the wording of a draft of the Staff Regulations it was not prejudging the date of the entry into force of the Staff Regulations, since that was dependent on steps to be taken by each of the four institutions.

(Treaty, Art. 78 — Convention on the Transitional Provisions, third paragraph of Art. 7)

5. *Servants of the Community — Period prior to the entry into force of the Staff Regulations — Situation during such period*

   The fact that a servant's contract of employment was concluded before the entry into force of the Staff Regulations does not imply that the provisions of a draft of the Staff Regulations which have not yet entered into force, especially those providing for and regulating the assignment of non-active status, are to be applied in their entirety in advance.

   Nevertheless if an employee's post is abolished and he cannot be assigned to another post the administration must be guided by the draft of the Staff Regulations as far as the payment of fair compensation for the damage suffered is concerned.

   (Convention on the Transitional Provisions, third paragraph of Art. 7)

6. *Costs*

   The question whether an action is unreasonable and vexatious and for this reason justifies an order that the applicant must pay the costs must be determined subjectively from the point of view of the applicant.

   (Rules of Procedure, Art. 61 — Rules of the Court concerning costs, second subparagraph of Art. 2 (1) and Art. 5)

In Case 1/56

RENE BOURGAUX, assisted by Pierre Chareyre, Advocate at the Conseil d'État and the Cour de Cassation, Paris, and Henri Rolin, Advocate at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of G. Margue, 6 Rue Alphonse Munchen,

applicant,

v

THE COMMON ASSEMBLY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Secretary General, M. F. F. A. de Nerée tot Babberich, acting as Agent, assisted by Pierre Ansiaux, Advocate at the Cour de Cassation, Belgium, and Jean Coutard, Advocate at the Conseil d'État and the Cour de Cassation, Paris, with an address for service in Luxembourg at its offices, 19a, Rue Beaumont,

defendant,

Application, for the annulment of a decision of the Bureau of the Common Assembly and of an order of its President,

THE COURT

composed of: M. Pilotti, President, J. Rueff and O. Riese (Presidents of Chambers), P. J. S. Serrarens, L. Delvaux, Ch. L. Hammes and A. van Kleffens, Judges,

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

gives the following

JUDGMENT

Procedure

On 12 January 1956 the applicant, Mr Bourgaux, lodged an application at the Registry of the Court of Justice challenging both the decision of 25 November 1955 of the Bureau of the Common Assembly, taken when it was discussing its administrative rules of procedure, which provided *inter alia* for the abolition of the applicant's post and non-renewal of his contract of employment expiring on 31 December 1955, and also the order of the President of the Common Assembly of 13 December 1955, implementing the said decision.
The appointment of the defendant's agent and of Counsel to assist the parties has been carried out in accordance with the Protocol on the Statute and the Rules of Procedure of the Court of Justice.
The parties have exchanged pleadings as provided for in the Rules of Procedure of the Court; the formal procedure followed the normal course and moreover has not been challenged in this respect.
The President of the Court of Justice assigned the case to the First Chamber and appointed Judge Hammes to be the Judge-Rapporteur.
By order of 12 June 1956 the First Chamber prescribed measures of inquiry, requesting the parties to supply particulars relating to three detailed questions set out in the said order and also the documents therein mentioned.
The parties complied with this order within the prescribed period.
The applicant in his reply expressly stated that he withdrew his claim for the award of the sum of one franc for non-material damage.
The First Chamber by order of 29 June 1956 closed the preparatory inquiry. The parties have not submitted final written conclusions.
The oral procedure took place during the hearings in open court on 26 and 29 September, 15 October and 23 November 1956.
Pursuant to an order of the Court of 29 September the parties produced additional documents at the hearing.
During the hearing the parties presented oral argument.
The defendant applied to the Court for leave to produce further documents and to require the personal appearance of and to examine the authors of an experts' report on the reorganization of the Secretariat of the Assembly.

