

The procedure for verifying the ability of the person concerned to perform the duties pertaining to a post, which must not be taken to require a perfect match between his qualifications and those required by the post in question, must be effective and must take its course in such a way that the applicant for reinstatement and the Community courts can verify that the obligations imposed on the administration by Article 40(4)(d) of the Staff Regulations have been fulfilled. In this connection, although the administration cannot be compelled to prove that it has examined the abilities of the official awaiting reinstatement where there is a manifest divergence between his abilities and the requirements of the vacant post, such proof must be adduced in all cases where, in the absence of such a manifest divergence, a complete verification of the abilities of the person

concerned in relation to a particular post is necessary.

The failure to verify systematically the abilities of the official in question in relation to each vacant post to which he could have been reinstated constitutes a service-related fault which may give rise to liability on the administration's part in so far as such failure delays the reinstatement of the person concerned and deprives him of his remuneration from the date when he could possibly have been reinstated to the date of his actual reinstatement. The calculation of the damage sustained by the person concerned must take account of the automatic advancement to higher steps in his grade which he would have been given under Article 44 of the Staff Regulations if he had been reinstated in the first vacant post suited to his abilities.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
1 July 1993 *

In Case T-48/90,

Bruno Giordani, an official of the Commission of the European Communities, represented by Giuseppe Marchesini, Avvocato with a right of audience before the Corte di Cassazione of Italy, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

* Language of the case: Italian.

Commission of the European Communities, represented by Antonio Aresu and Sean van Raepenbusch, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation for the damage allegedly suffered by the applicant by reason of the delay in his reinstatement with the Commission on the expiry of leave granted on personal grounds,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: D. P. M. Barrington, President, R. Schintgen and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 10 March 1993,

gives the following

Judgment

Facts

In 1960 the applicant was appointed to a post in the scientific and technical services of the Commission (EAEC). He had technical training in engineering, acquired at the Scuola Tecnica Industriale (Industrial Technical College) in Bolzano, Italy, and subsequently at the Höhere Technische Lehranstalt, Ingenieur-Schule (Higher Technical College, Mechanical Engineering) in Bregenz, Austria,

and was initially appointed at Grade B 7, Step 3, and assigned to the Directorate-General for Personnel and Administration, Purchases Department. On 1 February 1962 he was transferred to the Joint Research Centre ('JRC'), Ispra, where he was assigned to the Procurement and Stores Department as deputy head responsible for the technical purchases section. On 20 February 1963 he was appointed in Category A, Grade 6, Step 2, and on 10 June 1965 he was promoted to Grade A 5, Step 2. On 15 October 1965 he was given the duties of head of the Procurement and Stores Department of the JRC, Ispra, which he had carried out on a provisional basis since 24 February 1965. In June 1970 the applicant's department was attached, within the JRC, Ispra, to the larger Finance and Procurement Department.

- 2 According to Vacancy Notice V/IS/126/65 of 3 August 1965 which concerned the post in question, the applicant's duties as head of the Procurement and Stores Department of the JRC, Ispra, required 'degree-level knowledge, preferably in the technical field, or equivalent professional experience; very good knowledge of materials and equipment used in a nuclear research centre; excellent experience of procurement technique and methods including, in particular, the purchasing organization and systems used in industry; experience of the problems and methods involved in the automation of purchasing and stock and inventory management; knowledge of the financial and administrative organization of the Community'.
- 3 By decision of the Commission of 16 March 1972 the applicant was granted leave on personal grounds for one year from 1 April 1971, following his application of 2 February 1971. At his request, the period of leave was extended until 31 March 1974.
- 4 During his period of leave on personal grounds and the following years the applicant worked at first as the sales manager and legal representative of the Italian subsidiary (Schneeberger Italiana SpA) of a Swiss company (Schneeberger Maschinenfabrik), from which he resigned on 31 January 1985, and then as partner in and sole director of a family firm (Pfeil Italia Srl) which was put into liquidation in 1986.
- 5 Before his period of leave expired the applicant, by letter of 15 March 1974, requested reinstatement. By letter of 27 March 1974 the head of the Administration and Personnel Division of the JRC, Ispra, informed the applicant that his

request could not be met because at that date there was no vacant post in his category or service corresponding to his grade.

6 Subsequently the applicant submitted six further requests for reinstatement to the authorities of the JRC, Ispra, on 30 September 1976, 24 September and 15 October 1983, 7 January 1984, 15 July 1985 and 20 March 1986, the responses to which were unfavourable.

7 On 9 April 1986 the applicant again submitted a request for reinstatement, addressed to the Directorate-General for Personnel and Administration of the Commission, on the formal basis of Article 90 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations').

8 By letter of 12 May 1986 the Commission informed the applicant that a post was vacant in the Infrastructure Division of the JRC, Ispra, in career bracket A8/A5 of the scientific and technical service.

9 The duties attaching to this post were described as follows: 'responsible, in the framework of the general services of the establishment, for: (a) organization, maintenance and development of the internal telecommunications system (exchange and telephone network, telex, computer network); (b) transport of personnel and equipment; (c) supervision, maintenance and modernization of the vehicle fleet; (d) collection, sorting and dispatching of letters and packages; and (e) organization of the internal removal of office equipment and scientific apparatus'. With regard to the qualifications required for the post in question, the notice which was brought to the applicant's attention was worded as follows: 'university degree or equivalent qualification or equivalent professional experience; experience of technical and financial management of various services; ability to determine the different needs of users and to direct the various human resources in order to meet those needs; ability in devising and wording specifications; estimation of costs; ability in frequent external contacts with authorities, organizations and companies'.

- 10 By letter of 16 May 1986 the applicant accepted the post offered and, on 26 May 1986, the appointing authority adopted a decision reinstating the applicant with effect from 1 September 1986. However, this decision contained no particulars of the step and seniority allowed to the applicant. It was not until 14 October 1986 that the applicant found, on reading his salary statement, that his salary was that of an official of Grade A5, Step 5, which was the classification he held when he left to take leave on personal grounds.
- 11 On 26 November 1986 the applicant submitted a complaint under Article 90(2) of the Staff Regulations against his classification in step in so far as it showed that the administration had not taken account of the period during which he had been involuntarily absent from the service and that, consequently, he had not been granted a step and seniority compensating for the delay in his reinstatement.
- 12 On 30 June 1987, following the implied rejection of his complaint, the applicant brought an action before the Court of Justice seeking, first, the annulment of the reinstatement decision of 26 May 1986, as supplemented by his salary statement of 14 October 1986, in so far as that decision had awarded him Step 5 of Grade A5 and, secondly, the reconstitution of his career and compensation for the salary lost by reason of the delay in reinstatement.
- 13 On 30 September 1987, however, the Commission notified the applicant of a decision expressly rejecting his complaint of 26 November 1986 on the ground that it had not been possible to meet his requests for reinstatement before 26 May 1986 because he did not fulfil the conditions for reinstatement in any of the posts declared vacant since the end of his leave on personal grounds on 31 March 1974.
- 14 The Court of Justice gave judgment in that case on 27 June 1989 (Case 200/87 *Giordani v Commission* [1989] ECR 1877), finding the claim for annulment admissible because the time limit for the submission of a complaint by the applicant

started to run on 14 October 1986, when examination of his salary statement showed him the Commission's decision concerning the step awarded him on reinstatement. However, on the main issue the Court dismissed that claim on the ground that the applicant's classification on reinstatement must be the same as his classification when he took leave on personal grounds, as is clear from Articles 40(3) and (4)(d), 72 and 73 of the Staff Regulations, without prejudice, however, to 'his right to request to be classified in a different step on the basis of other provisions of the Staff Regulations' (paragraph 18, last sentence, of the judgment cited above).

