A candidate is not therefore entitled to challenge the statement of the reasons for the refusal to recruit him by producing medical opinions during proceedings before the Court, when he declined to provide the Medical Committee with any document of that kind and his own doctor did not cooperate with that committee.

4. Whilst the Court, in proceedings against a refusal to recruit on grounds of physical unfitness, may not substitute its own assessment for the medical opinion on specifically medical matters, it must, in carrying out the task specifically assigned to it, verify whether the recruitment procedure followed a lawful course and, more particularly, consider whether the appointing authority's decision refusing to recruit a candidate is based on a medical opinion which incorporates a statement of reasons establishing a comprehensible link between the medical findings which it contains and the conclusion as to unfitness which it draws.

5. The taking of blood for the purposes of the medical examination provided for in Article 33 of the Staff Regulations in order to investigate the possible presence of HIV antibodies constitutes an affront to the physical integrity of a candidate and can be carried out only with his informed consent.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
18 September 1992 *

In Joined Cases T-121/89 and T-13/90,

X, represented by Thierry Demaseure, Michel Deruyver and Gérard Collin, of the Brussels Bar, with an address for service in Luxembourg at the offices of Myson SARL, 1 Rue Glesener,

applicant,

supported by

* Language of the case: French.

Union Syndicale, Brussels, represented by its Legal Adviser, Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Myson SARL, 1 Rue Glesener,

intervener,

v

Commission of the European Communities, represented by Henri Étienne, Principal Adviser, and Sean van Raepenbusch, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission decision of 6 June 1989 refusing to recruit the applicant as a member of the temporary staff by reason of his being physically unfit and for compensation for the non-material damage alleged by the applicant,

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

composed of: B. Vesterdorf, President, A. Saggio and C. Yeraris, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 12 May 1992,

gives the following

Judgment

Facts

1 The applicant worked for the Commission of the European Communities on a free-lance basis from 29 August 1985 to 30 March 1986 and from 1 May 1986 to 31 August 1987, and as a member of the auxiliary staff from 1 September 1987 to 31 January 1988. Having been admitted to Competition No COM/C/655 for typists, he was informed on 4 July 1989 that he had not passed the written tests.

2 With a view to the possibility of his being employed for a period of six months as a member of the Commission's temporary staff, the applicant was invited, by letter from the Careers Division of the Directorate-General for Personnel and Administration of 14 February 1989 to undergo a medical examination in accordance with Articles 12(2)(d) and 13 of the Conditions of Employment of other Servants of the European Communities (hereinafter 'the Conditions of Employment').

3 That examination was carried out on 15 March 1989 by Dr S., a medical officer of the Commission. The applicant underwent a clinical examination, supplemented by biological tests. However, he declined the suggestion of the medical service that he should be screened for HIV antibodies (Aids).

4 By letter of 22 March 1989 the medical officer, after informing the applicant that he could not issue a medical opinion favourable to his recruitment, asked him to give the name of his own doctor so that the latter could be informed of the abnormalities found.

5 By letter of 28 March 1989, the Head of the Careers Division informed the applicant that, following the medical examination, the medical officer had concluded that he was physically unfit to carry out the duties of typist in the Commission and that there was therefore no possibility of his being recruited.

6 On 5 April 1989, the medical officer telephoned Dr P., the applicant's doctor in Antwerp, and informed him of the results of the applicant's medical examination. At the request of Dr P., the Commission's medical officer also sent him, by letter of 12 April 1989, a copy of the results of the laboratory analyses relating to the applicant.

7 In response to the abovementioned letter from the Head of the Careers Division, the applicant, by letter of 9 April 1989, requested that his case be referred for an opinion of the Medical Committee provided for in the second paragraph of Article 33 of the Staff Regulations of Officials of the European Communities, which applies to temporary staff by virtue of Article 13 of the Conditions of Employment.

8 By letter of 26 April 1989 the applicant's doctor informed the President of the Commission that a diagnostic error had been made by the Commission's medical officer, who had concluded that his patient was suffering from an opportunist infection, constituting a case of 'full blown Aids', and also objected to the fact that the applicant had, without his consent, been subjected to a dissimulated Aids screening test.

9 By letter of 27 April 1989 the Head of the Commission's Medical Service informed the applicant that a Medical Committee had been convened to consider his case on 26 May 1989 and invited him to forward all relevant medical reports and documents.

10 By letter of 19 May 1989, the applicant replied to the Head of the Medical Service that he possessed no medical documents because he had never been seriously ill. He also stated that he had been treated for minor medical problems by Dr P.

11 By letter of 6 June 1989, the Director-General for Personnel and Administration informed the applicant that the Medical Committee, convened at his request, had

met on 26 May 1989 and had confirmed the opinion issued on 22 March 1989 by the Commission's medical officer. On that basis, the Commission considered that the applicant did not meet the physical fitness requirements for recruitment to its staff.

