In Case 26/63

PIERGIOVANNI PISTOJ, a servant of the Commission of the European Economic Community, represented by Marcel Slusny, Advocate of the Cour d'Appel, Brussels, lecturer at the University of Brussels, and by Giuseppe Guarino, Advocate of the Rome Bar, Professor at the Institute of Economic and Commercial Science in Rome, with an address for service in Luxembourg, at the Chambers of Mr Arendt, avocat-avoué, 6 rue Willy-Goergen,

applicant,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by its Legal Adviser, P. Leleux, acting as Agent, assisted by J. Coutard, Advocate of the Conseil d'État and of the Cour de Cassation of France, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application

1. Principally:
   for annulment of the integration procedure undergone by the applicant, as well as ancillary measures;
   the reinstatement of the applicant in respect of his rights and duties;

2. Alternatively:
   a finding of a wrongful act or omission on the part of the Commission and the consequent reparation for the damage suffered by the applicant,

THE COURT (Second Chamber)

composed of: Ch. L. Hammes, President, R. Rossi and R. Lecourt (Rapporteur), Judges,

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

gives the following

JUDGMENT
Issues of fact and of law

I — Facts

Mr Pistoj was appointed as Head of Division in the Directorate-General of the Internal Market of the Commission of the European Economic Community by a decision of 4 December 1958, notified to the person concerned by letter of 16 December 1958. Having been classified in Grade A 3, Step 2, Mr Pistoj was promoted to Step 5 of the same grade by a decision of the Commission of 4 May 1960.

After having received various statements from Mr Pistoj, the Establishment Board, at its 31st meeting on 19 July 1962, issued an unfavourable opinion concerning his integration, which was worded as follows:

'The Establishment Board, after having studied the report on the ability, efficiency and conduct in the service of Mr Pistoj, a servant in Grade A 3 of the Directorate-General of the Internal Market, and after having gathered all the necessary information and having heard the servant himself,

— considers that Mr Pistoj has not been able to direct the work of the division under his charge with the requisite administrative ability and to establish good relations with his superiors and his subordinates;

— considers that Mr Pistoj was unable to adapt himself to the duties entrusted to him in a satisfactory manner, because of his inability to accommodate himself to his new work and the lack of order and method in his work,

and consequently expresses an unfavourable opinion in respect of his ability to carry out the duties to which he is assigned.'

The Establishment Board decided, however, to send a special report to the Commission of the EEC; this report contained the following sentence:

'The Establishment Board, being aware of the fact that Mr Pistoj raises a social problem, suggests to the Commission of the EEC that it should make use of the power conferred upon it by Article 102 (2) of the Staff Regulations by giving him a grade and a post in another Directorate-General, which would suit his abilities.'

This suggestion of the Board appears to have taken up an unofficial proposal made previously to Mr Pistoj by Mr Caron, Vice-President of the Commission.

The unfavourable opinion of the Establishment Board was notified to the applicant by letter of 14 March 1963. In this letter he was offered a post in Grade A 4, Step 6, with seniority as from 1 January 1961, in the Library and Documentation Department. This offer was subject to acceptance within 8 days.

On 15 March 1963, Mr Slusny, counsel for Mr Pistoj, asked for an extension of this time-limit and for his client's file to be sent to him. The request for an extension of time was repeated on 22 March 1963 and on the same day the Director-General, Mr Smulders, wrote to the applicant stating that the extension had been refused.

By letter of 25 March 1963, Mr Slusny again asked for an extension of time and by letter of 11 April the Commission replied to him that it could not grant his request. Mr Slusny again asked for authority to examine the file by letter of 17 April 1963 and this was authorized by letter of 25 April 1963.

Examination of the file was not possible until 7 May 1963 and Mr Slusny placed on record the incomplete and untidy state of the file.

By a letter of 6 May 1963, Mr Smulders informed the applicant that his employment was being terminated, subject to

three months' notice and severance allowance equal to two months' basic salary.

Mr Pistoj's application was lodged at the Court Registry on 13 May 1963.