In answer to a question put to him by the Judge-Rapporteur the applicant stated that his application was only directed against the decision of the Bureau of the Assembly of 25 November 1955 in so far as it did not renew his contract of employment; more particularly he was not challenging Orders Nos 6 and 7 relating to the abolition and creation of certain posts.
At the hearing on 23 November 1956 the Advocate General delivered his opinion that the application should be dismissed

but that each party should bear its own costs.

Facts

1. The applicant, Mr Bourgaux, entered into a contract of employment dated 10 January 1953 with the Common Assembly of the European Coal and Steel Community acting in accordance with the last paragraph of Article 6 of the Treaty and the third paragraph of Article 7 of the Convention on the Transitional Provisions and of Articles 45 and 49 of the Rules of Procedure of the Assembly.
The contract in addition to providing reciprocal obligations states that 'the terms of the Rules of Procedure in force' apply to relations between the parties in so far as they are not inconsistent with the express terms of the contract.
With regard to these terms it is advisable in this case to call attention to the following points:

(a) Article 2 provides that 'the contract shall take effect as from 1 January 1953 for the term of two years';

(b) Article 15 states that 'those servants to whom, on the expiration of this contract, the definitive version of the Staff Regulations of the Common Assembly is not applied shall receive an allowance amounting to not less than one-twelfth of their annual emoluments for each year of service with the Assembly';

(c) Article 16 provides that 'the servant may determine the contract at any time by giving three months' notice in writing'.

Pursuant to this contract, although it is silent on this point, the applicant was appointed head of the Reports of Proceedings and Temporary Parliamentary Services Department.

2. As Mr Bourgaux's contract came to an end on 31 December 1954 the parties agreed to extend it to 31 December 1955 upon the same terms and with reference to the provisions of the provisional Staff Regulations, 'a copy of which was sent to you when the contract of employment was handed to you' as stated in the letter of 2 February 1955 confirming the extension.

3. The Secretary General of the Common Assembly informed the applicant by letter dated 13 December 1955 of Order No 1087 of the same date whereby the President of the Assembly notified him that on the expiration of his contract on 31 December 1955 it would not be renewed.

This notice gave effect to decisions taken by the Bureau of the Assembly on 25 November 1955 when it discussed the administrative rules of procedure which provided, *inter alia,* for a reorganization of departments, the abolition of the post occupied by the applicant and also the non-renewal of his contract of employment.
In adopting these measures the Bureau was following the recommendations of a Committee of Experts which came to the conclusion that two departments, including the one run by Mr Bourgaux, should be abolished.
The President's order was based on Article 43 of the Regulations of the Common Assembly dated 10 January 1953 as amended on 16 January and 12 May 1954 together with the aforementioned administrative rules of procedure of 25 November 1955 and Orders Nos 6 and 7 of the same date on the 'abolition and creation of posts'.
It refers to the contract dated 10 January 1953 but does not state on what contractual basis the allowance payable on termination of the appointment, for which provision was made under that contract, was calculated.
The sum awarded to the applicant under this head, in the absence of a further offer of employment by the Community, was made up of an allowance equal to payment for a period of 24 months of the basic salary drawn by the applicant in December 1955 plus family allowances in addition to allowances under the contract and the regulations in force; it was considerably more than the amount provided for under Article 15 of the contract.

4. A memorandum of 15 December 1955 signed by the head of the General Admin-

istration Department of the Assembly addressed to the Accounts Branch gives particulars of the allowances awarded to the applicant:

(a) *Allowance for termination of contract* (Under Article 15 of his contract of employment) 123399 Bfrs

(b) *Allowance for chance of place of residence* (Pursuant to Article 31a of the provisional regulations) 124000 Bfrs

(c) *Special allowance provided for by Order No 1087* 801192 Bfrs

5. On 22 December 1955 the Luxembourg Caisse d'Épargne de l'État received from the General Secretariat of the Assembly an order to pay 1048591 Bfrs to the applicant.

