

JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 1 FEBRUARY 1979 ¹

Fausta Deshormes, née la Valle
v Commission of the European Communities

Case 17/78

1. *Officials — Applications to the Court — Decisions on contingent pension rights — Interest in taking proceedings*
(Staff Regulations, Art. 91)
2. *Temporary staff — Auxiliary staff — Difference — Whether post permanent or not*
(Conditions of Employment of Other Servants of the European Communities, Arts. 2 (b) and 3)

1. Although it is true that before retirement, an uncertain future event, pension rights are contingent rights which are in process of creation from day to day, it is none the less clear that an administrative act deciding that a period of employment cannot be taken into account for the calculation of years of pensionable service immediately and directly affects the legal situation of the person concerned even if that act is to be implemented only subsequently. Therefore the official has a legitimate, present and vested interest in taking proceedings against such an act.
2. The difference between temporary staff (within the meaning of Article 2 (b) of the Conditions of Employment of Other Servants of the European Communities) and auxiliary staff lies in the fact that a member of the temporary staff fills a permanent post included in the list of posts of an institution, whereas, except in the case of temporary replacement of an official, a member of the auxiliary staff performs administrative work without being assigned to a post included in the said list.

In Case 17/78

MRS FAUSTA DESHORMES, NÉE LA VALLE, an official of the Commission of the European Communities, residing at 13 A Drève du Caporal, Brussels, represented by Marcel Grégoire and Edmond Lebrun, Advocates at the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Bieber, Advocate, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

¹ — Language of the Case: French.

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Joseph Griesmar, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for an order that, for the calculation of the applicant's years of pensionable service for the purpose of her retirement pension, the defendant institution must take into account her periods of employment under contract as an expert and as a member of the auxiliary staff before she was established, and for the annulment of the decision rejecting the related complaint,

THE COURT (Second Chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, M. Sørensen and A. Touffait, Judges,

Advocate General: G. Reischl

Acting Registrar: J. A. Pompe

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

Mrs Deshormes took up employment with the Commission of the EEC on 1 January 1961 in the University Information, Youth and Popular Education

Division of the Press and Information Service of the Communities. She was appointed a probationer on 7 February 1973, and established on 1 September 1973; previously her official position had been governed by contracts (5 contracts — including renewals — as an expert from 1 January 1961 to 28 February 1964; 11 contracts — including renewals — as a member of the auxiliary staff from 1 March 1964 to 31 December 1968; 3 contracts — including renewals

— as a member of the temporary staff from 1 January 1969 to 31 December 1971; and 2 contracts — including renewals — from 1 January 1972 to 30 November 1972).

On 18 July 1977 Mrs Deshormes wrote to the President of the Commission to submit a complaint under Article 90 (2) of the Staff Regulations against a note from the Director of Personnel rejecting her request for her years of employment with the Commission as an expert and as a member of the auxiliary staff to be taken into account for the calculation of her pension rights. The administration registered this complaint on 20 July 1977 and rejected it by implied decision; whereupon Mrs Deshormes brought this action, by an application lodged at the Court Registry on 17 February 1978. On 16 February the applicant received a letter from the Commission explicitly rejecting her complaint.

The written procedure followed the normal course. After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

In her application, the *applicant* claims that the Court should:

- “1. Declare the application to be admissible and well founded;
2. Rule that the legal designation of the contracts entered into by the defendant with the applicant for the periods of employment from 1 January 1961 to 31 December 1968 and from 1 January 1972 to 30 November 1972 is that of contracts for the appointment of temporary staff or, alternatively, decide that, for the calculation of the applicant’s years of pensionable service for the purposes of her

retirement pension, the said periods of employment are to be assimilated to periods of employment as an official or at least as a member of the temporary staff;

3. Order the defendant to take into account for the calculation of the applicant’s years of pensionable service for the purposes of her retirement pension the periods of employment from 1 January 1961 to 31 December 1968 and from 1 January 1972 to 30 November 1972;
4. Annul the implied decision rejecting the applicant’s complaint registered on 20 July 1977;
5. Order the defendant to pay the costs.”

In its defence the *defendant* contends that the Court should:

- “1. Dismiss the application as inadmissible;
2. At all events dismiss it as unfounded.”