15 In the same judgment the Court dismissed the claims for the reconstitution of the applicant's career and for compensation as inadmissible on the ground that he had not submitted to the administration a prior request, pursuant to Article 90(1) of the Staff Regulations, for the reconstitution of his career and for compensation for the delay in reinstatement. The Commission thus learnt of these grievances only as a result of the complaint of 26 November 1986. As a result, the defendant institution had been unable to adopt a decision, whether express or implied, on these claims. The Court added that the salary statement of 14 October 1986, which had been established on the basis of Article 40(3), and not Article 40(4)(d), first sentence, of the Staff Regulations, on which the applicant based his claim for compensation for the damage caused by the delay in reinstatement, could not be regarded as an implied rejection of the applicant's request.

16 On 29 September 1989 the applicant submitted a request to the Commission under Article 90(1) of the Staff Regulations, which was registered on the same day, for compensation for the loss which he considered he had suffered by reason of the delay in reinstatement. As no reply was received, he submitted a complaint, registered on 10 April 1990, against the implied rejection of the request. No reply was received to this complaint either.

Procedure

17 The applicant then brought the present action, which was registered at the Court of First Instance on 14 November 1990.

18 The written procedure followed the normal course. On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and requested the Commission to produce the applicant's personal file, together with all the vacancy notices for Grade A5 posts in the scientific and technical service published between 1 April 1974 and 12 May 1986 and the vacancy notices for Grade A5 posts in the administrative service published between 15 October 1983 and 12 May 1986, including the vacancy notice concerning the post in which the applicant was reinstated by the decision of 26 May 1986. The Commission was also asked to explain the reasons why it was not possible to reinstate the applicant before 26 May 1986 in any of the posts to which those notices relate. The Commission's replies to these questions and the documents which it was asked to produce were lodged at the Court Registry on 24 February 1993. The Court also requested the applicant to indicate, at the hearing, the posts to which he considered he was entitled to be reinstated.

19 At the hearing on 10 March 1993 the parties presented oral argument and answered the Court's questions. The applicant also lodged three vacancy notices for posts in the scientific and technical service which were not among those produced by the Commission, together with the vacancy notice relating to the post which he held before he took leave on personal grounds (V/IS/126/65, 3 August 1965) and a curriculum vitae.

Forms of order sought

20 The applicant claims that the Court should:

1. declare that he is entitled to be classified in Grade A5, Step 8, and to receive payment of the amounts due on that basis, subject to the claims in point 3, from a date to be determined on the outcome of the proceedings;
2. take account of the unjustified delay in reinstatement when calculating his seniority, to the extent found necessary for supplementing his pension rights;

3. order the Commission to pay him a sum equal to the difference between the Community remuneration which he ought to have been paid at each stage and the income he received for his private work, which he is able to prove fully;
4. in the alternative and by way of measure of inquiry, order the production of the vacancy notices for Grade A5 posts in the scientific service published by the Commission between 1974 and 1986 and in the administrative service between at least 15 October 1983 and 26 May 1986;
5. order interest to be paid on the amounts found to be payable and order the defendant to pay the costs.

At the hearing the applicant withdrew the claim, set out in his application, for the delay in reinstatement to be included in the calculation of his seniority with regard to pension entitlement, and also sought an order that the defendant be ordered to pay him token compensation for the non-material damage which he claimed to have suffered by reason of the uncertainty to which he had been exposed, because of the Commission's conduct, until his reinstatement.

21 The Commission contends that the Court should:

1. without opening the oral procedure, declare the action inadmissible in its entirety;
2. in the alternative to the preceding claim, dismiss the applicant's submissions and claims, rule that the action is unfounded and dismiss it on the merits;
3. in the further alternative to that claim, rule that the damage suffered must be calculated in accordance with and within the limits set out by the Commission in point II, paragraph 25, of the defence;

4. dismiss all the applicant's claims for preparatory inquiries and, on the contrary, if necessary, order all the measures of inquiry referred to in point II, paragraph 26, of the defence and point D of the rejoinder;
5. dismiss any claim for interest on any amounts found to be payable to the applicant, or limit it as indicated in point II, paragraph 30, of the defence;
6. if the Commission is successful, order the applicant to pay the costs and, otherwise, order each party to bear its own costs.

Admissibility

Arguments of the parties

- 22 The Commission asks the Court to dismiss the action as inadmissible under Article 92(2) of the Rules of Procedure of the Court of Justice, which were applicable during the written procedure, prior to the entry into force of Article 113 of the Rules of Procedure of the Court of First Instance.
- 23 The Commission contends that the applicant's action, in so far as it is based on the alleged delay in his reinstatement, can relate only to the decision of 26 May 1986 because the applicant's salary statement of 14 October 1986 is merely an accounting document. Since the legality of the decision of 26 May 1986 can no longer be contested because the applicant both failed to submit a prior complaint in good time and acquiesced, fully and without reservation, in that decision by manifesting his consent to reinstatement, a claim by the applicant for compensation on the basis of its alleged illegality is inadmissible, as is clear from the settled case-law of the Court of Justice and the Court of First Instance (Case 59/65 *Schreckenberg v EAEC Commission* ECR 786; Case 401/85 *Schina v Commission* ECR 3911; Case 346/87 *Bossi v Commission* ECR 303; Case T-27/90 *Latham v Commission* ECR II-35).

- 24 According to the Commission, the action is also inadmissible because, in the absence of a prior decision, whether express or implied, by the Commission on the applicant's claims concerning the alleged delay in reinstatement, the step he took on 26 November 1986 is not a complaint, but a request within the meaning of Article 90(1) of the Staff Regulations, in accordance with the theory that the nature of legal measures is to be interpreted so that they retain their effects, adopted by the Court of Justice in its judgments which look to the substance, not the formal classification, of steps taken by officials under Article 90 of the Staff Regulations (Case 167/86 *Rousseau v Court of Auditors* [1988] ECR 2705; Cases 23/87 and 24/87 *Aldinger and Virgili v Parliament* ECR 4395). Consequently, the fact that the decision which impliedly rejected the applicant's request of 26 November 1986 was not followed by the submission of a complaint within three months, but by an action brought directly before the Court of Justice on 30 June 1987, resulted in a ground of inadmissibility which continues to the present day.
- 25 The Commission adds that the applicant did not submit a complaint against the decision of which he was notified on 30 September 1987, which expressly rejected his request of 26 November 1986. As that decision laid down the Commission's position on the applicant's requests it may no longer be contested and consequently the present action is inadmissible.
- 26 On the basis of this reasoning the Commission concludes that, although Article 90 does not fix a time-limit for the submission of requests in accordance with its provisions, the applicant did not follow through, in the proper time, the pre-litigation procedure under Article 90 of the Staff Regulations and may therefore not use the procedure once again by submitting in succession a request on 29 September 1989 and a complaint on 10 April 1990 in order to obtain a re-examination of the facts of the case and the decision which was the subject of the judgment of the Court of Justice of 27 June 1987. According to the Commission, such re-examination is possible only where a new fact has arisen (Case 17/71 *Tontodonati v Commission* [1971] ECR 1059; Case 127/84 *Esly v Commission* [1985] ECR 1437; Case 125/87 *Brown v Court of Justice* [1988] ECR 1619, paragraph 13; and Case 161/87 *Muyssers and Tülp v Court of Auditors* [1988] ECR 3037), which is not the case here. Consequently the action should be ruled inadmissible in its entirety.