6. On the same date the Luxembourg Caisse d'Épargne de l'État transferred the sum of 1048591 Bfrs, through clearance channels to the Banque Générale du Luxembourg and requested it to credit the said sum to the applicant's account.

7. On 12 January 1956 the application was lodged and registered at the Court Registry.

I — *Submissions and arguments of the parties*

1. Mr Bourgaux claims that the Court should:

(a) Annul the decision of the Bureau of the Common Assembly of 25 November 1955, since it was 'improperly' adopted;

(b) Accordingly annul the order of the President of the Assembly of 13 December 1955 made in implementation of the said decision of the Bureau;

(c) Award him damages in the amount of one franc.

It is pointless to examine the last claim in the application since the applicant withdrew it during the proceedings.

2. The defendant contends that the Court should dismiss the application.

3. Each party submits that the other party should bear the costs.

4. The defendant during the written procedure did not challenge either the jurisdiction of the Court under Article 42 of the Treaty or the admissibility of the application.

It is only in its rejoinder that the latter calls in question the admissibility of an action against decisions adopted by the Bureau of the Assembly without however referring *expressis verbis* to Article 38 of the Treaty. Nevertheless counsel for the defendant enlarged upon this submission when he addressed the Court at the hearing on 26 September 1956.

5. An analysis of the applicant's submissions with reference to the decisions which he asserts should be annulled makes it clear that there is a general complaint (A) contained in the submission challenging the decision of the Bureau of the Assembly to reduce the staff of two specific administrative units and its view that two employees cannot be assigned to new posts.
The individual complaints (B) represent two points of view in that they criticize (a) the non-renewal of Mr Bourgaux's contract, on the one hand, and, (b), in the alternative, his unconditional dismissal, that is to say without being assigned non-active status, on the other hand.

A — The submission concerning the reduction of staff and the inability to assign two employees to new posts attacks the decisions to reorganize the administrative departments of the Assembly (Orders Nos 6 and 7 of the said Bureau).
In this connexion the applicant offered to adduce evidence, either by the examination of one of the experts or by producing the report of another expert; the defendant

made a similar offer in its submissions of 20 November 1956.

During the oral arguments the applicant withdrew his claim for annulment on this ground and stated the application did not relate to the orders 'on the abolition and creation of certain posts'.

B — (a) The submissions dealing with the non-renewal of the applicant's contract of employment refer to decisions of the Bureau and the President of the Assembly which are clearly of an individual character.

On this point Mr Bourgaux claims that 'he has a contract governed by public law concluded before the Staff Regulations entered into force so that he cannot be dismissed unless the grounds for his dismissal are stated and moreover are substantial'.

He maintains in support of this argument 'that by limiting the duration of the contract ... the parties did not necessarily intend to enter into a contract for a fixed period ...'.

On the other hand he goes on to say that the abolition of the post is not a sufficient ground for bringing to an end contractual relations which include 'an expectancy' of a right to be and remain a member of the staff although carrying out other duties; in any event the burden of proving that this is impossible lies on the institution.

In any case when the Assembly brought the relations between the parties to an end on the ground that this was required by the imperative exigencies of the service whereas in fact it was a disguised disciplinary measure, this was a misuse of powers. He produces in support of this argument documents emanating from the Secretary General of the Assembly and addressed to the President, Mr Pella, which contain a somewhat unflattering appraisal of the applicant.

The defendant retorts that it was entitled not to renew the contract of employment, provided that this non-renewal did not 'automatically' result from the abolition of a post and that the evidence that reinstatement was impossible is to be found in its discussions and the opinions which it obtained.

In fact since the total number of employees in the secretariat and under the heads of department had been reduced by two, the applicant could only have been kept in his grade if another servant occupying a post not affected by the reorganization had been dismissed.

The defendant further emphasizes that since Mr Bourgaux had not yet given up his post in his home country, he acknowledged that his employment with the Assembly was precarious.

