented from doing so by the vagueness of those claims and, since it could not annul any particular appointment, the Court would have to annul all of them. The absurd consequences of this approach suffices to dismiss it out of hand. In this connexion the Commission refers to French administrative case-law which is to the effect that the administration is obliged to reinstate an official in his original post and to oust his successor only in the rare cases where the person concerned has a right to a specific post, which does not apply in the case of the applicant.

Finally the Commission points out, in this connexion, that, on the assumption that, by virtue of the decisions of the Court, it is required to reinstate the applicant with retroactive effect, this would mean, *inter alia* that the whole of the period which had elapsed would have to be taken into account in fixing seniority.

Nor, moreover, would a retroactive reinstatement give rise to any right to the

receipt of salary during the period when the applicant was not in fact at work; Article 12 of the Staff Regulations cannot apply in such a case because it concerns an official who is at work. Furthermore, in its judgment in Case 58/75, *Sergy*, the Court laid down, in terms of a general principle, the rule that, in the absence of any services rendered, a servant has no right to a salary.

The Commission points out, assuming the reinstatement of the applicant, that the individual chances of promotion of an official in Grade A 4 who has at least two years' seniority may be expressed as 1 in 29. The average chance of promotion is therefore so small that it is impossible to take serious account of it in this case.

Finally, the Commission contends that, if, in the circumstances, the applicant's dismissal from the service of the Commission 'has taken place', as he says, it is due to his own fault as a result of the refusal to accept the offer of 1 March 1976. Because of this, the applicant cannot validly justify any claim to an allowance other than those granted under the Staff Regulations to any official leaving the service, in so far as he fulfils the conditions prescribed: this applies in particular in the case of the resettlement allowance and the severance grant provided for in Article 12 of Annex VIII to the Staff Regulations. In any case the applicant has no right to the allowance provided for in Annex IV to the Staff Regulations, which is available only in the case of retirement in the interests of the service applied to officials in Grade A 1 or A 2 or, by the same token, to make use of any of the provisions in Article 50 of the Staff Regulations which are applicable in those circumstances. With regard to the remaining claims, the Commission refers to its previous statements and to the submissions put in concerning the other heads of claim which, in the way they were submitted by the applicant, apply both to the possibility of reinstatement and to the possibility of termination of service.

The reply in Case 92/76 (lodged on 31 March 1977)

The applicant answers the Commission's criticism that he did not concern himself with his reinstatement during the whole of 1973 and 1974 by saying that his complaint prior to the application in Case 1/74 was clear on this point; that throughout that case he pressed to be reinstated; and that, with the minimum delay, he requested the Commission to apply the judgment in Case 1/74.

Commenting on the Commission's efforts to reinstate him, the applicant claims that, despite the decision of the Court in Case 1/74, the request for a decision and the applicant's subsequent complaint, it did nothing further to reinstate him between 21 November 1974, the date of the Court's judgment, and 1 March 1976. The efforts of the Directorate-General for Personnel and Administration during the preceding period were confined to two attempts, both of which were abortive.

The applicant further contends that the facts show that the Commission has still not replied to the questions why:

- The procedure described in the Commission's decision of 14 January 1970 entitled 'Leave on Personal Grounds' has not been applied;
- The applicant's file was not included among the applications for the posts in Career Bracket A 5/A 4; and
- The applicant's request of 6 January 1975 for a decision and his subsequent complaint of 3 July were filed away.

Finally, the applicant asks whether the post to which the decision of 29 July 1976 refers really exists or whether it is a fictitious post created in breach of the budgetary regulations.

On a point of law the applicant states that it is impossible to withdraw the decision of 29 July 1976 at least a regards the offer of the post mentioned

therein, which he has accepted subject to asking whether the post exists and contesting the conditions on which the offer was made.