27 The applicant stresses that the decision of 26 May 1986 gave no indication of the step and the seniority granted to him on reinstatement and that these particulars were given only in the salary statement of 14 October 1986, so that the salary statement, which enabled him to ascertain the damage which he was suffering in his classification, amounted to the only decision on this point. Therefore, contrary to the Commission's argument, his complaint of 26 November 1986 fulfilled all the conditions of form and substance to be classified as such, as the Court of Justice found in the judgment of 27 June 1989 when examining his claims for annulment. Consequently, in so far as the dismissal of his claims for compensation by the abovementioned judgment of the Court of Justice was based on the fact that his complaint of 26 November 1986 had not been preceded by a request under Article 90(1) of the Staff Regulations, it was open to him, without a time-limit, to submit such a request and a complaint against its dismissal. As he has therefore followed the pre-litigation procedure under Article 90 of the Staff Regulations, the applicant considers that his action is admissible.

Findings of the Court

28 In its abovementioned judgment of 27 June 1989, the Court of Justice found that the Commission did not learn that the applicant was claiming that his reinstatement was unduly delayed until he submitted his complaint on 26 November 1986 (paragraph 24). Therefore the Court of Justice dismissed the applicant's claims for the reconstitution of his career and for compensation as inadmissible only on the ground that his complaint of 26 November 1986 had not been preceded by a request within the meaning of Article 90(1) of the Staff Regulations, seeking a preliminary decision by the Commission on his claims.

29 Article 90(1) of the Staff Regulations does not lay down a time-limit for the submission of requests by officials thereunder.

30 It follows that the request submitted to the Commission by the applicant on 29 September 1989 and his complaint of 10 April 1990 against the implied rejection of his request were made in accordance with Article 90(1) and (2) of the Staff Regulations and that his resulting action before the Court of First Instance

was consequently brought in accordance with Article 91 of the Staff Regulations so that, contrary to the Commission's reasoning, this action must be ruled admissible.

31 It should be added that the admissibility of the action cannot be affected by the fact that the applicant did not submit a complaint, within the time-limit fixed by the Staff Regulations, against the decision of which he was notified by the Commission on 30 September 1987 and which expressly rejected his complaint of 26 November 1986. First, in the abovementioned judgment of 27 June 1989, the Court of Justice clearly described the applicant's representation of 26 November 1986 as a complaint, so that its implied rejection as a result of the expiry of the time-limits laid down by the Staff Regulations could only be contested in an appeal to the Court under Article 91 of the Staff Regulations. Secondly, the decision notified to the applicant on 30 September 1987 was expressly adopted in response to the complaint of 26 November 1986, merely confirmed the implied decision rejecting that complaint and was adopted after the expiry of the time-limits laid down by the last subparagraph of Article 90(2) (Joined Cases 33/79 and 75/79 *Kuhner v Commission* [1980] ECR 1677, paragraph 9) and the latter part of the second indent of Article 91(3) of the Staff Regulations. That implied rejection had already become the subject-matter of the action brought by the applicant before the Court of Justice on 30 June 1987 when he was notified, on 30 September 1987, of the confirmatory decision relied upon by the Commission. That decision did not therefore give rise to any new element in the applicant's legal position not already submitted for the appraisal of the Court of Justice and not determined by its judgment of 27 June 1989, following which the applicant brought the present action after completing the procedure prescribed by Articles 90 and 91 of the Staff Regulations.

Substance

Delay in reinstatement of the applicant

Arguments of the parties

32 The applicant submits that, by delaying his reinstatement, the Commission contravened Article 40(4)(d) of the Staff Regulations, thereby committing a wrongful act which has caused him damage.

33 In his view, the obligation to reinstate an official, as set out by Article 40(4)(d) of the Staff Regulations, requires the Commission to take all the necessary steps for that purpose in so far as it possesses all the information concerning the opportunities for such reinstatement, whereas the official can only decline the first post offered to him on that basis.

34 In this connection the applicant states, first, that the administration never sent him the vacancy notices for posts for which he might have applied, in spite of his requests of 30 September 1976, 24 September 1983, 7 January 1984 and 15 July 1985, and in spite of a standard letter, dated March 1981, from the head of the Administration and Personnel Division of the JRC, Ispra, stating that officials awaiting reinstatement systematically received current vacancy notices, so that they could make their interest known. Secondly, the applicant states that there was either no reply at all to his requests for reinstatement, as in the case of that of 30 September 1976, or a late reply in the negative, as in the case of that of 15 March 1974, to which the administration replied only by a letter of 19 March 1981. Finally, some of his requests received only dilatory replies, as in the case of that of 24 September 1983, in which he asked to be sent vacancy notices which might be of interest to him and to which the administration replied on 10 October 1983 by asking him to state whether he wished to receive notices of vacant posts. Likewise, his request for reinstatement of 7 January 1984 in which, in addition to asking the administration to send him vacancy notices which might be of interest, he pointed out that he had to resume paid employment as a matter of urgency, was answered by letter of 25 May 1984 in which the administration asked him whether he was still interested in reinstatement and whether he was receiving in good time the vacancy notices which he requested.

35 With regard to the defendant's possibilities for reinstating him before 26 May 1986, the applicant maintains that, in view of the 327 notices of vacant posts in the scientific and technical service produced by the Commission and of his experience and the duties which he performed before he went on leave, he could quite properly have been reinstated in three posts in particular in the scientific and technical service of the Commission.