As far as concerns the alleged misuse of power the defendant, in its oral submissions, denied that it showed any malevolent intention towards Mr Bourgaux. When the Bureau adopted the decision which is challenged, it did not take note of the documents produced by the applicant which amounted to personal acts of the Secretary General.

(b) The submission relating to the applicant's dismissal refers to the decisions of the Bureau of the Assembly and of its President not to renew his contract when it came to an end instead of assigning him non-active status.

Mr Bourgaux relies on 'Article 42 of the Staff regulations adopted provisionally on 12 December 1955' to support this claim; furthermore the prospect of obtaining a post under the Staff Regulations vested in him a vested right (arising before the Staff Regulations entered into force) to be assigned non-active status involving a prior claim to be assigned to any post falling vacant during this period, or, on the expiration of the said period, to receive a pension.

The defendant denies that any Staff Regulations entered into force on the date mentioned by the applicant: it asserts that the text referred to by Mr. Bourgaux is a draft of the Staff Regulations drawn up subsequent to the decision of 25 November 1955, which in any case was not approved by the Committee of Presidents, the only competent body for this purpose, (ECSC Treaty, Article 78 — third paragraph of Article 7 of the Convention on the Transitional Provisions) until 28 November 1956, and which did not enter into force by virtue of any publication; only the regulation of 1 July 1953 could apply.

The Assembly however acknowledges that it settled the applicant's case by a payment equivalent to the allowance payable to a servant for the period of non-active status provided for in a draft of Staff Regulations considered on 24 March 1955 by the Committee of Presidents, but only by way of fixing the amount of the allowance, since the contract of employment merely provided for the minimum payment.

LAW

A — Jurisdiction and admissibility

In this case the Court's jurisdiction arises under Article 42 of the Treaty read together with Article 17 of the applicant's contract of employment which refers to 'the terms of the Rules of Procedure in force'; all the various versions of the rules of procedure of the Common Assembly have contained an article conferring jurisdiction upon the Court.

The defendant maintains that, since the applicant claims the annulment of a decision affecting him, the jurisdiction of the Court is governed and limited by the provisions of Article 38 of the Treaty, under which the application is inadmissible.

Nevertheless the general wording of Article 42 makes it impossible to conclude that an arbitration clause can be subject to a binding legal limitation which in this case would rule out the remedy of an application for annulment.

The remedies available in administrative matters to the staff of all four institutions are organically distinct from the restricted nature of the review by the Court which under Article 38 of the Treaty applies to the activities of the Assembly as an institution.

Since the aim of these remedies is to restore contractual rights or rights under the Staff Regulations which have been infringed, the annulment of a measure infringing them cannot be excluded in an appropriate case.

Therefore the Court has jurisdiction to hear this case and the application is admissible.

B — The purpose of the application

In his originating application the applicant launches a general attack on the decision of the Bureau of the Common Assembly of 25 November 1955 (in conjunction with Order No 1087 of the President of that institution dated 13 December 1955).

The discussions and decisions of the Bureau on that day according to the minutes of proceedings of that sitting were complex and many of them are interconnected.

During the hearing the applicant limited his challenge to the many decisions of the Bureau to the one (Item No 15 of the Minutes) providing for the non-renewal

of his contract and has thereby admitted that the institution is entitled to organize its administration in the best interests of the service.
In these circumstances the applicant's offer in his reply to prove by means of a new expert's report that the reorganization has not achieved its object as well as the defendant's request for the presentation of evidence by experts whom it consulted are to be rejected as having no purpose.