II — Conclusions of the parties

The applicant's application was worded as follows:

'For these reasons,

the applicant states that he is making an application against the European Economic Community or, alternatively, the Commission which he names as opposing parties.'

The applicant claims that the Court should:

'1. Declare null and void the integration procedure followed in respect of the applicant, as well as the opinion of the Establishment Board of 19 July 1962, notified to the applicant by letter from Mr Smulders of 14 March 1963;

2. Declare null and void the decision to terminate the applicant's contract, notified by letter from Mr Smulders of 6 May 1963;

3. Declare that the Commission is obliged to submit the applicant once more to the integration procedure, after having carried out the formalities laid down in the last sentence of Article 5 and in Article 110 of the Staff Regulations;

4. Declare that consequent upon annulment the applicant should be regarded as being still in the service of the Commission, in accordance with the detailed rules of the transitional scheme to which he had been subject until now;

declare that the European Economic Community or, alternatively, the Commission shall owe to the applicant his monthly salary after the expiration of the period of notice set out in the letter of 6 May 1963, and that the applicant shall continue to have a right to the other benefits resulting from his present status;

5. Alternatively:

Declare that the termination notified to the applicant is improper and defective;

declare that the European Economic Community or, alternatively, the Commission are liable to make reparation for the material damage suffered by payment of compensation of 5 000 000 Belgian francs, subject to increase or decrease during the proceedings and for the non-material damage by payment of compensation of 5 000 000 Belgian francs, with the same reservation;

6. Declare that the European Economic Community or, alternatively, the Commission shall bear the entire costs of the proceedings;

7. Take note that the applicant:

(a) reserves the right during the proceedings to raise such fresh issues of fact and of law to which he might be obliged to have recourse following the service by the opposing party of its defence and of the possible production of documents by the latter;

(b) offers to prove by all legal means, including the evidence of witnesses, the facts which he alleges and which until now have not been indicated in writing, if such facts are disputed by the opposing party.'

In its statement in defence the *defendant* contended that the Court should:

'Dismiss the application made by Mr Pistoj as inadmissible and in any event unfounded both in respect of the decision against integration and that terminating his original contract, with all the consequences in law arising therefrom, particularly in respect of the rules concerning costs and fees.'

In his reply the *applicant* defined more clearly point 7 of his previous conclusions and claimed that the Court should:

'In the further alternative:

1. Order the production by the opposing party of:
   (a) the minutes of the meetings of the Council of Ministers concerning that part of the Staff Regulations dealing with the integration procedure and the application of Article 110;
   (b) the minutes of the meetings of the Commission concerning the applicant's requests for an extension of time and of those concerning his dismissal;
   (c) the communications from the opposing party to the Provisional Staff Committee relating to the integration of officials as well as all minutes of the meetings of the Provisional Staff Committee concerning the said integration procedure;
   (d) the "White book" distributed by the Provisional Staff Committee in June 1963 (Document 7014 Pers. F. 63 and particularly a memorandum to the Commission (p. 17) and a declaration made to the Commission (p. 95));
2. Order Mr Smulders, Director-General of Administration, to be heard on the integration procedure in general;
   In the further alternative:
   order the production of the applicant's medical file.
   and in the final alternative:
   authorize the applicant to prove by the evidence of witnesses the following fact:
   that he was seriously ill, particularly in March and April 1963, and that on 22 March 1963 he was confined to bed with a high fever, the applicant citing, but not exclusively, as witnesses:
   — Mr and Mrs René Micha, 74 Avenue Louise, Brussels,
   — Mr V. P. R. Meganck, 93 Boulevard de Waterloo, Judge of the Tribunal de Police, Brussels, and his wife,
   — Mrs B. Naessens, 21 Rue Ercoliers, Brussels,
   — Mr Roberto Celli, an official at the Commission,
   — Mr Alessandro Cappelletti, an official at the Commission,
   — Mr Giuseppe Riccardi, huissier.'