- 36 In this connection the applicant refers, first, to Vacancy Notice COM/R/1523/85, for which applications had to be submitted by 26 July 1985. The duties of the post, in the framework of the general services of the JRC, Ispra, concerned the organization of ordinary and special maintenance operations on buildings and technological installations for the production and distribution of fluids (heating, air-conditioning, water, discharge and processing of waste, both conventional and doubtful, compressed air, gas, etc.), estimating the costs of such operations, and drawing up forward maintenance programmes and specifications for work assigned to third parties.
- 37 Secondly, the applicant refers, in connection with his experience of contracting acquired in the course of the duties he performed prior to taking leave, to Vacancy Notice COM/R/1561/85, for which applications had to be submitted by 22 November 1985. The duties of this post consisted in assisting the officer responsible for the management of the R and D programme, non-nuclear energy, particularly in the field of solid fuels. As part of those duties, the official appointed would be responsible for monitoring and managing contracts in collaboration with the Contracts Department, writing technical and administrative reports, giving instructions to contractors with regard to the content of final reports and monitoring the management of the budget for the sub-programme.
- 38 Finally, with reference to his previous experience of contracting and his training in and experience of supervising fuels and engines, the applicant states that he could have been reinstated in the post published in Vacancy Notice COM/R/1571/85, for which applications had to be submitted by 10 January 1986. The duties of this post were to assist the officer responsible for the R and D sub-programme for 'optimization of the production and utilization of hydrocarbons' and to be responsible for, *inter alia*, analysing proposals for research, negotiating the technical programmes of contracts, monitoring contracts, writing technical and administrative reports and giving instructions to contractors with regard to the content of final reports.
- 39 Furthermore, the applicant maintains that he could have been reinstated in one of the posts in the administrative service because interpenetration between the scientific and technical service and the administrative service is possible under the Staff

Regulations and in many cases a practice of the Commission, and because he had informed the Commission that he would be available for such a post at least from 15 October 1983.

40 Accordingly the applicant maintains that he could have been reinstated in the administrative post advertised at the JRC, Ispra, on 3 October 1977 in Vacancy Notice No 393, which expressly stated that officials and employees of the scientific and technical services could apply. He stresses that the duties attaching to that post, to which an official of the scientific and technical service was finally appointed, were to manage the authorization department of the Finance and Contracts Division, whose main work was to authorize commitments and expenditure for both orders and contracts, and to manage outside contracts. By not reinstating him in this post, which required ability in the field of contracts, the defendant overlooked the qualification he had acquired in the course of his duties as head of the Procurement and Supplies Department, the post he held at the time when he left on leave, and his more general ability in administrative tasks. In this connection the applicant refers to the administrative functions entailed by the post to which he was reinstated in the Infrastructure Division of the JRC, Ispra, in which he was given responsibility for telecommunications and transport services, and adds that after reinstatement he was assigned, by decision of 15 December 1986, to an administrative post, to advise and assist the director of the JRC, Ispra, in matters of contracting.

41 Also with regard to posts in the administrative service, the applicant adds, with reference to the 66 vacancy notices produced by the Commission, that he could also have been reinstated in the administrative post published in Vacancy Notice COM/355/85, for which applications had to be submitted by 27 March 1985. That post, in the Directorate-General for Personnel and Administration (DG IX), entailed assisting a head of division in preparing and monitoring all the tasks allocated to the administrative unit responsible for the management, supervision and maintenance of buildings and monitoring contracts concerning them, the management of certain credits and of equipment and the vehicle fleet, and all activities providing logistical support for the Commission's services in Luxembourg.

42 The Commission contends that it was not objectively possible to reinstate the applicant before 26 May 1986 because there were no vacant posts suited to his abilities. It explains that the applicant's career profile is unusual in that, while he has basic technical and scientific training and a diploma — not, however, a degree-level diploma — in motor engineering, he has also acquired commercial experience. Before he joined Euratom, the applicant had been engaged in commercial work dealing with matters of procurement, selling and promotion in the industrial engine and motor vehicle industry, and after he joined Euratom on the staff of the JRC, Ispra, he was responsible for making the purchases necessary for basic research, with a considerable involvement in the nuclear field, which required the ability to assess the qualities of sophisticated scientific equipment, not merely ordinary plant and machinery. According to the Commission, these abilities are not fully appropriate for either the scientific sector or the administrative sector, which made it difficult to reinstate him.

43 With regard to the posts in the scientific and technical service, the Commission emphasizes that, although the applicant had to be reinstated in any case in a post in this service, because of his basic training and original recruitment, his special qualifications and the fact that he did not possess a university qualification in engineering necessitated an *ad hoc* assessment of his abilities in relation to all the available posts of which there were consequently very few or even none.

44 The post published in Vacancy Notice COM/R/1523/85, the Commission states, entailed managing and maintaining buildings and installations, particularly installations for the production and handling of fluids — highly specialized work requiring the qualifications of a 'graduate in industrial engineering or an equivalent qualification or equivalent professional experience' — and thus required training of a totally different kind from that possessed by the applicant, who 'had no experience in commercial matters, what one would call ... a sales engineer'.

- 45 The post published in Vacancy Notice COM/R/1561/85 entailed supervising and managing research contracts in the field of non-nuclear — recoverable and reclaimable — sources of energy. It called for a university education attested by a diploma or experience at an equivalent level, together with a sufficiently thorough knowledge of regenerative energy systems to assess and manage projects entrusted to private or public undertakings under research contracts 50% of which was financed by the Commission. Those duties were therefore unsuited to the applicant's abilities as he had worked in an entirely different field.
- 46 The post published in Vacancy Notice COM/R/1571/85 entailed assisting the officer responsible for the research and development sub-programme for 'optimization of the production and utilization of hydrocarbons', in the specific sectors of synthetic fuels, engines and other fuels, and thus required 'a university education appropriate to the hydrocarbons sector and experience in industry' — qualifications not 'quite' corresponding to the applicant's professional profile.
- 47 As regards the administrative service, the Commission states that the applicant could not have been reinstated in a post in this service because Article 40(4)(d) of the Staff Regulations imposes on the administration a legal obligation to reinstate an official in a vacant post only if the post is in the service to which he belongs. It considers that the administration has a discretionary power to reinstate an official of the scientific and technical service in an administrative service post, although it is not required to offer it to him first or to assess vacant posts in the administrative service with this in view. For those reasons, no such assessment was made in the applicant's case.
- 48 With regard in particular to the administrative post published in Vacancy Notice No 393 of 3 October 1977, the Commission adds that its obligation under Article 40(4)(d) of the Staff Regulations relates only to notices of vacant posts within the meaning of Article 4(2) of the Staff Regulations and does not extend to notices of

‘internal transfer’ such as the notice in question. It considers that ‘internal transfer’ notices do not concern officials awaiting reinstatement, who no longer have their post, but only officials who can be transferred, with their post, to duties which are in essence similar to those they previously performed.

- 49 Finally, with regard to the administrative post published in Vacancy Notice COM/355/85, the Commission accepts that the applicant held an administrative post ‘in the wide sense’ of the term in the Purchasing Department of the JRC, Ispra, but contends that his basic training and his membership of the scientific and technical service meant that he should be reinstated in that service only, because he had no specific preparation for a post in the administrative sector. Therefore the Commission considers that the applicant did not possess the qualifications required for the post, namely ‘specific experience in the property sector, ... the management of buildings and all aspects of the logistics of the Commission’s services in Luxembourg’.

Findings of the Court

- 50 Article 40(4)(d) of the Staff Regulations imposes on the Community institutions an obligation to reinstate an official, on the expiry of leave on personal grounds, 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. Apart, therefore, from a vacant post and the fulfilment of the requirements for that post by the person concerned, reinstatement does not depend on any additional condition such as an indication of interest on the part of the official concerned or whether he works or not during his leave. Consequently, the discretion of the authorities concerned with reinstatement relates only to the assessment of the actual abilities of the official entitled to reinstatement, which must be effected with reference to the posts which he is capable of holding, and does not extend to the advisability of reinstating him or of examining his abilities, which the administrative authority must in any case do in the interests of the service (Case 58/75 *Sergy v Commission* [1976] ECR 1139, paragraph 13).