12 By letter of 3 July 1989, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the decision of 6 June 1989 and, so far as necessary, against the opinion of the medical officer of 22 March 1989 and the decision of 28 March 1989. In that complaint, he requested the annulment of the abovementioned measures and sought compensation for the non-material damage which he had allegedly suffered, although he did not specify the cause of such damage or quantify it.

13 In response to the letter from the applicant's doctor dated 26 April 1989, the Director-General for Personnel and Administration stated, by letter of 26 July 1989, on behalf of the President of the Commission, that systematic and compulsory HIV screening had been abandoned in the Community institutions more than a year earlier, in conformity with the conclusions of the Council and of the Ministers of Health of 15 May 1987 and 31 December 1988, and the decisions of the Commission. In the same letter, it was stated that the applicant had not been subjected to a disguised Aids screening test but to a biological examination — a T4/T8 lymphocyte count — which was intended to evaluate the state of the patient's immune system and was not in any way specific to investigation for viral or bacterial infection.

14 By letter of 4 September 1989, which was received at the Secretariat-General on 8 September 1989, the applicant lodged, under Article 90(2) of the Staff Regulations, a 'supplemental' complaint, seeking payment of a lump sum of BFR 10 million in respect of material and non-material damage caused to him by Commission officials.

15 Both of the applicant's complaints were rejected by decision of the Commission of 27 November 1989, which was notified by a memorandum from the Director-General of Personnel and Administration of 28 November 1989.

Procedure

16 In those circumstances, on 4 July 1989 the applicant commenced the following proceedings before the Court of Justice:

— an action for the annulment of the decision of 6 June 1989 and, so far as necessary, of the opinion of the medical officer of 22 March 1989 and, in the alternative, of the decision of 28 March 1989 withdrawing the offer of employment as a typist;

— an application for the adoption of interim measures, seeking suspension of the operation of the Commission decision of 6 June 1989.

17 Applications for leave to intervene were lodged in support of the applicant by:

— Union Syndicale, Brussels, and Mr Blanchard, a Commission official, on 13 July 1989;

— the Ligue Belge des Droits de l'Homme, a Belgian non-profit-making association, on 19 July 1989.

18 Those applications related both to the proceedings on the application for interim measures and to the main proceedings.

19 By order of 21 July 1989, the President of the Second Chamber of the Court of Justice granted leave to Union Syndicale, Brussels, to intervene in the proceedings on the application for interim measures and rejected the application from Mr Blanchard. By order of 26 July 1989, the application by the Ligue Belge des Droits de l'Homme was also rejected.

20 By order of 31 July 1989, the President of the Second Chamber of the Court of Justice, having regard to the adverse character of the contested decision, dismissed the application for suspension of its operation as inadmissible on the ground that no interest of the applicant could be furthered by such a measure.

21 Pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of Justice, by order of 15 November 1989, referred the case to the Court of First Instance, where it was registered as Case T-121/89.

22 By order of 13 February 1990, the Court of First Instance (Third Chamber) granted leave to Union Syndicale, Brussels, to intervene in Case T-121/89 in support of the applicant and rejected the application from Mr Blanchard. By order of the same date, it also rejected the application for leave to intervene from the Ligue Belge des Droits de l'Homme.

23 On 3 March 1990, the applicant brought a second action (Case T-13/90) before the Court of First Instance, seeking compensation for the damage which he claimed to have suffered as a result of the Commission's conduct.

24 By application lodged at the Registry of the Court of First Instance on 8 May 1990, Union Syndicale, Brussels, sought leave to intervene in Case T-13/90 in support of the applicant.

25 By order of 24 October 1990, the Court of First Instance (Third Chamber) joined Cases T-121/89 and T-13/90 for the purposes of the oral procedure and the judgment.

26 By order of 24 October 1990, the Court of First Instance (Third Chamber) granted leave to Union Syndicale, Brussels, to intervene in Case T-13/90 in support of the applicant.

27 At the request of the applicant, the Court of First Instance (Third Chamber) directed that his name should be replaced by the letter X in all publications and that the oral procedure should take place *in camera*.

28 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) invited the applicant to submit his observations regarding the possibility of his complete medical file being produced. The applicant gave notice that he had no objection, whereupon the Court invited the Commission to produce the medical file concerning the applicant's physical unfitness, including all related documents, and asked the parties to answer a number of questions in writing.

29 The parties responded within the prescribed time-limits, whereupon the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

30 The hearing was held on 12 May 1992 *in camera*. The representatives of the parties presented oral argument and answered the questions put to them by the Court.