With regard to the applicant's claims for compensation, that for pecuniary damage suffered in connexion with his career and that for non-material damage, the applicant points out that, in terms of procedure, the application in Case 92/76 was separate from that in Case 126/75 and is not therefore limited by his conclusions in the latter case. In any event the applicant is entitled to put in additional conclusions to cover the new development represented by the decision of 29 July 1976.

The application for compensation for the pecuniary damage in connexion with his career is linked to the right to reinstatement in accordance with Staff Regulations. It also applies in the event of wrongful dismissal since the obligations of the Commission in case of a refusal to reinstate him cannot be less than they would be if it decided to reinstate the applicant in accordance with the Staff Regulations on the basis of the principle that 'no one may found an argument on his own wrong-doing'.

The non-material damage was incurred by the applicant as a result of the loss of status which arose from the break in the advancement of his career, by worries about his career on the part of an official who, for three and a half years, was uncertain about his future, and by the complications in his temporary position in UNCTAD arising out of the fact that he had to remain at all times prepared to reply to the Commission's first offer. The applicant had already drawn the Commission's first offer. The applicant had already drawn the Commission's attention to this non-material damage in his request of 6 January 1975.

The Commission's decision of 29 July 1976 cannot reinstate the applicant without covering his request dated 6 January 1975 and his subsequent complaint of 3 July 1975. By its implied decisions rejecting the aforesaid request and complaint, the Commission dismissed the applicant from its service; there is therefore no possibility of a reinstatement unless the two implied decisions of rejection have been previously annulled either by the Court of by the Commission.

The applicant is entitled to have the period from 12 October 1973 to 14 August 1976 taken into account for the purposes of the pension scheme without any contribution by him: during that period the applicant was in active employment even though he was prevented from performing his duties. Article 83 of the Staff Regulations provides that an official's contribution to the pension scheme shall be deducted monthly from his salary, which means that, if there is no salary, no contribution is called for from the person concerned. If the applicant receives the arrears of salary corresponding to the period in question, his contribution to the pension scheme must be deducted from those arrears.

The applicant emphasizes that the crucial issue in this dispute is the date of his reinstatement. In a reference to this in his reply in Joined Cases 126/75 and 34/76, the applicant adds that the 'competent authority' for the purposes of offering an official the first vacant post within the meaning of Article 40 (4) (d) of the Staff Regulations is not the appointing authority but the Directorate-General of Personnel and Administration. The latter is empowered only to carry out an administrative formality in order to recognize an existing legal situation but not to create a new legal situation. There is no provision in Staff Regulations for a formal decision of reinstatement adopted by the Commission itself. Leave on personal grounds is granted by the appointing authority for a fixed period; accordingly, the initial decision simultaneously fixes

the date from which leave is granted and the date of reinstatement.

In support of his argument that Article 4 of the Staff Regulations cannot apply to reinstatement, the applicant recalls that, according to its final paragraph, Article 4 applies to the events contained in Chapter 1 of Title III of the Staff Regulations, which covers the various forms of recruitment, whereas leave on personal grounds comes under Chapter 2 of Title III.

The applicant contests the objection of inadmissibility raised by the Commission in its rejoinder in Joined Cases 126/75 and 34/76 against the introduction, at the reply stage of these cases, of claims for compensation in order to cover the pecuniary damage suffered by the applicant with regard to his career and for non-material damage.

In this connexion, the applicant points out that the decision of 29 July 1976 is a new development which gives him the right to introduce additional conclusions during the proceedings; moreover, more than a year elapsed between the two statements and the damage suffered by the applicant was aggravated during that period.