In her reply, the *applicant* made the following claims:

“— The applicant asks the Court, primarily, to uphold the claims put forward in the application, and to rule, so far as may be necessary, that the periods of employment from 1 January 1961 to 31 December 1968 and from 1 January 1972 to 30 November 1972 must be taken into account for the calculation of the applicant’s years of service within the meaning of the first paragraph of Article 77 of the Staff Regulations, or must at least be assimilated to such years of service;

— in the alternative, before ruling on the substance of the case, to give the applicant leave to produce evidence in any form permitted by the law, including witnesses, to the

effect that during the period from 1 January 1961 to 28 February 1964 when she was purportedly employed as an expert, she worked for the defendant full time and in a relationship of subordination, and in particular that she was subject to the same instructions for her work and to the same administrative rules as an official;”

and gave the names of four possible witnesses.

In its rejoinder, the *defendant* maintained its previous conclusions.

III — Summary of the submissions and arguments of the parties

A — Admissibility

The *defendant* submits that the application is inadmissible on three grounds:

- The applicant’s interest is merely contingent and therefore is not present and vested, because she cannot yet justify her potential status as an official entitled to a retirement pension;
- The administrative acts cited and produced by the applicant (the letters from Mr Pratley and Mr Baxter) are administrative information or preparations for a possible decision and are no more than information relating to the administration’s intentions or resolutions regarding a possible decision; therefore it is doubtful whether they are acts adversely affecting the applicant;
- In the alternative, if those acts are found to be such, it is to be noted that the applicant allowed the limitation periods to expire, first in that her complaint against Mr Pratley’s letter was not submitted until ten months after that letter, and secondly in that she failed to appeal

within the prescribed period against the implied decision of rejection which resulted from the administration’s silence over her claims made in August 1976.

The *applicant* replies that:

- She does have an interest in taking proceedings against an act which decides that a certain period of past employment cannot be taken into account for the calculation of her years of pensionable service and which immediately and directly affects her legal position, even if that act is only to be implemented subsequently, because pension rights are acquired in a state of active employment. It is according to the decision taken during his active employment that an official will be prompted, before it is too late, to make or not to make supplementary personal arrangements for his pension.
- Of the acts capable of adversely affecting the applicant, one is undisputable, namely the implied decision rejecting the applicant’s complaint. Consequently discussion of the nature of Mr Pratley’s and Mr Baxter’s letters is irrelevant.
- As regards observance of the limitation periods, it must be pointed out that the defendant seeks to use this as a means of restricting the applicant to a choice between coming before the Court either too soon — if the letters are only information — or too late — if they are acts adversely affecting the applicant. A first note dated 13 August 1976 did not constitute a formal request within the meaning of Article 90 (1) of the Staff Regulations but was nothing more than a note, and to that extent the partial failure to reply to that note

within the four month period cannot constitute an implied decision rejecting an application. Finally, the two letters in question should be regarded as forming a single entity inasmuch as the administration's attitude regarding all the applicant's claims can be ascertained only from both of them together, and therefore the official should be allowed to carry out a single procedure after receipt of the second letter.

The *defendant* rejoins that:

- According to the case-law of the Court to the effect that an official in one capacity does not have sufficient interest to bring proceedings before the Court regarding the rights in another capacity, this application would be admissible only if the applicant could now claim to have the capacity of a former official. Therefore the applicant has only contingent rights which are in process of creation and are subject to the contingency of her becoming entitled to a pension.
- The letters of 14 September 1976 and 30 June 1977 cannot form the subject-matter of an appeal, as they are mere declarations of intent. However, if they did constitute enforceable decisions, the appeal would have had to be directed against them and not against the decision rejecting the complaint in order to be admissible.
- The contents of the complaint do not permit its nature to be disputed, and it was out of time, which confirms the defendant's first line of argument.

B — Substance of the case

The *applicant* argues that:

- The contracts concluded between the applicant and the defendant were unlawfully designated as contracts for the employment of an expert, then of a member of the auxiliary

staff. In fact, in pursuance of those contracts the applicant "occupied full time and in a relationship of subordination a permanent post included since 1963 in the list of posts appended to the section of the budget relating to the defendant", a legal definition which corresponds to that of contracts for the employment of members of the temporary staff.

Consequently, the defendant disregarded the principle according to which the legal designation of contracts prevails over the designation given by the parties.