III — Submissions and arguments of the parties

General

The parties discuss the naming of the defendants as parties to the proceedings and more precisely whether the defendant is the European Economic Community itself or the Commission.

The parties are in disagreement on certain matters which can hardly be considered in relation to a particular ground of complaint but which throw light upon their respective positions.

The facts are described, and above all interpreted, in very different ways; an example of these differences is provided by the use made by the applicant and the defendant of the designation of the words 'social problem' used in respect of the applicant by the Establishment Board with a view to giving him a new post in accordance with Article 102 (2) of the Staff Regulations.

The integration procedure, and above all the legal nature of the Establishment Board, are described quite differently. According to the defendant, because of its composition and its duties this Board is not a judicial but an administrative body making a value-judgment on people and not on the legality of an act or of conduct. The principle '*audi alteram partem*' should be applied in the light of the nature of the duties of the

said Board, that is to say, that it should be complied with by taking into consideration the comments of the persons concerned. On the contrary, according to the applicant, the Establishment Board has a judicial character and its positive decisions also bind the administration.

The parties are in disagreement on the point whether all the grounds of complaint raised by the applicant amount to a dispute concerning legality. The defendant questions this. The applicant maintains that the Court has both the power of annulment and unlimited jurisdiction and describes the consequences that would follow in his view from a possible annulment.

A — Grounds of complaint concerning the annulment of the integration procedure followed in respect of the applicant

The *applicant* claims that the disputed procedure is null and void because of the absence, irregularity (failure to make the necessary consultations) or the lack of publication of the general provisions provided for in Article 110 of the Staff Regulations concerning integration in accordance with Article 102. On this point the applicant raises:

— an argument on the wording: the arrangement and the position of the Chapters of Title IX of the Staff Regulations, and the drafting of Articles 110 and 102;

— an argument based on the purpose and the wording of Article 110: the collaboration of the Staff in the drafting of the general provisions for giving effect to the Staff Regulations and the harmonization of the application of the Regulations by the various institutions;

— an argument based on the fact that the Commission itself submitted its regulations of 13 December 1961 and 9 March 1962 *a posteriori* to the Staff Committee.

The applicant considers that, according to Article 110, it was necessary to explain and publish the method of reporting on officials and the method of preparing reports and to standardize the criteria for the assessment of servants.

According to the applicant, Article 102 presupposes measures of application, which the Commission has by implication admitted by the adoption of regulations. He maintains finally that to admit the contrary would be to deny the aims, the usefulness and the guarantees (consultation and publicity) of Article 110.

The *defendant* replies that Article 102 is a transitional provision which does not require general provisions for giving effect to it and that this Article is sufficiently explicit to be directly and immediately applicable.

The defendant denies that there is any significance in the argument based on the position of the provisions in Title IX and considers that Article 102, governing an operation prior to the application of the Staff Regulations, is a transitional provision.

Consultation of the staff of which mention has been made is thus not legally necessary and is only a courtesy gesture, which makes the time when it occurred quite unimportant. On the other hand a regulation concerning a transitional provision does not have the character of a permanent implementing regulation of the Staff Regulations.

The *applicant* alleges that the disputed decision is null and void, as the definition of the duties and powers attaching to each post, as provided for in the last sentence of Article 5 of the Regulations, has not been drawn up after the opinion of the Staff Regulations Committee had been given and the Staff Committee had been consulted. This results, moreover, in the nullity of the reports of the applicant's immediate superiors with regard to him as they were not able to judge upon his ability to fill a position which was not properly defined. The fact

that the position to be filled is settled does not make it permissible to ignore the formality of prior definition.

The *defendant* replies that it was a matter of filling a particular position occupied since 1958 by the applicant and not a position described in an abstract manner. The applicant is confusing here application of the Staff Regulations with implementation of the transitional measures intended to allow such application.

The *applicant* disputes the validity of the integration procedure to which he was subjected and the decision to terminate his contract on the grounds that the *audi alteram partem* principle and the general principles of law were not respected before the Establishment Board which is in fact an administrative tribunal.