31 In response to a request made by the Court at the hearing, the defendant lodged at the Registry of the Court of First Instance, on 20 May 1992, a report of the meeting of the doctors in the Commission's Medical Service held on 15 June 1989 and a confidential memorandum from the head of that service dated 11 August 1989,

addressed to Mr L. By letter of 27 May 1992, the applicant and the intervener submitted their observations on those documents.

Forms of order sought

32 In his first application (T-121/89), the applicant claims that the Court of First Instance should:

(i) annul:

— the Commission's decision of 6 June 1989 refusing to recruit the applicant to fill the post of typist which had been offered to him, on the ground that he allegedly did not satisfy the physical fitness requirement laid down in Article 28(e) of the Staff Regulations;

— so far as necessary, the opinion of 22 March 1989 of the Commission's medical officer, informing the applicant that it was not possible to issue a medical opinion favourable to his recruitment, and the decision of 26 May 1989 of the appellate medical committee confirming the abovementioned opinion as to medical unfitness;

— in the alternative, the Commission decision, notified to the applicant by registered letter of 28 March 1989, withdrawing its offer of employment as a typist;

(ii) order the defendant to pay the costs, by virtue of both Article 69(2) and the second subparagraph of Article 69(3) of the Rules of Procedure of the Court of Justice, and the costs necessarily incurred for the purposes of the proceedings, in particular the costs relating to the arrangements for an address for service, travel and subsistence expenses and the remuneration of lawyers, pursuant to Article 73(b) of those rules.

33 In his second application (T-13/90), the applicant claims that the Court of First Instance should:

(i) declare both actions admissible and well founded and consequently annul:

— the measures challenged in the first application;

— in the alternative, the Commission's decision of 27 November 1989 rejecting his complaints, which had been notified to him by registered letter of 28 November 1989;

(ii) order the Commission to pay a lump sum of BFR 10 million by way of damages;

(iii) order the Commission to pay the costs, including those of the proceedings on the application for interim measures, and the costs necessarily incurred for the purpose of the proceedings.

34 The defendant contends that the Court of First Instance should:

(i) dismiss the first action as unfounded;

(ii) declare the second action inadmissible or, at least, unfounded;

(iii) award costs in accordance with the relevant provisions.

Case T-121/89 — Substance

35 In support of his claim for annulment, the applicant puts forward four pleas in law: first, breach of the right to a fair hearing; second, infringement of Article 25 of the Staff Regulations; third, breach of the general legal principles laid down in the European Convention on Human Rights and the Conclusions of the Council and of the Ministers of Health of 31 March and 15 December 1988; and, fourth, breach of the principle of the protection of legitimate expectations and good faith, and misuse of procedure.

The first and second pleas in law: breach of the right to a fair hearing and infringement of Article 25 of the Staff Regulations

36 The applicant refers to circumstances relating to both those pleas, which in his view constitute both a breach of the right to a fair hearing and an infringement of Article 25 of the Staff Regulations, according to which any adverse decision is to state the reasons on which it is based. According to the applicant, the Staff Regulations reconcile the obligation to state reasons with the need for medical secrecy by granting to an aspiring official the right to request that the grounds on which he is found to be unfit be communicated to a doctor of his choice. However, the applicant claims that the information disclosed to his doctor in the present case was excessively concise and did not provide a basis for him to defend his interests.

37 The applicant also maintains that the decision by which the Commission refused to recruit him is based on an opinion from the medical officer which is manifestly incorrect. In the first place, the results of the anamnesis and the clinical examination were not such as to support the conclusion that he had an immune deficiency preventing him from performing the duties involved in the proposed post of typist. Secondly, his own doctor and three specialists who were consulted challenged the relevance of the tests carried out by the Commission's Medical Service on the ground that, not having been repeated, they did not enable a reliable diagnosis to be made.

38 The intervener first puts forward arguments of a medical nature, from which it concludes that a diagnosis based on mere suspicions and probabilities and on an

incomplete examination of the applicant's immune system led in the present case to a medical error criticized by the applicant's own doctor and by three Aids specialists. Secondly, the intervener challenges the opinion of the Medical Committee on two grounds: (a) the fact that Dr Hoffman, Head of the Medical Service, sat on that committee, even though the examination undertaken by the medical officer had been carried out under his supervision, detracted from the legality of the composition of the committee; and (b) the fact that the Medical Committee failed to hear the applicant's doctor and did not itself carry out a clinical examination of the applicant undermined the latter's right to a fair hearing. Thirdly, the intervener contends that the Commission has produced no evidence that the applicant's own doctor was given all the information contained in the file made up by the medical officer before 26 May 1989, the date on which the Medical Committee met. It is clear that the applicant's doctor, not having full information at his disposal, was not in a position properly to defend the applicant from the medical point of view.