C — The substance of the case

The applicant concludes from the general tenor of his contract, which according to the provisions of the third paragraph of Article 7 of the Convention on the Transitional Provisions appears to foreshadow the Staff Regulations, that he has a right 'ante-dating the Staff Regulations' to prevent the defendant from terminating the relationship between the parties, even though subject to a fixed term, except for compelling reasons.
By limiting the duration of the contract to a fixed term the intention of the parties was to provide for a transitional situation made necessary in view of the time required to draft Staff Regulations.
The defendant does not dispute this explanation but, in so far as the non-renewal of the contract is concerned, relies on the fact that since Mr Bourgaux's post had been abolished it could not continue to employ him in the service.
In fact following a reorganization of its administration for reasons of economy it effected staff reductions after consulting experts in this field.
In particular, since the number of heads of department and heads of division was reduced by two units, the applicant could not be kept on in his grade unless another servant occupying a post unaffected by the staff reorganization was dismissed.
In this respect it is appropriate to observe that in this case there was a complete reconstruction of the Assembly's administration followed by a reallocation of posts.
Five posts of heads of department or division were abolished and three new posts were created.
In these circumstances the problem to be resolved was which of the five holders of these posts were to be given the three new posts.
Although the selection was within the discretion of the Bureau of the Common Assembly, it is nevertheless appropriate to consider whether it has been properly exercised or whether the relevant decision, as the applicant claims, amounts to a misuse of powers either because a right vested in him by virtue of his grade and seniority was wilfully disregarded or because it was a concealed disciplinary measure.
The selection should have been determined by personal qualifications having regard to the abilities required for each new post together with experience in the relevant field.

In this case the applicant's previous duties had been spread over several divisions.

The dismissal of other employees who were already in positions of authority could not be justified since the interests of everyone affected deserved equal consideration.

Moreover there was no reason why the defendant should decide to assign one of the posts to the applicant rather than to the three other reclassified employees whose ability has never given grounds for criticism.

There are therefore no grounds for the view that the applicant was the victim of a decision based on reasons other than the exigencies of the services.

Neither can the Court subscribe to the view that the selection adversely affecting the applicant amounted to a concealed sanction.

Although Mr Bourgaux's personal file containing the correspondence, which was produced to the Court, shows that certain difficulties arose between him and his superiors, it also appears from these letters, which make it clear that he was highly regarded, and from the defendant's statements at the hearing, that the Common Assembly had no cause to criticize him.

As far as concerns the unfavourable views expressed by the Secretary General of the Assembly recorded in statements communicated to the President, which surprisingly contradict the commendations already contained in the documents clearly referred to, it may be noted, without its being necessary to consider their more or less confidental nature, that there is nothing to show that they were brought to the notice of the Bureau and influenced its decision, especially as the only important opinion, that of 27 January 1955, was given almost one year before the contested measure.

This submission is therefore unfounded.

The applicant's argument that the defendant should have offered him some other similar post in its administration cannot be accepted, because the reorganization of the departments made such a step impossible. Moreover there was no obligation to offer a position subordinate to the one which had been abolished, since even the draft Staff Regulations only provide in such a case for entitlement to a post of the same grade and compensation if such reinstatement is impossible; furthermore the expert's opinion does not mention such a possibility and there is no ground for assuming that any such post would have been available.

The applicant submits in the alternative that the effect of the refusal to incorporate him in the reorganized administration of the Assembly should not have been the complete termination of all legal relations between the parties but the assignment to him of non-active status together with all the attendant consequences of such a step, for instance that he might have a prior claim to be reinstated and, if this proved to be impossible, the right to a pension.

He bases this submission on the provisions of the Staff Regulations of the Community which he maintains were adopted by the Committee of Presidents on 12 December 1955 and replaced the provisional Staff Regulations of 1 July 1953. However the construction which the applicant wished to place upon the deci-

sion of the Committee of Presidents is wrong.
This decision was only concerned with the provisions of the draft regulations and this moreover did not prevent draft amendments from being discussed at the meeting of the Committee of Presidents on 28 January 1956. The expression 'final adoption' therefore had no relevance except within the Committee of Presidents and the date of the entry into force of the Staff Regulations in the various institutions was still indeterminate, since it in fact depended on the completion of the annexes applicable to each institution and on the drawing up by a joint committee of the general provisions without which the Staff Regulations could not be applied.
Even if the Staff Regulations had been applicable before their entry into force and publication and had replaced the provisional regulations as soon as they had been 'adopted', the position still remains that their provisions on the assignment of non-active status would not have applied to the applicant since he had not previously been established.