With regard to the Commission's objections to the admissibility of the applications for annulment of the appointments made more than three months before the lodging of the complaint of 3 July 1975, that is to say, before 7 April 1975, the applicant argues that his application for annulment refers not to the vacant posts but the decisions to appoint. The applicant's letter of 26 April 1973, in which he requested his reinstatement for the first time after expiry of his leave on personal grounds, constituted an application for all the posts in Grade A 4 or Career Bracket A 5/A 4 then vacant or which were to become so before his reinstatement, so that the Commission ought to have notified him every time his application was set aside and the period for a complaint under Article 90 (2) of the Staff Regulations would begin to run from such notification. The applicant never received such notifications. As the Commission is to blame for the absence of those notifications it has no grounds on which to claim that the applicant's rights have lapsed. In the case of officials so appointed who received notification of their appointment before 7 April 1975, any complaint regarding the irregularity of their appointment is time-barred. But it is not time-barred as against the applicant in that his reinstatement with effect from 12 October 1973 was thereby prevented.

With regard to the case-law of the French Conseil d'État relating to the annulment of appointments, the applicant states that, since the Court was created, it has never hesitated to annul improper appointments.

Furthermore the applicant argues in this context that the link between a Community official and his post is fundamentally different from that which links a French official with his; a Community official can be appointed only to a specifically designated post (Article 4 of the Staff Regulations) and he has a right to that post. On the other hand, with the solitary exception of teachers and members of the judicature, French officials are appointed to a grade in a structure provided for by public service regulations. In the circumstances it is clear that, under French law, reinstatement of an official in no way makes it necessary to annul appointments made in the meantime. The situation is quite different in the case of a Community official.

With regard to the Commission's argument that the applicant never referred to any difficulty caused to him by the comparatively long period during which he was waiting for an offer of

reinstatement, he states that, because of the need to hold himself available for the Commission and because, therefore, of the impossibility of undertaking an engagement of any length, he was unable to look for a permanent post. Moreover, he has been out of work since 1 April 1977.

With regard to the Commission's argument that the applicant is not entitled to the allowance provided for under Annex IV to the Staff Regulations, which applies only to retirements in the interests of the service in the case of officials in Grades A 1 and A 2, the applicant states that Annex IV is of much wider application than Article 50 by itself. It is used as a provision to be referred to not only in the case of Articles 41 and 50 but also for the measures for the termination of service of staff adopted at the time of the merger of the executives and of the enlargement of the Community.

The applicant emphasizes that all he is asking for is the straightforward application of Annex IV; he referred to the final paragraph of Article 50 only by way of reference to establish the conditions for calculating the pension.

The rejoinder in Case 92/76 (lodged on 2 May 1977)

In reply to the question put by the applicant in his reply concerning the application of the Commission's decision of 14 January 1970, the Commission replies that, as general measures of reorganization of the service are involved, the applicant is not entitled to rely on them or to request that they be applied; in any case, in this connexion, the applicant was not subject to discriminatory treatment compared with other officials who were in the same position.

On the other questions put by the applicant in the part of the aforementioned reply relating to the facts, the Commission refers to the arguments put forward in its previous statements and adds that on 29 July 1976 it decided to assign an additional post in Career Bracket A 5/A 4 to the Directorate-General of Regional Policy with the object of ensuring the applicant's reinstatement in his original department, where no vacancy was available.

Furthermore the Commission states that 15 August 1976 was chosen as the effective date of the applicant's reinstatement as being the earliest date which would enable the applicant to be informed and to return to Brussels.

The Commission requests the Court to ignore the applicant's references to the statements which he submitted in Cases 126/75 and 34/76.

With regard to Case 92/76 the applicant has produced nothing different from or additional to his application and, in view of this, the Commission refers to its defence.

III — Oral procedure

The applicant, represented by Victor Biel, and the Commission, represented by its Agent, Raymond Baeyens, assisted by Denise Sorasio-Allo, submitted oral observations at the hearing on 7 July 1977.

The Advocate-General delivered his opinion at the hearing on 6 October 1977.