The applicant puts forward a series of facts which, according to him, show an absence of guarantees which adversely affects him and he bases his argument on French case-law and doctrine in order to point out the illegality of the actions of the Commission. The applicant was not the last to be heard and was not aware of all the evidence provided concerning him. His file contained errors and therefore the procedure of the Establishment Board was irregular.

The *defendant* replies that the applicant fails to recognize the nature of the Establishment Board and refers in this connexion to the opinion of Mr Advocate-General Lagrange and to the judgments in Joined Cases 35/62 and 16/63. The properly reasoned opinion of the Board was formed with full knowledge of the case, after consideration of the statements submitted by Mr Pistoj and a sufficient and proper inquiry. The defendant, taking a contrasting view of the duties of the Establishment Board, puts the facts in quite a different light from the applicant.

The *applicant* contests the decisions which adversely affect him because Mr de la Fontaine who, whatever his grade, is not employed in a supervisory capacity, as required by Article 102 of the Staff Regulations, took part in the work of the Establishment Board.

The *defendant* replies that Mr de la Fontaine is an established official in Grade A 2 which corresponds to a post of Director under Annex I to the Staff Regulations.

The *applicant* disputes the decisions in question, as the opinion of the Establishment Board did not state the reasons on which it was based in accordance with the requirements of Article 25 of the Staff Regulations although it adversely affected him and he was informed of it without delay. The applicant denies in any case that the two paragraphs which represent the reasoning of the opinion may be regarded as satisfying the requirements of Article 25.

The *defendant* refers to its explanations concerning the third ground of complaint and adds that a fuller set of reasons would have given the decision a disciplinary character in which the applicant would have been able to discern an attack on his reputation and an obstacle preventing him from finding new employment. The defendant cites in support of its argument the judgment of the Court in Joined Cases 35/62 and 16/63.

The *applicant* draws attention to the incorrectness of the facts upon which the Establishment Board has based its decision, or the incorrect assessment which the Board has made of those facts. He gives a series of examples, in particular on the subject of his absences because of illness and the relations which existed between him and his superiors or subordinates. He mentions the absence of valid proof on the subject of his alleged lack of order and method and recalls that the tasks and duties which he fulfilled before his entry into the service of the Community were similar to those of which it is complained that he was not able to adapt himself as an official of the Commission. The applicant cites the case-law of the Court

(Case 10/55) in support of his request for review by the Court.

According to the *defendant*, Mr Pistoj 'paid attention to tittle-tattle and malicious gossip' on the subject of his disputes with Mr Scholz, with his previous departments, etc. The Establishment Board based its opinion upon the evaluation report as Article 102 obliged it to do, and carried out an inquiry. The reports of the immediate superiors concurred. The minutes of the meetings of the Establishment Board set out in a schedule to the statement of defence indicate the facts on which the Board relied in practice. In particular it had duly taken into account all the memoranda prepared by Mr Pistoj. Finally, the fresh nature of the duties carried out by the applicant is due to the fact that he does not know how to lead a team, although he is intelligent and hard-working. The defendant refers to the judgment in Joined Cases 35/62 and 16/63 in respect of review by the Court.

The *applicant* alleges that the disputed decisions are null and void on the ground that the opinion of the Establishment Board and the decision subsequently taken in respect of him were based particularly upon the judgment of Mr Scholz, his immediate superior, who was motivated by personal resentment and animosity against him; there was thus misuse of powers arising from the remarks, attitude and reports of Mr Scholz.

The *defendant* replies that it is a question here of gratuitious assertions and that the part of the assessment report prepared by Mr Scholz is set out in an objective and impartial manner. The same is the case in respect of an internal departmental memorandum (which is normally secret), produced by the defendant, which was drawn up by Mr Scholz concerning the applicant. The difficult relations between Mr Scholz and the applicant was due to the manner in which the applicant ran the department for which he was responsible.