- First, if the Court does not designate these contracts as contracts for the employment of a member of the temporary staff, the defendant was not legally entitled to make use of the applicant's services by a contract for the employment of an expert then of a member of the auxiliary staff, subsequently renewed after a period of engagement as a member of the temporary staff. Secondly, the defendant was guilty of a wrongful act or omission by failing to regularize the applicant's situation when it had the opportunity to do so.
- This caused the applicant damage, for which she claims compensation.
- In the alternative, the periods of work carried out for 12 years under the same conditions as those applicable to an official should be assimilated to periods of employment as a member of the temporary staff. Consequently, the refusal to take these periods of employment into account for the calculation of the years of pensionable service constitutes a breach of the principles of equity, equality of treatment, justice and good administration.

The *defendant* contends that:

- The difference between a member of the temporary staff and a member of the auxiliary staff does not lie in the existence of a relationship of subordination but in the fact that the former fills a permanent post included in the list of posts, whereas the latter performs his work without being assigned to a post included in that list.

Therefore, in her situation, the applicant cannot claim the status of a member of the temporary staff either for the period from 1 January 1961 to 28 February 1964 or for the periods covered by the contracts of employment as a member of the auxiliary staff.

First, there is no necessary causal connexion between the damage allegedly resulting through the period from January 1961 to February 1964 not being counted for the purpose of retirement pension and the alleged unlawful act or omission consisting in employing the applicant under an expert's contract.

Secondly, the fact of having been appointed a member of the auxiliary staff after three years as a member of the temporary staff is not contrary to the provisions of the second paragraph of Article 8 of the Conditions of Employment of Other Servants of the European Communities.

Whilst it is admitted that a situation in which the status as a member of the auxiliary staff is extended beyond one year constitutes an illegality, this does not imply that there is a duty on the part of the Commission to make good, at least to the extent claimed by the applicant, damage which is purely hypothetical.

Finally, the defendant cannot be accused of having failed to fulfil its duty to assist an employee or of any wrongful act or omission.

The fact that the applicant performed her duties under the same conditions as an official does not allow equation with that status. Finally, too broad an

application of principles such as equality of treatment or equity for the purpose of bringing into account periods of service as a member of the auxiliary staff would give rise to reverse discrimination contrary to positive law in relation to persons currently in receipt of a pension.

The *applicant* replies that:

- As regards the period from 1 January 1961 to 28 February 1964, the defendant itself admitted the existence of a relationship of subordination. Furthermore, since 1963 the applicant has carried out the duties corresponding to a permanent post included in the list of posts. It follows from these two facts that the designation of the contract is as a contract for the employment of a member of the temporary staff.
- As regards the periods from 1 March 1964 to 31 December 1968 and from 1 January 1972 to 30 November 1972, the objection based on the fact that the post was no longer vacant after the competition fails in fact, because even though a candidate was appointed to the post, the applicant continued alone to carry out the duties corresponding to it.
- Therefore the applicant stands by the position she has taken up on the legal designation of the contract at issue and of her contractual situation which, for the two periods of employment as a member of the auxiliary staff, was that of a member of the temporary staff.
- According to a line of argument identical to that in the first submission, the illegality constitutes a wrongful act because in relation to the applicant the defendant evaded the obligations incumbent upon any employer, in particular as regards providing for a pension. A breach of duty to assist an employee and a wrongful act or omission on the part of the Commission result from the very abnormality of the applicant's precarious situation.

- The causal connexion between these wrongful acts and the damage — which is present and certain — is clear, since the applicant is demanding compensation for this failure to regularize the situation, which gives rise to unjust enrichment on the part of the defendant.
- The exceptional situation which the applicant is in justifies the application of the principle of equity acknowledged by the Court (judgment of 15 March 1973 in Case 37/72 Marcato [1973] 1 ECR 361).
- The argument that to adopt such a solution would lead to a breach of positive law and reverse discrimination cannot be accepted.
- There is inconsistency between the wrongful act alleged — the fact of not having fulfilled the duties incumbent upon every employer — and the compensation claimed — taking the period covered by the experts' contracts into account in the pension scheme under the Staff Regulations. The Commission does not deny the illegalities of which it is guilty, namely entering into an expert's contract involving a relationship of subordination and keeping the applicant employed for many years as a member of the auxiliary staff, but submits that in the absence of evidence produced by the applicant these illegalities do not constitute wrongful acts or omissions on the part of the Commission.