39 The Commission contends that, because of its concern to ensure medical confidentiality, the applicant was informed, through his own doctor, of all the findings made by the medical officer when preparing the anamnesis and clinical examination. All the results of the biological examinations were disclosed to him in the same way. According to the Commission, as a result of a number of signs which emerged in the course of the anamnesis and the clinical examinations, the medical officer arranged for appropriate biological tests to be carried out from which he concluded that the applicant was suffering from a significant immune deficiency. The adverse conclusion of the Medical Service, in respect of the applicant, was due to the fact that the latter might at any time become seriously ill.

40 The Commission also states that the medical officer was aware of the fact that the tests carried out could not serve as a basis for any precise aetiological diagnosis. The changes ascertained concerning the T4 and T8 counts are certainly not specific to any illness and only an HIV screening test, which the applicant refused to undergo, could possibly have provided evidence of the presence of the Aids virus. Nevertheless, according to the Commission, it is undisputed that an immune deficiency which cannot be attributed to a specific cause proving its temporary nature justifies a declaration of physical unfitness for work. Finally, at the hearing, the

Commission repeated the argument that the applicant is not entitled to produce to the Court medical assessments not disclosed by his doctor to the Medical Committee, which, under Article 33 of the Staff Regulations, has sole authority to adjudicate as to any error of a medical nature made by the medical officer.

41 This Court observes that Articles 12(2)(d) and 13 of the Conditions of Employment provide that a member of the temporary staff, before being engaged, must undergo a medical examination by one of the institution's medical officers in order to establish whether 'he is physically fit to perform his duties'. Furthermore, the second paragraph of Article 33 of the Staff Regulations, which is applicable by virtue of Article 13 of the Conditions of Employment, provides as follows:

'Where a negative medical opinion is given as a result of the medical examination provided for in the first paragraph, the candidate may, within 20 days of being notified of its opinion by the institution, request that his case be submitted for the opinion of a medical committee composed of three doctors chosen by the appointing authority from among the institution's medical officers. The medical officer responsible for the initial negative opinion shall be heard by the Medical Committee. The candidate may refer the opinion of a doctor of his choice to the Medical Committee ...'

42 The purpose of the medical examination provided for by the abovementioned provisions is thus to allow the institution concerned to determine whether the candidate's state of health is such that he is capable of fulfilling all the obligations which he may be required to fulfil by virtue of the nature of his duties. To that end, the medical officer of the institution may base his finding of unfitness not only on the existence of present physical or psychological disorders but also on a medically justified prognosis of potential disorders capable of jeopardizing the normal performance of the duties in question in the foreseeable future (judgment of the Court of Justice in Case 155/78 *Miss M.* v *Commission* [1980] ECR I-1797, paragraphs 10 and 11).

43 Moreover, a refusal to engage a candidate on grounds of physical unfitness constitutes a decision adversely affecting him within the meaning of Article 25 of the Staff Regulations, which must therefore state the reasons on which it is based. However,

that obligation to state reasons must be reconciled with the requirements of medical confidentiality which, save in exceptional circumstances, leave the individual doctor to decide whether to communicate to those whom he is treating or examining the nature of the condition from which they may be suffering. That reconciliation is effected through the ability of the person concerned to request and ensure that the grounds of unfitness are disclosed to a doctor of his choice (judgments of the Court of Justice in Case 121/76 *Moli* v *Commission* [1977] ECR 1971, at 1978; in Case 75/77 *Mollet* v *Commission* [1978] ECR 897, at 906; and in Case 115/78, cited above).

44 At the request of the candidate, the medical officer of the institution is required to disclose to the candidate's doctor all relevant information concerning the findings of physical unfitness and, more specifically, the results of the medical examinations carried out so that that doctor is in a position to give the person concerned the necessary information regarding the possibility of challenging those findings. If the person concerned wishes to challenge the merits of the negative opinion of the medical officer, he must forward the opinion of his doctor to the Medical Committee, together with all supporting medical documents, and, if appropriate, request that his doctor be heard by the Medical Committee. The purpose of the procedure provided for by the second paragraph of Article 33 of the Staff Regulations is to facilitate a review of the negative medical opinion by a body established under the Staff Regulations, which must give a final opinion as to the physical fitness of the candidate, having regard to all the documents which, at that time, are contained in the medical file of the person concerned. It is for the Medical Committee to decide whether it is appropriate to have the candidate undergo a further medical examination, and it may prescribe further tests or seek the opinion of specialists.

45 In reviewing the legality of a refusal to recruit a person on grounds of physical unfitness, the Court may not substitute its own judgment for the medical opinion on specifically medical matters. However, it is for the Court, in carrying out the task specifically assigned to it, to verify whether the recruitment procedure followed a lawful course and, more particularly, to consider whether the appointing authority's decision refusing to recruit a candidate on grounds of physical unfitness is based on a medical opinion which incorporates a statement of reasons estab-

lishing a comprehensible link between the medical findings which it contains and the conclusion as to unfitness which it draws (judgment in Case 155/78, cited above, paragraph 14; see also Case 189/82 *Seiler and Others* v *Council* [1984] ECR 229, paragraph 15).