The *applicant* claims that the disputed decisions are null and void on the ground of the participation of Mr Caron, Vice-President of the Commission, in the deliberations at the end of which these decisions were confirmed, since Mr Caron had taken part in the disputed integration procedure and had accepted the unfavourable assessments of Mr Pistoj's immediate superiors. It would be against the general principles of law to allow anyone to make a ruling in the last instance on previous decisions in which he had himself been involved. The applicant emphasizes that the Commission in confirming an opinion of the Establishment Board did not automatically apply Article 102, but in view above all of the reservations expressed by Mr Pistoj on the legality of the procedure followed by the Establishment Board has by implication recognized the validity, the regularity and the legality of that procedure.

The *defendant* replies that the Commission had no power of discretion and that the consequences of the unfavourable opinion of the Establishment Board were automatically applicable under Article 102 of the Staff Regulations, and in consequence bound it absolutely. The offer of a new position subject to a time-limit for acceptance was a concession to which Mr Pistoj had no right; there was thus nothing abnormal about Mr Caron's participation in the various discussions. Lastly, the complaint has no substance since Mr Caron was not present at the 22nd meeting of the Commission during which the decision concerning Mr Pistoj was taken.

The *applicant* disputes the Commission's decision terminating his contract, because of the insufficient time given for acceptance, possibly subject to reservations, of the less senior post which was offered to him. The applicant emphasizes that Mr Caron's unofficial proposal did not solve the question of seniority in the new grade; he mentions his state of ill health and the representa-

tions of his counsel and alleges that the Commission has committed an abuse of law equivalent to misuse of powers.

The *defendant* replies that the termination of the contract is lawful under Article 102 of the Staff Regulations and that it was subject to three months' notice. It mentions that Mr Caron had already, one month previously, made a verbal suggestion to the applicant that he should be integrated in a post in a lower grade and states that this suggestion is repeated in the documents annexed to the application. The defendant considers that Mr Pistoj had time to ask for any necessary clarification and that 'Mr Pistoj who was absent from his post and stated that he was ill was trying to gain time'.

The defendant expresses its reservations on the drafting of the submission and the utilization of the term 'abuse of law'; it mentions that 'annulment — should it come about — would not affect either the opinion of the Establishment Board or the dismissal of Mr Pistoj but only the refusal to extend the time for accepting a less senior post'.

B — Grounds of complaint concerning the application for compensation

The *applicant* asks alternatively that the improper termination of his contract should in the circumstances be regarded at the least as amounting to a wrongful act and be penalized by the award of damages. Having regard to the amount of his salary, his age, his probable length of service at the Commission and the possibility of receiving a pension, the applicant claims 5 000 000 Belgian francs *ex aequo et bono* for material damage and 5 000 000 Belgian francs for non-material damage.

The *defendant* replies that in view of the unfavourable opinion of the Establishment Board it was impossible to integrate Mr Pistoj and that it made a proposal to him which amounted to a favour; that if Mr Pistoj should succeed in his request for annulment he would suffer no damage; that if he lost this first appeal no wrongful act could be attributed to the administration, taking into account the circumstances of the present case; and, lastly, that neither the existence nor the quantification of the alleged damage can be maintained.

IV — Procedure

The procedure followed the normal course. The case was assigned to the Second Chamber and Judge Robert Lecourt was appointed Rapporteur with Mr Karl Roemer as Advocate-General.

By letter of 12 February 1964, Mr Slusny, counsel for the applicant, stated that he would be assisted in the oral procedure by Mr Guarino, Advocate of the Rome Bar. The Registrar replied by letter of 17 February, drawing his attention to Article 73 (b) of the Rules of Procedure.

At its administrative meeting of 10 March 1964, the Second Chamber of the Court decided to open the oral procedure without any preparatory inquiry.

The oral procedure was opened on 18 March 1964; the hearing was adjourned until 27 May 1964 to allow for possible agreement between the parties.

At the hearing on 10 June 1964 the Advocate-General delivered an opinion favouring acceptance of the application and the payment of costs by the defendant.