On the three submissions made, the *defendant* rejoins that:

- If the contracts as an expert are legally designated as contracts of employment, transposition to the context of the Staff Regulations does not necessarily mean that they are to be regarded as contracts for the employment of temporary staff rather than as contracts for the employment of auxiliary staff.
- According to the case-law of the Court (Case 18/63 [1964] ECR 85, at p. 100) the facts cannot prevail over the law and over the legal designation of a contract. Thus the fact that the applicant carried out tasks corresponding to those of a permanent post does not allow her to be regarded as occupying such a post, and this situation is confirmed by the fact that during the period under consideration her emoluments were charged under the budgetary chapter entitled "member of the auxiliary staff".
- The Commission is ready to arrange retroactively for the applicant's membership of the Belgian social security scheme.
- It would be too broad an application of the principles of justice and equity to grant the applicant rights pertaining to the status of an official on the ground that she has carried out permanent duties in the same way as an official.

IV — Oral procedure

The parties presented oral argument at the hearing on 9 November 1978, and they answered questions put by the Court.

The Advocate General delivered his opinion at the hearing on 14 December 1978.

Decision

- 1 The applicant was recruited on 1 January 1961 to occupy a post in the University Information, Youth and Popular Education Division of the Press and Information Service of the ECSC corresponding to the grade of principal administrator.
- 2 Since then she has been and still is carrying out the same duties and assuming the same responsibilities in the same service, which has since been attached to the Commission.
- 3 From 1 January 1961 to 28 February 1964 she was bound to the Commission by a contract as an expert which was renewed five times; from 1 March 1964 to 31 December 1968 by a contract as a member of the auxiliary staff within the meaning of Article 3 of the Conditions of Employment of Other Servants of the European Communities (hereinafter referred to as the "Conditions of Employment") (Category A, Group 1, Step 1, then Step 2 as from 1 March 1966), renewed eleven times; from 1 January 1969 to 31 December 1971 by a contract as a member of the temporary staff within the meaning of Article 2 (Category A, Grade 5, Step 3), renewed three times; from 1 January 1972 to 30 November 1972 by a contract as a member of the auxiliary staff, renewed twice.
- 4 On 1 December 1972 the applicant was appointed a probationer and by a decision of 22 October 1973 she was established with effect from 1 September 1973.
- 5 On 18 July 1977 the applicant sent the President of the Commission of the European Communities, the appointing authority, a complaint under Article 90 (2) of the Staff Regulations requesting that her periods of employment as an expert and as a member of the auxiliary staff be assimilated to periods of employment as an official or a member of the temporary staff for the calculation of her years of pensionable service for the purpose of her retirement pension.
- 6 In a letter of 15 February 1978 signed by a member of the Commission she was given the reply that the period in which she had served as an expert (1 January 1961 to 28 February 1964) still required comprehensive examination, and with regard to the periods in which she had been employed as a

member of the auxiliary staff (1 March 1964 to 31 December 1968 and 1 January 1972 to 30 November 1972) she was reminded that she had acquired pension rights in the Belgian pension scheme, to which the Commission had paid contributions.

- 7 In these circumstances the applicant applied to the Court on 17 February 1978 for the annulment of the decision rejecting her complaint and an order that, for the calculation of her years of pensionable service for the purpose of her retirement pension, the defendant must take into account the periods of employment from 1 January 1961 to 31 December 1968 and from 1 January 1972 to 30 November 1972, for the purposes of the first paragraph of Article 77 of the Staff Regulations.

Admissibility

- 8 The defendant makes three submissions as to inadmissibility:
 - 9 It submits first of all that the applicant does not have any present, vested interest to assert or even any definite future interest because she is not entitled to challenge the principles governing the future payment of her pension in legal proceedings while she is in active employment, since only the actual payment of that pension, when it has occurred, can form the subject-matter of a court ruling.
 - 10 Although it is true that before retirement, an uncertain future event, pension rights are contingent rights which are in process of creation from day to day, it is none the less clear that an administrative act which decides that a particular period of employment cannot be taken into account for the calculation of years of pensionable service immediately and directly affects the legal situation of the person concerned even if that act is to be implemented only subsequently.
 - 11 The adoption of this first submission would mean that the applicant could ascertain her rights only at the time of her retirement, and would leave her until then in a state of uncertainty regarding her financial situation making her unable immediately to make the necessary personal arrangements for her future as she sees it.
 - 12 It follows that the applicant, whom the administration has placed in a complex situation as regards the course of her career, has a legitimate, present, vested and sufficiently clear interest in having an uncertain factor in her status decided forthwith by the Court.