46 It is in the light of those principles that the charges made by the applicant and the intervener in relation to the first and second pleas in law must be examined. The starting point for such an examination must be certain findings based on the documents before the Court.

47 It is apparent from the medical file and from the documents produced by the parties that, with a view to the possibility of working as a member of the temporary staff for a period of six months, the applicant underwent a medical examination on 15 March 1989 carried out by Dr S., a medical officer of the Commission. The anamnesis drawn up on the basis of a questionnaire completed and signed by the applicant revealed that he suffered from chronic acne and that in 1988 he had contracted shingles. A clinical examination revealed shingles scars on the left haemothorax, signs possibly indicative of the presence of bucco-pharyngeal candida (pale tongue, pale, thick saliva), and bilateral inguinal polyadenopathy. In view of the combined results of the anamnesis and the clinical examination, the medical officer ordered blood tests in order to determine, *inter alia*, the T4 and T8 lymphocyte counts. The latter test yielded the following results for the applicant: T4 = 299/mm3 (normal range 675-1575), T8 = 41/mm3 (normal range 12-44), T4/T8 ratio 0.39 (normal range 1-3). In view of those results as a whole, the medical officer concluded on 22 March 1989 that the applicant was suffering from a significant immune deficiency which rendered him unfit to perform the duties of a member of the temporary staff. By letter of the same date, he informed the applicant that he was unable to issue an opinion that the applicant was suitable for recruitment and asked him to give him the name, address and telephone number of his own doctor, so that he could give the latter details of the abnormalities found. In the opinion of the medical officer, those abnormalities called for 'further examinations to clarify the diagnosis, enabling appropriate treatment to be undertaken, if necessary'. After the applicant had given the name of his doctor to the medical

officer, the two doctors spoke by telephone on 5 April 1989 and a copy of the results of the laboratory analyses carried out in respect of the applicant was forwarded to the latter's doctor. According to a handwritten memorandum from the medical officer contained in the medical file, he informed the applicant's doctor that the immune deficiency ascertained might be linked with the presence of the Aids virus, which would justify an additional screening test not only for the HIV-1 virus but also for the HIV-2. According to the same memorandum, the two doctors agreed that a mere HIV positive result, in the absence of clinical symptoms, did not constitute a cause of unfitness, whilst the presence of Aids at an advanced stage would justify a refusal to recruit, as in the case of cancer at an advanced stage or a serious psychological disorder. By letter of 9 April 1989, the applicant informed the administration that, following a conversation with his own doctor, he was going to ask that his case be referred for an opinion to the Medical Committee provided for in the second paragraph of Article 33 of the Staff Regulations. The applicant's own doctor, for his part, wrote to the President of the Commission complaining that his patient had, without giving his consent, been subjected to a dissimulated Aids screening test, namely a test to determine the T4/T8 lymphocyte count, and that he was the victim of a medical error. In response to the letter from the Head of the Medical Service, inviting him to send 'all medical reports or documents' which he considered it appropriate to place before the Medical Committee, the applicant replied: 'I have no medical documents because I have never been seriously ill'. The Medical Committee confirmed the opinion issued by the medical officer, concluding that the applicant 'is not physically fit to perform his duties'. More details of the administrative steps taken by the applicant and the Commission's responses are contained in the part of this judgment setting out the facts.

48 This Court finds that the Commission's medical officer thus disclosed to the applicant's own doctor not only the reasons for the finding of unfitness, namely the presence of a significant immune deficiency, but also all the details concerning the signs which appeared in the course of the anamnesis and the clinical examination. Moreover, the applicant's own doctor received a complete copy of the results of the applicant's blood tests. That is confirmed by the answers given by the applicant and the defendant to a written question put to them by the Court in the course of the procedure and by statements from the applicant's representative at the hearing. Accordingly, neither the applicant nor the intervener is justified in maintaining that the information disclosed to the applicant's doctor was too concise and insufficiently comprehensive to enable him to give his patient appropriate advice and to enable the applicant to defend his interests effectively.

49 As regards the intervener's allegation concerning the composition of the Medical Committee, it is important to note that Dr Hoffman, Head of the Commission's Medical Service, was not a member of it. Accordingly, without its being necessary to rule whether the status of Head of the Medical Service in itself constitutes a legal impediment to membership of the committee provided for in the second paragraph of Article 33 of the Staff Regulations, that allegation must be rejected as unfounded.