51 The obligation to carry out a detailed examination to ensure that an official entitled to reinstatement satisfies the requirements for a vacant post, implied by Article 40(4)(d) of the Staff Regulations, also appears from the internal decision of the Commission of 14 January 1970, published in the Staff Courier No 103, concerning leave on personal grounds. This decision requires the Directorate-General for Personnel and Administration of the Commission to offer the officials concerned, 'in accordance with the procedure prescribed in Article 40(4)(d) of the Staff Regulations', a vacant post in their original Directorate-General or service even if the procedure for filling those posts has commenced and, failing such post in their original Directorate-General or service, to refer the matter to a reinstatement committee consisting of three senior officials, appointed *ad hoc* for each case to be examined, with the task of determining the post to be offered to the official in question. Those procedural obligations are reiterated in the decision which replaced the abovementioned decision of 14 January 1970, published in Administrative Notices No 569 of 5 September 1988, which provides that for purposes of reinstatement 'the Directorate-General for Personnel and Administration shall examine all vacant posts and the qualifications of officials' awaiting reinstatement. The same decision also imposes on the administration an obligation to hold in abeyance procedures for filling any vacancy which 'appears to correspond' to the qualifications of an official whose leave will expire within six weeks or less, or whose leave has expired, in order to give priority to permitting a successful outcome to the reinstatement procedure.

52 Therefore the procedure for verifying the ability of officials awaiting reinstatement, which the authorities of the Community institutions are required to carry out subject to review by the Community courts, must be effective and must take its course in such a way that the institutions can prove that it has been observed. If that were not so, neither the officials seeking reinstatement, who are not normally informed of vacancies in their institution save in cases where they are offered a post, nor the Court would be able to verify that the obligations imposed on the Community institutions by Article 40(4)(d) of the Staff Regulations have been fulfilled.

53 In this connection, although the competent authorities cannot be compelled to prove that they have examined the abilities of an official awaiting reinstatement where there is a manifest divergence between his abilities and those required for a particular post which is vacant, such proof must nevertheless be adduced in all cases

where, in the absence of such a manifest divergence, a complete verification of the abilities of the person concerned in relation to a vacant post is necessary.

54 At the Court's request, the Commission has produced the applicant's personal file (No 21756) which contains, in annex A, part 1, an information sheet in his name entitled 'List of JRC officials on leave on personal grounds'. It shows, *inter alia*, the dates of three of the applicant's requests for reinstatement (15 March 1974, 30 September 1976 and 24 September 1983) and the types of post which he could have been offered as a priority, involving 'purchasing and selling duties' and 'managerial duties'. The same information sheet refers to the scientific and technical service vacancy notices COM/R/567/80, 515/81, 523/81, 529-530/81, 531-532/81, 544/81, 545/81, 538-539/83, 508/84 and 517/84 which, according to a note on the list, were 'vacancies for which the official's abilities were verified (without an offer of reinstatement)'. Finally, the same part of the applicant's file contains a note dated 22 May 1984 (XII-B-5(D)-84-12.505) recording the negative conclusions reached after verification of the applicant's abilities and those of four other officials awaiting reinstatement in relation to the post referred to by one of the abovementioned vacancy notices, COM/R/517/84 (and 520/84). The note indicates that the post entailed duties in connection with the FAST programme and concludes that 'it is clear that Mr Giordani, whose first post in the JRC was head of the procurement department, cannot meet the needs of FAST'.

55 The competent services of the Commission therefore considered it necessary to verify the applicant's abilities with regard to the requirements of posts such as those referred to in the abovementioned note and information sheet, although there was undoubtedly a divergence between those abilities and the requirements. Consequently there was all the more reason for those services to ensure that the applicant's file contained a record of the conclusions reached on an examination of his abilities in relation to the requirements of posts which appeared manifestly, or at least more, in keeping, with his abilities and thus to ensure that reasons were stated for the refusal to reinstate him in one of those posts. That was not done, in particular, for the posts indicated by the applicant, covered by vacancy notices COM/R/1523/85, COM/R/1561/85 and COM/R/1571/85. Therefore the Commission's statement that the applicant's abilities were examined in relation to all the posts in the scientific and technical service declared vacant between 1974 and 1986

cannot be accepted. This is all the more evident in that, at the hearing, the applicant pointed out notices of vacancies in the scientific and technical service which the Commission was unable to produce to the Court.

56 In the absence of proof, or even evidence, of a systematic examination of the applicant's abilities in relation to each post to which he could have been reinstated before 26 May 1986, the defendant has not sufficiently shown that it observed the procedure for examining the abilities of officials awaiting reinstatement, the principles of which are determined by Article 40(4)(d) of the Staff Regulations and certain details of which were laid down by the internal decision of the Commission of 14 January 1970, which was applicable during the period in question.

57 This failure on the Commission's part, arising from conduct which is irregular by reference to Article 40(4)(d) of the Staff Regulations, constitutes a service-related fault which may give rise to liability to the applicant in so far as it prevented his reinstatement before 26 May 1986. The objective nature of the damage suffered by the applicant, which renders his claim for compensation admissible (*Sergy v Commission*, cited above, and Case 785/79 *Pizziole v Commission* [1983] ECR 1343) arises in the present case from being deprived of his remuneration as an official from the date when he could possibly have been reinstated to the date of his actual reinstatement.

58 Consequently it is necessary to ascertain whether the applicant could have been reinstated before 26 May 1986 on the basis, firstly, of his abilities as shown by the file and, secondly, the profile of the posts to which he contends he was entitled to be reinstated.

59 With regard to the posts in the scientific and technical service to which the applicant was unquestionably entitled to be reinstated, the Court refers, first, to the post

published in Vacancy Notice COM/R/1523/85, applications for which had to be submitted by 26 July 1985. According to that notice, the duties of the post were as follows: 'organization of ordinary and special maintenance operations on buildings and technological installations for the production and distribution of fluids (heating, air-conditioning, water, discharge and processing of waste, both conventional and doubtful, compressed air, gas, etc.); estimating the costs of such operations; drawing up forward maintenance programmes; drawing up specifications for work to be carried out by third parties'. The qualifications required were as follows: 'university education in industrial engineering or equivalent professional experience; experience in the sector of general maintenance of buildings and installations for the production and distribution of fluids, automation and control relating in particular to air-conditioning; ability to estimate costs; ability to design and draw up specifications'.

60 The description of the duties of that post shows that they entailed both commercial tasks, particularly in relation to contracting, and, technical tasks connected with the maintenance of the installations of the JRC, *Ispra*.