This submission must therefore be rejected as unfounded.

The position is the same with regard to the argument that the Staff Regulations applied *de facto,* which is inferred from the fact that following a request by employees of the Common Assembly to the President that the Staff Regulations might be applied to them, orders issued by him provided on their behalf for a special form of extension of their contracts, which amounted in principle to the revocation as from 31 December 1955 of the provisional Staff Regulations of 1 July 1953 but retaining in an annex the provisions therein mentioned until the date when the definitive Staff Regulations entered into force.
The applicant however could not derive any benefit from such an extension because the new staff organization governed by the above-mentioned regulations entered into force on 1 January 1956, but did not provide a post for him.
Finally, the applicant claims that, since his contract was concluded before the entry into force of the Staff Regulations, it gives him the right to have applied to him in advance the provisions of the Staff Regulations relating to the possibility of the abolition of a post and in particular the assignment of non-active status.
There are however in this case no grounds for the direct application in their entirety of the rules relating to assignment of non-active status, which would amount to the application in advance of a draft which was still in the process of being drafted.
Furthermore the Staff Regulations could not in any circumstances apply to the applicant as of right, because he has not been established, which is a condition precedent to their application, and because the relevant budget rules and estimates had not been drawn up.
When the Bureau of the Common Assembly took its decision it had to be guided by the provisions of the draft Staff Regulations governing the consequences of abolition of a post.

In this connexion the Bureau of the Assembly decided to award the applicant not only the minimum compensation provided for under Article 15 of his contract but also compensation equal to his entire salary for two completed years. The compensation which the Bureau of the Assembly has thus awarded the applicant is in keeping with its obligation to be guided by the rules specified in the draft Staff Regulations, even though the defendant referred in its oral argument to draft regulations which at the time had been withdrawn and replaced. Moreover the applicant has not made any complaint as to the amount of the compensation granted.

This submission is unfounded.

The applicant's application must be dismissed.

D — Costs

The parties have failed in some of their submissions and in particular the defendant has failed in its submission that the application is inadmissible; it would therefore be appropriate for the parties to bear their own costs.
In this case the defendant submits that Mr Bourgaux's application is frivolous and vexatious and that he should therefore be ordered to bear the entire costs. Although the Court has objectively acknowledged that the institution, which relies on the fact that owing to the reorganization of its departments it could not keep the applicant on its staff, has acted in good faith, the applicant from his point of view might doubt whether his redundancy was unavoidable especially in view of the fact that the defendant's behaviour was, as mentioned above, to some extent equivocal.
As the application was therefore not vexatious the Court decides that the parties must bear their own costs.

Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate General;
Having regard to Article 42 of the Treaty;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice and the Rules of the Court on costs,

THE COURT

hereby:

Declares that Mr Bourgaux's application is admissible;

Dismisses Mr Bourgaux's application as unfounded;

Orders each party to bear its own costs.

Pilotti Rueff Riese

Serrarens Delvaux Hammes van Kleffens

Delivered in open court in Luxembourg on 17 December 1956.

M. Pilotti	A. Van Houtte	Ch. L. Hammes
President	Registrar	Judge-Rapporteur

OPINION OF MR ADVOCATE GENERAL ROEMER[1]

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Mr President,
Members of the Court,

Allow me, at the outset of my opinion in Case 1/56, *Bourgaux* v *Common Assembly,* briefly to rehearse the facts once again.

I — Facts

The applicant entered the employment of the Common Assembly on 1 January 1953. His contract was concluded for two years and on its expiry was extended for a further year until 31 December 1955 under a general extension of similar contracts. The applicant was head of the Reports of Proceedings and Parliamentary Services Department. On 25 November 1955 the Bureau of the Common Assembly after obtaining an opinion from outside

1 — Translated from the German.