50 Similarly, there is no basis for the intervener's contention that the applicant's right to a fair hearing was undermined by the fact that the Medical Committee failed to hear his own doctor and did not consider it appropriate to undertake a clinical examination itself. As has been pointed out, it is for the candidate who has the matter referred to the Medical Committee to request a hearing of his own doctor. In the present case, the applicant failed to give the Medical Committee any medical documents whatsoever, whilst his doctor chose to write to the President of the Commission to criticize a medical error which, in his opinion, had been committed and to call in question the practices of the Commission's Medical Service.

51 Finally, this Court considers that account must be taken of the following considerations in relation to the question whether the refusal to recruit the applicant as a member of the temporary staff was accompanied by a statement of reasons conforming with the requirements of the Staff Regulations. Firstly, the reason given by the medical officer, which was confirmed by the Medical Committee, namely that the applicant is suffering from a significant immune deficiency, is in principle capable of justifying a finding of physical unfitness for performance of the duties of a member of the temporary staff, in the light of the potential risk of increased susceptibility to infections. The concept of physical unfitness includes not only present disorders but also potential disorders which might prevent the person concerned from properly performing his duties for the period of his engagement. Furthermore, in the medical opinion which was issued on the basis of the results of a clinical examination and blood tests, a comprehensible link is established between the medical findings which it contains and the conclusion as to unfitness which it draws and it cannot therefore be regarded as vitiated by a manifest error of assessment, as the applicant alleges. Secondly, although the parties agree that the abnormalities found in the immune system do not constitute a basis for diagnosing a specific illness, since an immune deficiency may derive from various causes, they nevertheless disagree as regards the possibility of drawing a definitive conclusion

regarding the unfitness for work of the person concerned without further clarification as to the aetiology of the illness. In support of their respective positions, the parties have produced conflicting medical opinions. This Court considers that the difference between them relates to a question which should have been raised before the Medical Committee, whose task under the Staff Regulations is to examine the merits of the medical opinion issued by the institution's medical officer. However, it must be stated, first, that the applicant's doctor did not arrange for the additional tests suggested by the medical officer to determine the origin of the applicant's immune deficiency and, secondly, that the latter did not place before the Medical Committee the opinion of any doctor, either his own or another. In those circumstances, this Court considers that the applicant, whose doctor did not cooperate with the Medical Committee, is not entitled to challenge the statement of the reasons for the refusal to recruit him by producing to the Court for the first time medical opinions which were not submitted in due time for consideration by that committee. Accordingly, the applicant's allegations concerning the legality and adequacy of the statement of the reasons for the contested decision must be rejected.

52 It follows from the foregoing that the first and second pleas in law must be rejected.

The third plea in law: infringement of the European Convention on Human Rights and the Conclusions of the Council and the Ministers of Health of 31 May and 15 December 1988 concerning Aids

53 Referring, first, to Article 8 of the European Convention on Human Rights, the applicant maintains, first, that since everyone has the right to respect for his private and family life, no Aids screening test may be carried out without his knowledge or consent and, secondly, that the appointing authority is not entitled to require aspiring officials to undergo an Aids screening test without such action being expressly provided for by the Staff Regulations or the Conditions of Employment as a measure necessary for the protection of health. In the applicant's view, neither the Staff Regulations nor the Conditions of Employment nor any other legislation authorized the Commission to require him to undergo a test of that kind.

54 Referring, secondly, to the Conclusions on Aids adopted on 31 May and 15 December 1988 by the Council and the Ministers of Health of the Member States meeting within the Council (OJ 1988 C 197, p. 8 and 1989 C 28, p. 1), the applicant states that it appears therefrom, first, that the 'large firms' to which it is appropriate to assimilate European institutions must be humane in their conduct towards workers infected with or suffering from Aids and, second, that recourse to HIV antibody screening tests is not justified for persons to be recruited, nor is it an appropriate method for combating Aids.

55 In the applicant's view, Article 8 of the Human Rights Convention was infringed in his case, as were the abovementioned Conclusions of the Council and of the Ministers of Health, because he was subjected by the Commission Medical Service, against his will and without his knowledge, to a dissimulated Aids screening test, that is to say a T4 and T8 lymphocyte count. The applicant maintains that, in current medical practice, that blood test is used only in the case of persons who are seropositive and, very exceptionally, people who have been exposed to radiation. Since the applicant displays no signs of irradiation, the Commission's medical officer had no reason to subject him to a biological examination of that kind, which is not a suitable basis for a reliable diagnosis. According to the applicant, the only reason for the refusal to recruit him was therefore a mere suspicion that he was seropositive.