61 With regard to the commercial and contracting duties, the Court notes that the post held by the applicant before he took leave on personal grounds required, according to the vacancy notice in which the post was published (V/IS/126/65), 'excellent experience of procurement technique and methods ...'. It must also be observed that the Commission, in its replies to the Court's questions, stated that 'Mr Giordani's curriculum vitae shows a commercial training ...', that the applicant, in his above-mentioned post, was responsible for 'all the procedures for ordering, purchasing and receiving goods' and that he 'has always been engaged in work in the commercial sector' and in particular in aspects 'connected with the purchase and management of stocks of technical and scientific equipment', a sector in which 'he has consistently given proof of his qualities and skill'. Finally, at the hearing the Commission confirmed that the applicant's experience 'revolved essentially around the area of marketing' and that he was responsible for 'purchases for a large research centre ...', entailing an ability 'to assess the quality of such raw material and scientific equipment' and 'through contacts with suppliers, to obtain good prices thanks

to negotiations ...'. Finally, it must be added that the post to which the applicant was reinstated on 26 May 1986 required 'ability in designing and drawing up specifications, and estimating costs'. Therefore the defendant cannot, in the context of the present proceedings, cast doubt on the fact that the applicant manifestly possessed the abilities required in commercial and contracting matters for the duties pertaining to the post published in notice COM/R/1523/85.

- 62 With regard to the duties of a more technical nature, the management and maintenance of installations in the Ispra centre, the Court notes that the vacancy notice concerning the post held by the applicant before he went on leave required 'very good knowledge of the materials and equipment used in a nuclear research centre ...'. The Commission, in its replies to the Court's questions and at the hearing, stated that the applicant had 'a basic scientific and technical training' and that the duties pertaining to the post he held before he went on leave 'required a skill ... halfway ... between basic scientific training, which was indispensable because the duties related to the maintenance of the equipment necessary for Ispra, and training in management so as to carry out transactions which, objectively, are commercial ... because it is a matter of purchasing in a specific market ..., being able through contacts with suppliers to obtain good prices ... and a whole range of subsequent services such as, for example, warranties for maintenance and repair, and after-sales service'. Finally, the Court observes that the post to which the applicant was reinstated on 26 May 1986 entailed various management and maintenance tasks. His qualifications could therefore have matched the abilities necessary for carrying out duties relating to the maintenance of the buildings and the technical installations of the JRC, Ispra. The defendant, who explained at the hearing that the post published in Vacancy Notice COM/R/1523/85 required 'expertise in the purchasing of goods essential for the work of the Ispra centre', 'experience in commercial matters, what one would call ... a sales engineer' and 'a person familiar with the problems inherent in handling' cannot therefore question that the applicant manifestly had the abilities necessary for this post.

- 63 The Court refers, secondly, to the post in the scientific and technical service published in Vacancy Notice COM/R/1571/85, for which applications had to be

submitted by 10 January 1986. According to the notice, the duties of this post were as follows: 'to assist the officer responsible for the R and D sub-programme for "optimization of the production and utilization of hydrocarbons" in managing that subprogramme, particularly in the following fields: synthetic fuels, deposits, engines and hydrocarbon fuels. Responsible, *inter alia*, for analysing research proposals, negotiating technical contract programmes, monitoring contracts, drafting technical and administrative reports and giving instructions to contractors with regard to the content of final reports'. As for qualifications, the notice required: '1. a university education attested by a diploma or professional experience at equivalent level; 2. appropriate knowledge of the hydrocarbons sector in general; 3. several years' experience in industry'. According to the Commission's observations at the hearing, this post required 'a university education appropriate to the hydrocarbons sector and experience in industry'.

64 In so far as this post entailed tasks of negotiating, concluding and monitoring contracts, it is clear from what has been said concerning the post published in Vacancy Notice COM/R/1523/85, that the applicant possessed, in the opinion of the Commission itself, all the abilities required. Furthermore, in addition to his technical training as an engineer, the applicant, as appears from his file and as the Commission itself has admitted, had acquired experience '... particularly in sales organization and systems in industry ...' in the post he held before he went on leave. The Commission also acknowledged that the applicant had experience of this kind in its replies to the Court's questions, in which it stated that the applicant, 'apart from a brief period of work as a design engineer in a Swiss company designing marine diesel engines, was responsible from 1954 to 1960 for the sales network of a number of companies in the industrial engine and motor vehicle industries'. The Commission confirmed this statement at the hearing, referring to the applicant's experience in the 'promotion of industrial products, particularly in the engineering and motor vehicle sector'. It follows that, in so far as the post in question required experience of industry, the applicant possessed the necessary abilities, particularly with regard to industrial engines and, therefore, hydrocarbons — of which, furthermore, the applicant had also obtained specific commercial experience before he joined the service of the Commission, as he stated without being contradicted by the Commission on this point.

- 65 Consequently, the Commission has not shown that it was impossible for it to reinstate the applicant on 26 July 1985 in the post published in Vacancy Notice COM/R/1523/85 or on 10 January 1986 in the post published in Vacancy Notice COM/R/1571/85, and it is unnecessary to determine whether he could also have been reinstated in the post published in Vacancy Notice COM/R/1561/85. In so far as the Commission actually assessed, in good time, the applicant's abilities by reference to the requirements pertaining to these two posts, its refusal to reinstate him appears to be based on insufficient grounds and, in part, to conflict with the applicant's actual abilities, particularly since Article 40(4)(d) of the Staff Regulations does not require the qualifications of the person concerned to match perfectly the requirements of the post in question, but only requires him to be able to perform the duties pertaining to the post (*Pizziolo v Commission*, cited above, paragraph 5).
- 66 However, it is also necessary to consider whether the applicant ought to have been reinstated at a date earlier than either 26 July 1985 or 10 January 1986, in particular on 26 October 1977, which was the final date for the submission of applications for the post in the administrative service published in the JRC, Ispra, in Notice No 393 of 3 October 1977, a post in which the applicant claims he was also entitled to be reinstated.
- 67 That notice concerned an administrative post in Category A, of no stated grade, in the directorate of the JRC, Ispra, Finance and Contracts Division, which was to be filled by internal transfer. The duties of the post in question were described as follows: 'to manage the payment authorization department of the Finance and Contracts Division, whose main work is as follows: authorization of commitments, authorization of payments in relation to orders and purchasing contracts, management of outside contracts'. Regarding the qualifications for this post, the notice required 'a university education attested by a diploma or professional experience at equivalent level, experience of financial management preferably, experience of administrative management'. Finally, as the post was in the administrative service, the notice expressly stated that 'officials and temporary staff in the scientific and technical service may also apply'.