Grounds of judgment

A — The naming of the defendants as parties

The application is brought against the European Economic Community or, 'alternatively', against the Commission of that Community.

Under Article 179 of the EEC Treaty, 'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment'. The expression 'the conditions laid down in the Staff Regulations' necessarily implies that there is conferred upon the institution itself, as the appointing authority exercising its powers either directly or indirectly, the right to be a party to legal proceedings relating to disputes with its servants and officials.

Article 90 of the Staff Regulations, governing complaints through official channels prior to an appeal to the Court, provides that any official may submit a request or complaint to the appointing authority of his institution. The appeal to the Court referred to in Article 91 of the Staff Regulations must, in the absence of any provision to the contrary, follow similar rules and be made against the same institution. The decision to terminate the applicant's contract was taken by the Commission which, in relation to the applicant, exercises the powers conferred on the appointing authority. The appeal must therefore be considered as brought against the Commission of the EEC.

B — Application for annulment

Admissibility

The first claim in the applicant's conclusions is for the annulment both of the integration procedure which was applied to him and of the Establishment Board's opinion which was communicated to him by letter of 14 March 1963.

The defendant maintains that this head of the conclusions is inadmissible in that it relates to a procedure and a measure not having the character of a decision.

Under Article 91 (1) of the Staff Regulations there may be referred to the Court any dispute between the Communities and any person to whom the Staff Regulations apply regarding the legality of an act adversely affecting such a person ('un acte faisant grief à cette personne'). Only acts which are capable of directly affecting a given legal situation can be considered as adversely affecting a person.

In the present case the integration procedure, consisting of a series of measures preparatory to the disputed decision to terminate the applicant's contract, is not an act which in itself adversely affects the applicant.

Although under Article 102 (1) of the Staff Regulations the opinion of the Establishment Board constitutes an essential factor in the decision to be taken by the appointing authority upon which it is binding if it is unfavourable to the integration of the servant, it is not, however, for the purposes of an appeal under Article 91, a measure separable from the decision of that authority. It cannot therefore have a direct adverse effect upon the applicant.

The conclusions seeking the annulment of the integration procedure and of the opinion of the Establishment Board, considered separately from the contested decision to terminate the contract, are inadmissible. However, the submissions and arguments put forward in support of these conclusions may be invoked against the decision to terminate the contract itself.

The applicant further claims that the Commission should be required to re-submit him to the integration procedure, after completing the formalities provided for in the last sentence of Article 5 and in Article 110 of the Staff Regulations. The defendant submits that these conclusions are inadmissible, on the ground that the present case is an application for annulment in the context of which the Court is not empowered to order such a measure.

Although the Court, even in the context of proceedings in which it has unlimited jurisdiction, as it has under Article 91 (1) of the Staff Regulations, is unable to order the administration to carry out a specific act, the reopening of the integration procedure must however be considered merely as one of the consequences flowing from the execution of the judgment if the appeal were to be upheld.

The applicant finally claims that the decision to terminate his contract, communicated to him by letter of 14 March 1963, should be annulled. The defendant does not dispute the admissibility of this head of the conclusions and there are no grounds for the Court to raise the matter of its own motion.

As to the substance of the case

Infringement of Article 110 of the Staff Regulations

The applicant alleges that the integration procedure which was applied to

him pursuant to Article 102 of the Staff Regulations is void owing to the failure to adopt the general provisions for giving effect to it in compliance with the first paragraph of Article 110.

The implementing provisions provided for in Article 110 are of a 'general' nature. They are therefore only necessary for the implementation of the permanent provisions of the Staff Regulations. Apart from the question whether Article 102 of the Staff Regulations is sufficiently explicit to be applied without any other implementing measure, it must be stated that it only governs situations limited to a certain period of time. Since they relate to an essentially transitional provision, the measures adopted for giving effect to it consequently cannot be general in nature. In these circumstances, the regulations adopted by the Commission on 13 December 1961 and 9 March 1962 to implement Article 102 are special implementing measures which are not to be confused with the general implementing measures with which Article 110 is concerned and thus did not need to be adopted in accordance with the procedure provided for in that Article.

