On those grounds,

THE COURT (Third Chamber),

hereby:

1. **Dismisses the application as unfounded;**

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

Mackenzie Stuart Touffait Everling

Delivered in open court in Luxembourg on 9 July 1981.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Third Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 4 JUNE 1981

My Lords,

The Court of Auditors was created in 1975. In the course of organizing its translation service, it published, on 24 October 1978, a vacancy notice (No CC/LA/27/1978) relating to the post of Head of its Translation Division. This post was graded L/A 3. No one then employed by the Court of Auditors was considered eligible for promotion in Grade L/A 3. Candidates holding the position of a head of division L/A 3 in the Community and who considered that they were qualified were invited to apply.

This notice apparently attracted three candidates, only one of whom was held to fulfil the conditions set by the notice and he withdrew his candidature. The post of Head of the Translation Division was therefore left vacant.

On the same day, another vacancy notice was published (No CC/LA/28/1978) relating to the post of reviser in the Grades L/A 5 — L/A 4. Revisers within these grades in the Community were invited to apply. Mr Adriaen Van Zaanen, who was serving with the Commission in Luxembourg as a reviser in Grade L/A 4, applied to transfer to the Court of Auditors under this vacancy notice. On 8 December 1978 the Court of Auditors adopted a decision effecting his transfer to its Translation Division, where he was to be placed in Grade L/A 4, Step 5, with effect from 1 December 1978.

Mr Van Zaanen has said that he was given certain assurances that, if he transferred to the Court of Auditors, he would, after a time, be promoted to Head of the Translation Division. That has been denied on behalf of the Court of Auditors. Whatever is the position, no further attempt was made at that stage to find someone to occupy the post of Head of the Translation Division on a permanent basis. Instead, the Court of Auditors decided to fill it with a temporary appointment and, on 1 March 1979, it adopted a decision appointing Mr Van Zaanen to the post for a period of three months starting that day. That decision was based on Article 7 of the Staff Regulations which, so far as relevant, provides as follows:

"2. An official may be called upon to occupy temporarily a post in a career bracket in his category or service which is higher than his substantive career bracket. From the beginning of the fourth month of such temporary posting, he shall receive a differential allowance equal to the difference between the remuneration carried by his substantive grade and step, and the remuneration he would receive in respect of the step at which he would be classified in the starting grade if he were appointed to the career bracket of his temporary posting.

The duration of a temporary posting shall not exceed one year, except where, directly or indirectly, the posting is to replace an official who is seconded to another post in the interests of the service, called up for military service or absent on protracted sick leave".

It is common ground that Mr Van Zaanen was not replacing an official who had been seconded to another post, called up for military service or who was absent on sick leave. His temporary posting was in fact prolonged by a series of decisions, the last being dated 28 February 1980. This extends the posting from 1 January 1980 to 29 February 1980 when, the decision states, it "prendra obligatoirement fin". Strictly speaking, the various decisions shown to the Court only prolonged the payment of the differential allowance attached to the posting, but they have been treated as extending the posting. It seems clear

from the wording of the decision dated 28 February 1980 that the Court of Auditors took the view that the posting ceased automatically at the end of the one-year period specified in Article 7 (2).

On the same day, 28 February 1980, the Court of Auditors adopted another decision appointing a Mr E., a reviser in L/A 5, as temporary Head of the Translation Division for a period of six months. In consequence, on 3 April 1980, Mr Van Zaanen served on the Court of Auditors a complaint under Article 90 (2) of the Staff Regulations. In it he accepted that, in view of the terms of Article 7 (2), his temporary posting could not have been further extended but he alleged that the appointment of Mr E. was unlawful for three reasons. The first was that Article 7 (2) forbade the appointing authority from filling a vacant post with a series of temporary postings for more than one year. Secondly, he said that an official can only be posted temporarily under Article 7 (2) to a post in the next highest career bracket yet Mr E. was only an L/A 5 and the Head of the Translation Division was an L/A 3. His third contention was that the appointment of Mr E. was not made in the interests of the service, which required that the post be filled by one of the methods specified in Article 29 of the Staff Regulations.

Mr Van Zaanen's complaint seems to have elicited no reply at all from the Court of Auditors. It was therefore deemed to have been rejected on the expiry of the four-month period specified in Article 90 (2) of the Staff Regulations and, on 4 September 1980, Mr Van Zaanen lodged at the Registry his application commencing these proceedings.