- 68 It appears from the notice in question that the duties of the post concerned were, first, in the area of contracting, entailing the negotiation, conclusion and monitoring of contracts, secondly, of a financial nature, entailing the authorization of payments for orders and contracts, and, finally, of a general administrative nature.
- 69 In the light of the foregoing considerations, it is not in issue that the Commission expressly acknowledged, in its written replies to the Court's questions and at the hearing, that the applicant possessed undoubted abilities in commercial matters, including the negotiation, conclusion and monitoring of both procurement and sales contracts, particularly suited to the needs of a joint research centre such as Ispra, as a result of his experience in this field acquired in the course of both his private work and his duties in the service of the Commission. The applicant's abilities are also confirmed by the note on the abovementioned information sheet in his file, to the effect that he could be reinstated in a post entailing 'purchasing and selling'. In addition, before he took leave on personal grounds, the applicant performed the duties of head of the Procurement and Stores Department of the JRC, Ispra, which, according to the vacancy notice concerning this post, required 'excellent experience of procurement technique and methods including, in particular, the purchasing organization and systems used in industry'. Finally, according to the periodic reports in his file (part 3), to which the Commission referred in its replies to the Court's questions, the applicant, in his capacity as head of the Procurement Department of the JRC, Ispra, was responsible for 'all the procedures for ordering, purchasing and receiving goods'. It follows from the above findings that, in so far as the post referred to by Notice No 393 of 3 October 1977 entailed duties connected with the conclusion and management of contracts, the applicant manifestly possessed the necessary abilities.
- 70 In addition, the post held by the applicant before he went on leave on personal grounds required 'knowledge of the financial organization ... of the Community' and the department which he headed was attached in 1970 to the larger Finance and Procurement Department. Moreover, the post to which he was reinstated on 26 May 1986 required, according to the description of the duties it entailed, 'experience of technical and financial management of various services'. It follows that, in so far as the post referred to by Notice No 393 of 3 October 1977 required

particular abilities in financial management because of the tasks of authorizing commitments and payments which it entailed, the applicant possessed the necessary abilities.

71 Finally, when the applicant joined the Commission, he was appointed to a post in the Directorate-General for Personnel and Administration and the post he held before he went on leave required 'knowledge of the administrative organization ... of the Community'. In addition, as has just been pointed out, the post to which he was reinstated on 26 May 1986 required 'experience of technical and financial management of various services'. Furthermore, among the duties which could have been allotted to him on reinstatement, the abovementioned information sheet in his personal file indicated 'managerial duties'. Finally, at the hearing the Commission, while refusing to accept the possibility of reinstating the applicant in an administrative post, agreed that his post in the Purchasing Department of the JRC, Ispra, was of an 'administrative nature'. It follows that, in so far as the post referred to by Notice No 393 of 3 October 1977 required candidates with experience of administrative management, the applicant possessed the requisite abilities.

72 Consequently it must be found that the applicant manifestly possessed all the abilities necessary for reinstatement in the administrative post published in the JRC, Ispra, by Notice No 393 of 3 October 1977, corresponding to his category and, in the absence of any particulars in the notice concerning the grade to be filled, potentially to his grade.

73 The Commission does not expressly dispute that the applicant may have had the abilities necessary for reinstatement in that post, but contends that it had no legal obligation to reinstate him in it. On this point it considers, first, that the obligation to reinstate an official on the expiry of leave on personal grounds relates only to posts in the service to which he belongs and, secondly, that Article 40(4)(d) of the Staff Regulations imposes such obligation on the authority only where there is a notice of a 'vacant post' within the meaning of the second paragraph of Article 4 of the Staff Regulations, and not in the case of a notice of 'internal transfer' such as Notice No 393 of 3 October 1977.

74 The Commission's first argument must be rejected, without it being necessary to determine whether, in view of the fact that the second paragraph of Article 98 of the Staff Regulations provides that Article 45(2) is not to apply to officials covered by Article 92, that is to say officials in the scientific and technical services (Joined Cases 269/84 and 292/84 *Fabbro and Others v Commission* [1986] ECR 2983), the Community institutions must, on the basis of Article 40(4)(d), offer a post in the administrative service in preference to an official in the scientific and technical service who is entitled to reinstatement. If the authority concerned decides to open an administrative service post to officials and employees of the scientific and technical service, Article 40(4)(d) is in any case fully applicable. In that event the authority concerned, which must reinstate an official 'in the first post ... which falls vacant' according to Article 40(4)(d) of the Staff Regulations, has an obligation to give preference to reinstatement before using one of the other methods of filling a vacant post laid down by the third paragraph of Article 4 of the Staff Regulations.

75 The Commission's second argument, based on a distinction between a vacancy notice and a notice of internal transfer, must also be rejected. Both the transfer and the reinstatement of an official presuppose a vacant post, as appears from Article 4 of the Staff Regulations, and its third paragraph in particular, with regard to transfer, and from Article 40(4)(d) with regard to reinstatement.

76 Having thus established that the post which was the subject of Notice No 393 of 3 October 1977 manifestly corresponded to the applicant's abilities and that he could have been reinstated in it on 26 October 1977, the final date for the submission of applications, the Court finds that the Commission's failure to reinstate him in this post and to remedy the consequences of the delay in reinstatement constitutes a breach of Article 40(4)(d) of the Staff Regulations and a wrongful act which has caused the applicant actual damage for which he is justified in seeking compensation.

The consequences of the delay in reinstatement with regard to the applicant's step and seniority

Arguments of the parties

- 77 The applicant claims that the damage for which he seeks compensation by reason of the delay in reinstatement does not relate to the loss of his chances of promotion to a higher grade, but only the loss of automatic advancement to higher steps which he would have been given, in the grade which he holds, if he had been reinstated at the proper time.
- 78 The Commission contends that advancement to a higher step, like promotion to a higher grade, is not a true subjective right of the officials concerned. Notwithstanding Article 44 of the Staff Regulations, the possibility of deferment of advancement to a higher step or of relegation in step cannot be ruled out, as Article 86(2) makes clear.

Findings of the Court

- 79 In *Pizziolo v Commission*, cited above, the Court of Justice dismissed the claims of an official, whose reinstatement had been delayed, for the reconstitution of his career, taking account of the advancement in grade which he might have been given, on the ground that it could not be determined with any certainty what chances the applicant would have had of advancement if he had been reinstated at the proper time (*Pizziolo v Commission*, paragraph 16). The Commission's argument in the present case must be dismissed for the same reason, in so far as it is not possible to determine exactly the circumstances which, in the course of an official's career, could have entailed suspension or deferment of the right of automatic advancement to a higher step to which the applicant is entitled in his grade.
- 80 It follows that the applicant has a right, under Article 44 of the Staff Regulations, to advancement in step in his grade. Such advancement must be calculated as from 26 October 1977, the date on which he ought to have been reinstated in the services of the Commission.

Compensation and calculation of damage

Arguments of the parties

81 The applicant states that the damage he suffered by reason of the delay in reinstatement extended over only 18 months, from 1 February 1985 to 1 September 1986, during which time he had no earned income because, having given up private work as a result of being forced to resign from the company where he was working, by reason of its personnel policy, he was not reinstated to the services of the Commission and was therefore not receiving remuneration as an official. The applicant also claims interest on the sums owed to him as compensation by the Commission.

82 The Commission contends that, if the applicant's claims for compensation are successful, the damages payable should be limited to take account of the effect of the applicant's negligent conduct. On this point the Commission submits that the applicant has not shown the necessary diligence and willingness to cooperate with the administration to obtain reinstatement, thus failing in his duty to collaborate with the administration, a duty laid down by a general principle of public law which also appears in the Staff Regulations (Article 21, first paragraph). The conduct of the applicant, who showed only an intermittent interest in reinstatement, thus contributed to the alleged damage and broke the causal relationship between the act of the administration and the damage suffered (Case 36/62 *Acéries du Temple v High Authority* [1963] ECR 289).