Decision

1 The applications in the three joined cases are, essentially, intended to secure:

(a) recognition of the right of the applicant, who has been on leave on personal grounds since 1970, to be reinstated with effect from 12 October 1973, the date on which his leave expired and, to this end, the annulment, first, of the Commission's decision of 29 July 1976, reinstating the applicant with effect from 15 August 1976 though with effect in respect of seniority and pension from 12 October 1973, and, secondly, of the appointments made since that date to posts in Grade A 4 or Career Bracket A 5/A 4 for which the applicant possessed the requisite qualifications;

(b) payment of the salary which the applicant would have received if he had been reinstated with effect from 12 October 1973; and

(c) compensation of the applicant for the pecuniary damage which he claims to have suffered as regards his career and for nonmaterial damage, and the payment of certain allowances under the Staff Regulations.

2 The defendant, the Commission, raised certain preliminary objections on which the Court reserved its decision for the final judgment.

3 In view of the close connexion between these objections and the submissions on the substance relied on by the parties, consideration must first be given to the latter.

4 Article 40 (4) (d) of the Staff Regulations provides that, on the expiry of his leave, an official must be reinstated in the first post corresponding to his grade which falls vacant, provided that he satisfies the requirements for that post.

5 The applicant contends that the Commission has disregarded his rights under this provision by offering him reinstatement not in the first post which fell vacant in accordance with the requirements of the Staff Regulations but only in 1976, first by a letter of 1 March and then by the formal decision of 29 July.

6 However, before the expiry of his leave, the applicant had requested a measure terminating his service pursuant to Regulation (EEC) No 2530/72 of the Council and the refusal of this request by the Commission was contested by the applicant in a preliminary complaint through official channels and subsequently by application to the Court, which the Court (Second Chamber) dismissed by its judgment of 21 November 1974 in Case 1/74 [1974] ECR 1269.

7 Although it was accompanied by a request for reinstatement, the applicant's persistence in his request for termination of service was liable to cast doubt on the genuineness of his desire to make himself available to the Commission.

8 It was only as from 21 November 1974, the date of the judgment referred to, that the applicant can with certainty be said to have been in a position to claim his rights under Article 40 (4) (d) of the Staff Regulations.

9 The doubt to which the applicant's attitude gave rise was finally removed only by the letter which he addressed to the Commission on 6 January 1975 confirming his request for reinstatement.

10 It was therefore after the receipt of that letter, at the latest, that the Commission was under a clear duty to reinstate the applicant on the first occasion on which the requirements of Article 40 of the Staff Regulations were satisfied.

11 The Commission has not disputed, during the proceedings, that the proposal for reinstatement addressed to the applicant by the letter of 1 March 1976 and formally confirmed by the decision of 29 July 1976 was a belated one.

12 On the other hand the applicant refused the offer and contested the validity of the Commission's decision, in particular because it made no provision for the reinstatement to be effective retroactively from 12 October 1973.

13 Whilst it is true that the decision fixes 15 August 1976 as the date from which the reinstatement takes effect, conditions are attached to it which, on

all essential points, are tantamount to giving it the retroactive effect sought by the applicant.

14 In fact the applicant's seniority in grade and step is fixed as though the reinstatement had taken place on 12 October 1973.

15 As regards the pension scheme, the period from 12 October 1973 to 14 August 1976 is to be taken into account subject to a contribution from the applicant.

16 Finally, on the subject of salary, the applicant was invited to supply the Commission with a statement of the salary which he had received during the same period in respect of his service with the United Nations, so as to enable the Commission to calculate any pecuniary damage suffered as a result of his belated reinstatement.

17 It follows that the applicant has no legal interest in seeking the annulment of the decision of 29 July 1976 and that, in consequence, his application on this subject must be dismissed.

18 The position is the same as regards the application for the annulment of the appointments made since 12 October 1973 to posts in Grade A 4 or Career Bracket A 5/A 4.

19 With regard to the applications for compensation, it must first be determined whether the applicant's behaviour contributed to the damage which he claims to have suffered.