56 With respect to the alleged infringement of Article 8 of the Human Rights Convention, the Commission contends that no screening test for Aids is carried out in connection with the pre-recruitment medical examination without the informed consent of the candidate. It concedes that the fact that a person is seropositive, but displays no signs of Aids, is not in itself a ground of unsuitability and that there is no risk of contamination in normal working relations. Consequently, screening for HIV antibodies is never prescribed for the purposes of assessing suitability for work and it is for the candidate to decide whether or not he will undergo the HIV tests suggested by the institution's medical officer. Moreover, the Commission considers that that practice is precisely in conformity with the position adopted by the Council and the Ministers of Health, according to which screening tests are a matter of individual prevention, always involving information and advice from qualified persons.

57 Furthermore, the Commission contends that its medical officer never carried out a dissimulated HIV antibody screening test but that, having found a number of clinical signs that suggested an immune deficiency, he prescribed a number of blood tests to determine the immunoglobuline count, the lymphocyte count and the shortfall thereof. Those tests enabled him to establish objectively and quantify an immune deficiency which, regardless of its origin, may be an important factor to be taken into account when establishing whether or not a candidate is fit to fulfil all his likely obligations, having regard to the nature of his duties.

58 The Court observes that the taking of blood in order to investigate the possible presence of HIV antibodies constitutes interference with the physical integrity of the person concerned and can be carried out on a candidate only with his informed consent. However, the question what the legal consequences would be of a refusal by a candidate to submit to an HIV antibody screening test which the medical officer of an institution considered necessary, having regard to the clinical symptomatology of the person concerned, in order to make a medical assessment of his physical fitness, is a different question which does not arise in the present case. The applicant in this case has not established that he was, without his consent, subjected to a specific Aids screening test or that he was requested to undergo such a test by the Commission as a precondition for his engagement. The applicant has likewise not shown that he was subjected to a dissimulated HIV antibody screening test, since the parties agree that the blood test in question, namely the T4/T8 lymphocyte count, is not capable of establishing whether a person is seropositive. Finally, it must be added that in the circumstances, having regard to the abnormalities found in the anamnesis and clinical examination, the medical officer was entitled to request that such a test be carried out.

59 Accordingly, there can be no question in this case of any infringement of Article 8 of the Human Right Convention, or of the Conclusions of the Council and of the Ministers of Health of the Member States, whatever the legal status of those conclusions.

60 It follows that the present plea in law cannot be upheld.

The fourth plea in law: breach of the principle of the protection of legitimate expectations and good faith, and misuse of procedure

61 The applicant states, in the first place, that the Medical Committee gave a decision without hearing his views, without hearing a doctor of his choice and without itself undertaking a clinical examination. Those omissions frustrate the legitimate expectations which a candidate may have and the good faith he is entitled to expect from an administration organizing pre-recruitment medical examinations. According to the applicant, the abovementioned principles were also infringed as a result of the fact that the Commission's refusal to recruit him was based on tests carried out without his knowledge. Secondly, the applicant refers to the fact that he was within his rights in refusing to undergo an Aids screening test. Consequently, the decision of the Medical Service to subject him to such a test, without his knowledge or consent, constitutes a manifest misuse of procedure.

62 The Commission states in reply that, contrary to the applicant's allegations, the Medical Committee was fully aware of the matters referred to by the applicant in his letter of 19 May 1989 to the Head of the Medical Service and in the letter from his doctor to the President of the Commission, when it confirmed the medical officer's finding of unfitness. On the other hand, it was unable to take account of the actual medical assessments made by the doctors consulted by the applicant and produced *ex post facto* by the latter who, in view of his obligation to cooperate to ensure proper observance of the procedures laid down by the Staff Regulations, should have produced them in due time. Finally, the Commission states that since no HIV antibody screening test, dissimulated or otherwise, was carried out without the applicant's knowledge, the allegation as to misuse of procedure is factually unsubstantiated.

63 The Court observes that the allegations made in support of the present plea in law have already been examined in relation to the previous pleas. As regards, first, the fact that the Medical Committee did not hear the applicant or his doctor, the Court has already stated that, in the absence of a request to that effect from the person concerned, Article 33 of the Staff Regulations places no such obligation upon the Medical Committee. Similarly, it has made clear that the Medical Committee is at liberty to decide whether or not it is appropriate for a further examination to be carried out. Accordingly, the applicant has no reason to allege any failure to act which constitutes a breach of the general principles of protection of legitimate

expectations and good faith. As regards, secondly, the applicant's allegation that he was subjected to an HIV antibodies screening test without his knowledge or to a dissimulated test, suffice it to repeat that the applicant has not substantiated that assertion. Consequently, that assertion cannot be regarded as evidence of a misuse of procedure.

64 It follows that the present plea in law must also be rejected.

65 It follows from all the foregoing that the first application must be dismissed.

The admissibility of the application in Case T-13/90

66 The Commission contests the admissibility both of the claim for annulment and of the claim for compensation made by the applicant in his second action.

67 As regards the claim for annulment, the defendant institution contends that, in so far as it has the same subject-matter and is based on the same grounds as the claim set out in the first application, it is subject to the objection *lis alibi pendens* which the Court has to raise of its own motion.