83 In addition, to determine the amount of damage suffered by the applicant, the Commission considers that account must be taken of two factors, one being the applicant's premature resignation in February 1985 from his post in the private company Schneeberger Italiana SpA, resulting in a loss of earnings for which he himself is alone responsible, and the other being the fact that he received the sizeable sum of LIT 108 008 000 in compensation following his resignation.

84 With regard to the applicant's claim for interest to be added to the amounts he seeks, the Commission contends that the claim does not state how much interest should be paid or on what grounds. It asks the Court to dismiss this head of claim because it did not appear in the applicant's request or complaint. Finally, it argues that, should the Court award interest, it should be calculated according to the following principles: (a) only default interest should be taken into account, as the applicant had not specifically claimed compensatory interest; (b) the default interest should be calculated from the date when the action was brought before the Court because interest had never been claimed previously; and (c) the maximum rate applicable should be 6% per annum.

Findings of the Court

85 In evaluating the damage suffered by the applicant by reason of the loss of the remuneration to which he would have been entitled as an official had there been no delay in his reinstatement, it must first be borne in mind that his classification in Grade A 5, Step 5, on reinstatement was found to comply with Article 40(3) of the Staff Regulations by the Court of Justice in the *Giordani v Commission* judgment cited above (paragraph 18), without prejudice to his right 'to request to be classified in a different step on the basis of other provisions of the Staff Regulations'. Secondly, account must be taken of the fact that the applicant limits the damage to the period from 1 February 1985, when his private paid employment ended, to 1 September 1986, when he began to receive his remuneration as an official following reinstatement on 26 May 1986. Therefore the compensation to which he is entitled must be equal, first, to the total net monthly remuneration which he would have received from 1 February 1985 to 1 September 1986, taking account of the automatic advancement to higher steps which he would have been given under Article 44 of the Staff Regulations if he had been reinstated at Grade A 5, Step 5, on 26 October 1977 to the post published in Notice No 393 of 3 October 1977 and, secondly, the difference between the net remuneration received from 1 September 1986 and the remuneration which he would have received from that same date if he had been reinstated to the abovementioned grade and step on 26 October 1977.

86 With regard to the Commission's argument that the applicant did not show all the diligence necessary to facilitate his reinstatement, the Court finds that there is nothing in the file to justify the conclusion that the applicant did not show sufficient willingness to cooperate with the Commission's services with a view to obtaining reinstatement. Since the Commission has produced no evidence to support its allegation, it is sufficient to observe that the applicant submitted no fewer than eight requests for reinstatement between 15 March 1974 and 9 April 1986, his final request even being made on the basis of Article 90 of the Staff Regulations. Therefore this argument of the Commission must be dismissed.

87 Regarding the argument that the applicant resigned prematurely from his post in the private company in which he had worked up to 1 February 1985, the Court considers that the applicant, who had an unbroken period of paid private employment from the date when he started leave on personal grounds in 1971 up to 31 January 1985, cannot be deemed to have been under an obligation to continue that work, without thereby disregarding his repeated requests for reinstatement, ignoring all consequences of the Commission's failure to reinstate him without delay and interfering with his right to take up any work which suited him, since he has stated, without being contradicted by the Commission, that he was compelled to resign his post by reason of the personnel policy of the company in which he had worked until 31 January 1985.

88 Finally, the compensation received by the applicant on his resignation from Schneeberger Italiana SpA was quite obviously not paid by way of remuneration for the period following his departure, but because of his employment relationship with the company during the period when he had actually worked for it, up to 31 January 1985. It thus cannot be taken into account as remuneration for the period following his resignation from the abovementioned company, and the Commission's application to that effect must therefore be dismissed.

89 Nevertheless, in calculating the compensation payable to the applicant, account must be taken of any net earned income which he may have received as sole

director and shareholder of Pfeil Italia Srl after his resignation from Schneeberger Italiana SpA, from 1 February 1985 to 1 September 1986.

- 90 Finally, the applicant's claim for interest must be allowed. The sums payable by the Commission must thus bear interest, to be fixed at 8% and calculated from 1 February 1985, a date by which the applicant ought already to have been reinstated and the beginning of the period during which he did not receive his remuneration as an official because he had not been reinstated at the proper time. However, the applicant did not request compensation for the damage suffered until 29 September 1989 and, following the rejection of the request, he lodged a complaint only on 10 April 1990, without claiming interest in either case. Therefore the date for the calculation of interest should be fixed as 14 November 1990, when he brought the present action, in which he has claimed interest.
- 91 On the basis of the foregoing considerations, the Commission must be ordered to pay the applicant sums equal to (a) the difference between the net remuneration which he would have received from 1 February 1985 to 1 September 1986 if he had been reinstated on 26 October 1977 and the net earned income which he obtained from other work, and (b) the difference between the net remuneration actually received from 1 September 1986 and the net remuneration which he would have received from that same date, 1 September 1986, if he had been reinstated on 26 October 1977. The amounts payable will bear interest at the rate of 8% from 14 November 1990 until the date of actual payment.
- 92 Before a ruling is given on the amounts to be paid by the defendant to the applicant, however, the parties must be requested to lodge with the Court, within four months of the delivery of this judgment, their agreement concerning the calculation of the compensation payable to the applicant.

- 93 In the event of a failure to agree on the compensation payable to the applicant, the parties will submit their calculations to the Court within the same period, stating the precise reasons for their rejection of the other party's proposals.
- 94 The applicant's claim made at the hearing of 10 March 1993 for compensation for the non-material damage allegedly caused by the Commission's negligence in reinstating him at the proper time is dismissed as inadmissible because it is out of time.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Orders the Commission to compensate the applicant for the financial damage sustained as a result of not being reinstated on 26 October 1977 in Grade A 5, Step 5, in the post in the Joint Research Centre, Ispra, which was the subject of Notice No 393 of 3 October 1977;
2. Declares that the sums payable to the applicant shall be equal to: (a) the difference between the net remuneration which he would have received between 1 February 1985 and 1 September 1986 if he had been reinstated on 26 October 1977 and the net earned income which he obtained from other work, and (b) the difference between the net remuneration received from 1 September 1986 and the net remuneration which he would have received from that same date, 1 September 1986, if he had been reinstated on 26 October 1977;
3. Declares that the amounts payable are to bear interest at the rate of 8% from 14 November 1990 until the date of actual payment;

4. Orders the parties, before a ruling is given on the total compensation payable by the defendant to the applicant: (a) to lodge with the Court, within four months of the delivery of this judgment, their agreement concerning the calculation of the compensation payable to the applicant and (b) in the event of a failure to agree, to submit their calculations to the Court within the same period, stating the reasons why they reject the other party's proposals;

5. Dismisses the applicant's claims for compensation for non-material damage as inadmissible;

6. Reserves the costs.

Barrington

Schintgen

Kalogeropoulos

Delivered in open court in Luxembourg on 1 July 1993.

H. Jung

D. P. M. Barrington

Registrar

President