The first submission is therefore unfounded.

Infringement of the last sentence of Article 5 of the Staff Regulations

The applicant maintains that the decision to terminate his contract is void by reason of the irregularity of the integration procedure and since the definition of the duties and powers attaching to posts, provided for in the last sentence of Article 5 of the Staff Regulations, was not adopted beforehand in accordance with Article 110.

The principal aim of the definition of duties is to facilitate the classification, on the basis of Annex I to the Staff Regulations, of the servants integrated under the Regulations. It cannot therefore be considered as an indispensable legal procedure for the purposes of the application of Article 102. Moreover, in view of the complexity of the task of defining the various posts and the time involved, and taking account of each institution's need to integrate its servants as quickly as possible, it must be accepted that the disputed decision discloses no irregularity in this respect.

Infringement of the rights of the defence and the general principles of law

The applicant puts forward a series of facts which, according to him, establish that the procedure followed before the Establishment Board disregarded the rights of the defence as well as the general principles of law.

It is agreed that the report on the applicant's ability, efficiency and conduct in the service prepared by his superiors concluded that he was not fit to perform the duties of his post. By virtue of Article 102 (1) of the Staff Regulations an unfavourable opinion by the Establishment Board binds the appointing authority. Before issuing such an opinion this Board must however afford the person concerned an opportunity to submit his comments on the factors capable of influencing his integration. This requirement is satisfied when the person concerned has been heard by the said Board in connexion with the factors in the report which formed the basis for its decision and from which it drew its conclusions.

A different situation would obtain if the conclusions of the report had been amended after hearing new witnesses without the issue of any invitation to the servant concerned to submit fresh comments thereon. This did not happen in the present case. The applicant was aware of the report on him drawn up by his superiors. It is not disputed that he submitted his comments on the conclusions of this report, that he lodged written statements and that he was heard by the Establishment Board.

The fact that the minutes of the hearings of the persons who appeared before the said Board were not communicated to the applicant and that he himself was not the last to be heard is not such as to affect the regularity of the procedure followed, since these hearings in no way altered the conclusions in his superiors' report, which the Establishment Board adopted.

On this issue the application is therefore unfounded.

Animosity of an immediate superior

The applicant further maintains that the report of his superior was inspired by feelings of personal animosity to him. This allegation only refers to the applicant's immediate superior, Mr Scholz. The report on the applicant's ability, efficiency and conduct in the service was not however prepared by Mr Scholz alone, but also by others of the applicant's superiors.

With regard to Mr Scholz, although the facts alleged in the application give grounds for admitting that his relations with the applicant did not always run smoothly, they are not however capable of showing that this incompatibility in temperament was the determining factor in the unfavourable assessment contained in the integration report, as Mr Scholz himself acknowledged the intelligence of the applicant.

The other grounds of complaint raised by the applicant as to the form taken

by the integration procedure which was applied to him stem from a confusion between that procedure and criminal procedure. Such is not the case. The integration procedure enables the administration to choose the officials who will henceforth benefit from the guarantees under the Staff Regulations. This choice presupposes a certain freedom of judgment and therefore a procedure which does not necessarily include all the guarantees afforded to officials subject to the Staff Regulations.

Review by the Court can therefore be exercised only over those factors in which clear injustice may be seen. This is not the case here.

On this point as well the submission is therefore unfounded.

Infringement of Article 102 of the Staff Regulations

The applicant alleges that the opinion of the Establishment Board is irregular on the ground that this Board was not appointed in accordance with Article 102 (1) of the Staff Regulations since one of its members, Mr de la Fontaine, was not employed in a supervisory capacity.

Mr de la Fontaine was classified in Grade A 2. According to Annex I to the Staff Regulations this grade corresponds to the basic post of director. On this point the regularity of the opinion delivered by the Establishment Board must therefore be accepted.

This submission is therefore unfounded.

Infringement of Article 25 of the Staff Regulations

The applicant maintains that the opinion of the Establishment Board does not sufficiently state the reasons on which it is based.