In the meantime, on 2 September, the Court of Auditors published a notice of competition (CC/LA/3/80) relating to an internal competition for the post of Head of its Translation Division. On 8 September, Mr Van Zaanen wrote to the Selection Board to say that he would not be a candidate for the reasons expressed in his complaint of 3 April and the application commencing proceedings before the Court. The closing date for applications was originally 22 September but on 12 September the Court of Auditors extended the deadline to 2 October. On 1 October Mr Van Zaanen changed his mind. He made a formal application to enter the competition stating, nevertheless, that he would continue with his action. At the hearing Counsel for Mr Van Zaanen intimated that the competition attracted in total 18 candidates, all of whom, including Mr Van Zaanen himself, were rejected for one reason or another.

In his application, Mr Van Zaanen makes four claims:

(1) the decision terminating his temporary posting did not give reasons and should be annulled;

(2) the Court of Auditors could not lawfully appoint another official to the temporary posting, the period for such an appointment being limited to one year;

(3) the Court of Auditors was bound to advertise a vacancy and consider the possibility of filling it by promotion according to Articles 4 and 29 of the Staff Regulations;

(4) by its failure to act, the Court of Auditors has wronged Mr Van Zaanen and caused him losses which may be assessed at one unit of account.

Articles 4 and 29 provide as follows:

Article 4

"No appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided for in these Staff Regulations.

Vacant posts in an institution shall be notified to the staff of that institution once the appointing authority decides that the vacancy is to be filled.

If the vacancy cannot be filled by transfer, promotion or an internal competition, it shall be notified to the staff of the three European Communities".

Article 29

"1. Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by promotion or transfer within the institutions;

(b) whether to hold competitions internal to the institution;

(c) what applications for transfer have been made by officials of other institutions of the three European Communities;

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.

2. A procedure other than the competition procedure may be adopted by the appointing authority for the recruitment of Grade A 1 or A 2 officials and, in exceptional cases, also for recruitment to posts which require special qualifications".

The Court of Auditors has challenged the admissibility of the first three claims, saying that

(1) in his complaint, Mr Van Zaanen conceded that his temporary posting could not have been renewed so he cannot raise this issue in the action;

(2) the decision terminating his posting does not adversely affect him because the same result flows inevitably from Article 7 (2) of the Staff Regulations;

(3) the appointment of Mr E. cannot be challenged unless Mr Van Zaanen joins him as a party;

(4) Mr Van Zaanen's third claim is inadmissible because it was not raised in the complaint.

It does not seem to me that the submissions made by Counsel for the Court of Auditors that Mr Van Zaanen's claims are inadmissible have been made out. No authority was cited to support the proposition that Mr E. must have been made a party to the action for the claim to be admissible. If the latter had wished, he could no doubt have applied to intervene, in order to protect his interests. The fact that he is not joined as a party by the applicant does not in my opinion mean that the present application is inadmissible. Although Mr Van Zaanen accepts that he could not himself have been reappointed on a temporary basis, the real question which he wants decided is whether or not the Court of Auditors was entitled to keep the post of Head of its Translation Division open as a temporary posting for longer than a year. If not, the Court of Auditors would have been obliged to fill it in accordance with Articles 4 and 29 of the Staff Regulations, in which case Mr Van Zaanen would have been given the chance of being appointed to it through promotion or a competition. That does not seem to me to be a claim which can be said to be inadmissible. Moreover, it seems to me to be a claim which is contemplated by the complaint which Mr Van Zaanen made.

As far as Mr Van Zaanen's first claim is concerned it seems to me that, although the precise basis for the obligatory ending of his appointment is not stated, it is quite clearly indicated that the appointment is coming to an end because it has to, and both sides knew that this was because of the terms of Article 7. Even, however, if he is right in saying that reasons were not given, Mr Van Zaanen has no interest in obtaining the annulment of the decision terminating his temporary posting because, as he himself has conceded, expressly in his complaint and implicitly in his second claim in this action, his appointment could not have been continued after the end of February 1980. If the decision were to be annulled, he would be no better off since, in view of the wording of Article 7 (2), the Court of Auditors could only confirm it in substance (see Case 9/76 *Morello* v *Commission* [1976] ECR 1415). Accordingly it seems to me that this claim has to be rejected as unfounded.