20 On this aspect it has been stated above that, during the period from 12 October 1973 to 21 November 1974, the date of the judgment of the Court in Case 1/74, the applicant, by persisting in his request for termination of service under the specially favourable conditions provided for in Regulation (EEC) No 2530/72, cast doubt on the seriousness of his request for reinstatement.

21 Furthermore, the applicant's reply to the Commission's offer of 1 March 1976 and to the decision of 29 July 1976 was to contest the validity of those acts and to refuse to return to duty in the service of the Commission although it would have been permissible, and quite enough to protect his rights, for him to accept the post offered to him, without prejudice to his setting in motion the procedures provided for in the Staff Regulations in order to test the legality of the arrangements for reinstatement.

22 It is true that at a later stage, namely in the reply lodged on 19 January 1977 in Joined Cases 126/75 and 34/76, the applicant suggested, in order to preserve his rights, that the Commission should allow him to return to duty on condition that such a return did not mean that he accepted the arrangements or conditions on the basis of which the Commission had made its offer.

23 However, such a statement, made in the course of the written procedure in an action before the Court, cannot take the place of an acceptance, within the meaning of Article 40 (4) (d) of the Staff Regulations, of the post offered.

24 The course of events, viewed as a whole, accordingly makes it clear that the applicant's conduct helped so much to create and prolong the difficulties in the way of his reinstatement that the Commission cannot be held responsible for the non-material damage which the applicant claims to have suffered.

25 Nevertheless, during the intermediate period between the date on which in accordance with Article 40 of the Staff Regulations reinstatement became possible as a result of the applicant's request for reinstatement of 6 January 1975, and 1 March 1976, the date of the Commission's first offer, the Commission failed to comply with the duty imposed upon it by Article 40 (4) (d) of the Staff Regulations.

26 As far as this period is concerned therefore it must be determined whether, as the applicant claims, he has suffered pecuniary damage in connexion with the advancement of his career.

27 It cannot be determined with any certainty what chances the applicant would have had of advancement in his career during that period.

28 Generally speaking, the chances of advancement during such a period are so vague and hypothetical that they do not in themselves justify a finding that the applicant suffered pecuniary damage under this head.

29 The applications for compensation must therefore be rejected.

30 Finally the applicant has sought the award of a severance grant, as provided for in Article 12 of Annex VIII to the Staff Regulations, as well as the grant of the allowances provided for in Annex IV to the Staff Regulations in the event of being assigned non-active status or in the event of retirement in the interests of the service.

31 These applications cannot be upheld since the applicant's service has not been terminated pursuant to any of the provisions mentioned.

32 Accordingly, the applications made by the applicant must be rejected in their entirety.

33 In the circumstances, there is no need to consider the preliminary objections raised by the Commission.

Costs

34 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

35 The applicant has failed in his submissions.

36 However, under the terms of Article 70 of the said rules, the costs incurred by the institutions in actions brought by employees of the Community are to be borne by such institutions.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the applications in the joined cases;**

2. **Orders each party to pay its own costs.**

Sørensen Pescatore Mackenzie Stuart

Delivered in open court in Luxembourg on 27 October 1977.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 6 OCTOBER 1977 [1]

Mr President,
Members of the Court,

1. The substance of the dispute between Mr Robert Giry and the Commission, which has given rise to the three Joined Cases 126/75, 34/76 and 92/76, is concerned with the following question: if, despite the provisions of Article 40 (4) (d) of the Staff Regulations of Officials, an official has not, after the expiry of a period of leave, been reinstated in the post within the prescribed time, is he to be recognized as having the right to be reinstated retroactively (or from the date when the leave expired) for all purposes, in particular as regards the payment of salary?

The said provision lays down that an official granted, at his own request, unpaid leave on personal grounds 'must' on its expiry 'be reinstated in the first post corresponding to his grade which falls vacant in his category or service, provided that he satisfies the requirements for that post'.

Viewed in the light of the material facts in these cases, the question set out above may be couched in more specific terms,

1 – Translated from the Italian.