The submissions raised against the irregularity of that opinion are only admissible to the extent to which they bear upon the legality of the decision to terminate the applicant's contract which followed. In these circumstances the validity of this submission must be examined in relation to the said decision.

In its opinion of 19 July 1962 the Establishment Board declared that it had formed its opinion 'after considering a report on the ability, efficiency and conduct in the service of Mr Pistoj . . . , having gathered all the necessary information and heard the servant himself'.

It indicates the reasons for its unfavourable assessment of the applicant's suitability for the duties of his post in the following manner:

— 'it considers that Mr Pistoj has not been able to direct the work of the division under his charge with the requisite administrative ability or to establish good relations with his superiors and his subordinates;'

— 'it considers that Mr Pistoj was unable to adapt himself to carrying out the duties entrusted to him in a satisfactory manner, because of his inability to accommodate himself to his new work and the lack of order and method in his work.'

In these circumstances it must be found that the opinion of the Establishment Board sufficiently states the reasons on which it is based by means of the references made both to the information used and to the basic factors borne in mind underlying its assessment.

The same is true of the decision to terminate the applicant's contract, notified to him on 14 March 1963, since it adopts the reasoning of the opinion of the Establishment Board.

The submission is therefore unfounded.

Incorrect finding or incorrect assessment of the facts

The applicant maintains that the Establishment Board based its opinion on incorrect findings of fact or made an incorrect assessment of them.

The applicant has referred in particular to the absence of valid proof of his alleged failings. The Establishment Board based its opinion on the report of the applicant's immediate superiors, as Article 102 obliged it to do. Furthermore it carried out an inquiry and even consulted the numerous statements produced by the applicant. In these circumstances it used its power of discretion with full knowledge of the case.

The submission is therefore unfounded.

Presence of Vice-President Caron during the integration procedure

The applicant claims that the disputed decisions are void, on the ground of the participation of Mr Caron, Vice-President of the Commission, both at the deliberations of the Commission, the conclusions of which confirmed those decisions, and at the disputed integration procedure.

The Commission had no power of discretion and was bound by the negative opinion of the Establishment Board under Article 102 of the Staff Regulations. Even if Vice-President Caron were present during the meeting of the Commission at which the decision concerning Mr Pistoj was taken, he could not have been regarded as both judge and party.

This submission is therefore unfounded.

Insufficient time for acceptance of a lower position

The Commission offered Mr Pistoj a Grade A 4 position, subject to acceptance of the offer within eight days.

The applicant considered this time to be insufficient. Whatever the vicissitudes occurring on this subject in 1963, the Court, in an effort to effect a settlement, proposed to the Commission — which agreed — that it should allow this time-limit to be revived during the course of the proceedings. To this end, the proceedings were adjourned from 18 March 1964 to 27 May 1964. In spite of the revival of this time-limit, the applicant has in fact refused the Commission's proposals.

This ground of complaint has therefore no further foundation.

C—Application for damages

The applicant claims alternatively that the termination of his contract should be regarded as improper and as constituting a wrongful act for which damages and compensation should be awarded.

It is apparent from an examination of the foregoing grounds of complaint that the Commission has committed no wrongful act giving rise to liability on its part.

These is therefore no necessity to come to a decision on the request for compensation.

Costs

Under the terms of Article 70 of the Rules of Procedure of the Court of Justice of the European Communities, in proceedings commenced by servants of the Communities, institutions shall bear their own costs.

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

The applicant has failed in all his submissions and must bear his own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 173 and 179;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Staff Regulations of officials of the European Economic Community, especially Articles 5, 25, 102 and 110;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 70;

THE COURT (Second Chamber)

hereby:

1. **Dismisses application 78/63;**

2. **Orders the parties to bear their own costs.**

Hammes Rossi Lecourt

Delivered in open court in Luxembourg on 1 July 1964.

A. Van Houtte
Registrar

Ch. L. Hammes
President of the Second Chamber