Mr Van Zaanen's Counsel contends that Article 7 (2) prohibits a post from being occupied by a temporary appointment or temporary appointments for more than one year. Read with Article 4, there is an obligation to fill a post within a year of its becoming vacant. The alternative construction, it is said, would allow the appointing authority to keep a post unfilled indefinitely, if not perpetually, through the expedient of temporary postings.

Article 7 (2) is in my opinion not dealing with the length during which a post may be occupied by a temporary appointment or appointments. The first paragraph of Article 7 (2) makes it clear that it is the posting of an individual which is being

dealt with — it is "his temporary posting". The phrase "the duration of a temporary posting", is referring to the same thing. The object of Article 7 (2) is principally to prevent an official from being kept in a position in a career bracket higher than his substantive career bracket for too long a time, with all the effects this may have on his career prospects and his position in the service. It does not of itself lay down a limit of one year for the occupancy of the post by temporary appointments. Otherwise, if no suitable candidate could be found within one year, it would be obligatory if Mr Van Zaanen's Counsel is right, to leave the post unfilled or to appoint an unsuitable candidate at the end of one year.

This does not mean that there is no limit on an appointing authority. When a post is to be filled the authority must within a reasonable time proceed to implement the procedures referred to in Articles 4 and 29. If nothing is done or there is excessive delay then there might be grounds for an application based on Articles 4 and 29. Article 7 (2) does not, however, impose an automatic limit of one year on the appointment in respect of the post, only in respect of the length of time during which one individual may occupy the post.

It has been submitted, further, that Mr E.'s appointment was unlawful because a temporary posting can only be made to the next highest grade occupied by the official in question. Mr Van Zaanen's interest in this aspect of his second claim lies, it is said, in maintaining the integrity of the grading system. An official should not be made subordinate to a colleague in a lower substantive grade. However, the key phrase in Article 7 (2) is not "grade" but "career bracket". Many posts cover more than one grade. That being so, when an official holding a post in a career bracket comprising two grades, and whose substantive grading is in the lower, is called upon to occupy temporarily a post in the next highest career bracket, it may well be the case that he will leap-frog the intervening grade. This in fact seems to be the case here because the vacancy notice under which Mr Van Zaanen transferred to the Court of Auditors suggests that revisers fall into the career bracket L/A 5 — L/A 4. There does not therefore seem to be anything unlawful in a reviser in L/A 5 being posted temporarily to a post in a higher career bracket comprising Grade L/A 3. There is no evidence of any grave prejudice to the interests of the service.

In consequence in my opinion the second claim must be rejected.

As far as the third claim is concerned, it has been submitted on behalf of Mr Van Zaanen that the Court of Auditors should have recommenced the procedure for appointing the Head of its Translation Division as soon as the first vacancy notice of 24 October 1978 had failed to produce a suitable candidate. Indeed, it is claimed that the Court of Auditors should have examined the

possibilities of filling the post by promotion, Mr Van Zaanen himself being the person best qualified for the job (and maybe the only one eligible for promotion to L/A 3).

Article 29 sets out an order of preference, with promotion and transfer as the two methods of filling a post which the appointing authority should first consider (see Case 176/73 *Van Belle* v *Council* [1974] ECR 1361, at p. 1370). But this does not give an official a right to promotion: the appointing authority has a wide discretion and, in certain circumstances, may be justified in holding an internal competition, particularly where there is only one official suitable for promotion (see Case 123/75 *Küster* v *Parliament* [1976] ECR 1701, at pp. 1709 to 1710). In the present case, the reason for the delay in starting a new procedure for recruiting the Head of the Translation Division was apparently due to the fact that, after the failure of the first vacancy notice to produce an acceptable candidate, the Court of Auditors decided to hold a competition but the preparations and formalities required for this took a long time because it was still in the process of completing its internal organization; even then it had to organize in all some 157 competitions of which that for the post of Head of its Translation Division was the last. The fact that such a long period elapsed between the first vacancy notice and the competition for the post of Head of the Translation Divison is to be regretted. Nevertheless, in the light of the explanations given, I am not satisfied that there has been such a breach of duty by the Court of Auditors as justifies an application to the Court. As a result, the third claim must be rejected.

In view of the failure of his first three claims, Mr Van Zaanen's fourth claim must also be rejected.

Accordingly, although Mr Van Zaanen's sense of frustration is understandable, this application should in my view be dismissed. Each side should bear its own costs.