68 The applicant states that in his second application he seeks compensation for the damage suffered by him through the fault of the Commission. It is only because the two cases are connected that, having referred to the subject-matter of his first action for annulment, he seeks, in his second action, that the first be declared admissible and well founded. He emphasizes that it is only in the remote alternative that he also seeks the annulment of the express decision by which the Com-

mission rejected his second complaint of 4 September 1989. The two applications, in Cases T-121/89 and T-13/90, thus differ as to their subject-matter.

69 As regards the claim for compensation, the Commission contends that it has been consistently held that an official may not seek compensation for damage caused by an unlawful decision of the institution where an action for the annulment of that decision is not admissible. In the present case, the application for annulment and the application for compensation are closely linked, so that the latter is, in the Commission's view, inadmissible on the ground that the former is inadmissible by reason of *lis alibi pendens*.

70 In reply to that argument, the applicant contends that the present claim for compensation is admissible by reason of the fact that he commenced the proceedings in Case T-121/89 within the time-limit prescribed for that purpose.

71 Finally, the Commission expresses the view, *ex abundanti cautelae*, that if the applicant's complaint of 4 September 1989 were to be treated as constituting a 'request' for compensation for the loss allegedly suffered as a result of the Commission's conduct, it would be sufficient to state that, after the express rejection of that request by decision of the Commission of 27 November 1989, the applicant failed to lodge, within a period of three months, a complaint within the meaning of Article 90(2) against the act adversely affecting him whereby his request was rejected. That being so, the application in Case T-13/90 can only be considered inadmissible, in view of Article 91(2) of the Staff Regulations.

72 In reply, the applicant states that since he contested the decisions adversely affecting him within the prescribed time-limit, he was not required to follow the procedure laid down in Article 90 et seq. of the Staff Regulations before bringing the present action for compensation. He considers, nevertheless, that he observed that procedure by lodging a complaint within the three months following the measure

adversely affecting him and then, within the prescribed period following notification of the Commission's decision rejecting his complaint, he commenced these proceedings.

73 The Court observes that, in his reply, the applicant states that his second action does not seek the annulment of the measures to be reviewed by the Court in Case T-121/89, or compensation for the material damage caused him by such measures, since the enforcement of a judgment of the Court upholding his first action for annulment would constitute sufficient reparation for that damage. The applicant explains that he seeks compensation for the non-material damage suffered by him as a result of the conduct of the Commission which, in his view, did not take all the necessary measures to preserve the confidentiality of the grounds of the medical finding of unfitness, on the basis of which the decision not to recruit him was taken. That lack of confidentiality made it possible for several people to identify him and aroused in his relations the suspicion that he was seropositive. In view of those clarifications as to the scope of the forms of order sought in the second action, it must be recognized that the latter does not have the same subject-matter as the first action, in so far as the applicant merely seeks compensation for the non-material damage which he claims to have suffered as a result of the unlawful conduct of the Commission.

74 The Court considers that that claim for compensation must be rejected in so far as it is closely linked with the claim for annulment which has itself been rejected as unfounded. The applicant has not put forward any plea capable of securing the annulment of the contested decision and has thus not established any irregularity which might constitute a wrongful act or omission on the part of the Commission.

75 Moreover, that claim would also have to be rejected as inadmissible even if the alleged non-material damage were considered to derive from conduct on the part of the Commission unrelated to the legality of the decision referred to in the claim for annulment. In such circumstances, the administrative procedure must, by vir-

tue of Article 90(1) of the Staff Regulations, start with a request from the official that the appointing authority make good the damage suffered. It is only against a decision rejecting such a request that the person concerned may lodge a complaint with the administration, under Article 90(2) (judgment of the Court of Justice in Case 200/87 *Giordani* v *Commission* [1989] ECR 1877, paragraph 22; judgment of the Court of First Instance in Case T-5/90 *Marcato* v *Commission* [1991] ECR II-731, paragraph 50). In the present case, the applicant did not submit any such request to the appointing authority and, even on the assumption that the 'supplemental' complaint of 4 September 1989 constituted a request to make good the non-material damage allegedly suffered, the fact would nevertheless remain that the applicant did not lodge a complaint against the Commission's adverse decision of 27 November 1989.

76 It follows from the foregoing that the second application must also be dismissed.

Costs

77 Under the first subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they are applied for by the opposite party. However, Article 88 of those rules provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs. The parties should therefore be ordered to bear their own costs, including those in respect of the application for the adoption of interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the applications;

2. Orders the parties to bear their own costs.

Vesterdorf Saggio Yeraris

Delivered in open court in Luxembourg on 18 September 1992.

H. Jung B. Vesterdorf

Registrar President