- 13 Therefore the first submission must be rejected.
- 14 The defendant makes a second submission, arguing that the applicant is merely concerned with acts not capable of immediately producing any legal effect because they come within the category of administrative information or preparations for a possible decision.
- 15 Therefore those acts do not adversely affect her, because they merely indicate intentions about a subsequent decisional act, and in these circumstances the application is inadmissible.
- 16 Since the applicant has a legitimate, present, vested interest in her appeal being heard on the issue whether her periods of employment as an expert and as a member of the auxiliary staff are to be counted as years of pensionable service for the purpose of her retirement pension, there is no need to rule on the submission of inadmissibility based on the preparatory nature of the contested act, because it will be dealt with as part of the substance of the case along with all the factors in the case file.
- 17 It follows that the second submission is irrelevant and must be rejected.
- 18 The Commission makes a third submission of inadmissibility on the grounds that the applicant failed to observe the limitation period laid down in Article 91 (2) of the Staff Regulations of Officials of the European Communities, which provides that an appeal to the Court of Justice is admissible only if a complaint has previously been submitted to the appointing authority within three months of the act adversely affecting the person concerned.
- 19 In the present case, that act consists according to the defendant, in the letter of 14 September 1976 from the Head of the Individual Rights and Privileges Division of the Directorate for Personnel stating in answer to the applicant's claims that it was impossible to count a period of employment as a member of the auxiliary staff for the purpose of retirement pension, and was not followed by a complaint from the applicant until 20 July 1977, that is to say ten months after the letter from the Directorate for Personnel and thus out of time, which makes the application inadmissible on this point.

- 20 The applicant also failed to observe the limitation period laid down in Article 90 (2) of the Staff Regulations, which is three months as from the date of expiry of the period prescribed for reply (namely four months from the date on which the request for a decision was made) where the complaint concerns an implied decision of rejection within the meaning of Article 90 (1).
- 21 By a letter of 13 August 1976, the applicant requested the Head of the Individual Rights and Privileges Division for her period of employment as an expert to be assimilated to periods of pensionable service as an official or a member of the temporary staff for the purpose of her retirement pension.
- 22 The complaint against the implied rejection of this request of 13 August 1976 was not lodged until 20 July 1977, therefore the subsequent appeal to the Court of Justice must be declared inadmissible pursuant to Article 91 (2) of the Staff Regulations.
- 23 It emerges from the document included in the case file that although in 1976 and 1977 letters passed between the administrative departments of the Directorate for Personnel and the applicant concerning her pension rights in relation to her periods of employment as an expert and as a member of the auxiliary staff, they were only acts coming within the category of administrative information, because they did not come from an appointing authority as required by the Conditions of Employment for establishing a decision.
- 24 The first act having the character of a decision within the meaning of Article 90 (1) of the Staff Regulations dates from 30 June 1977, comes from the Director of Personnel, and refuses to take the years of employment as an expert by the Commission into account for the calculation of pension rights acquired under the Community scheme.
- 25 The applicant brought a complaint against this act adversely affecting her before the President of the Commission of the European Communities on 20 July 1977 pursuant to and within the period prescribed by Article 90 (2).
- 26 The appeal lodged on 17 February 1978 on this issue was therefore not out of time, since it observed the period of four months prescribed by Article 90 (2) where a complaint receives no reply and is thus deemed to be rejected by

implied decision, added to the period of three months prescribed in Article 91 for the purpose of bringing the case before the Court.

27 The second act in the nature of a decision, signed by a member of the Commission and dated 15 February 1978, states that the applicant's periods of membership as a member of the auxiliary staff gave her pension rights under Belgian law and therefore could not give rise to Community pension rights.

28 This act, which moreover reserves the question of any rights acquired as an expert, constitutes a fresh decision, taken by an authority superior to the one which gave the first decision.

29 Since it does not merely confirm that decision, it replaces it.

30 Thus the appeal lodged on this issue on 17 February 1978 was brought within the period prescribed by the law.

31 It follows from all these considerations that the appeal is admissible.

Substance of the case

32 The applicant accuses the defendant of having unlawfully designated the agreement between them as contracts for the employment of a member of the auxiliary staff.

33 She maintains that since she was engaged to occupy full time and in a relationship of subordination a permanent post included in the list of posts appended to the section of the budget relating to the defendant when there was no question of replacing an official who was unable for the time being to perform his duties, those agreements should have been recognized as having the characteristics of a contract for the employment of a member of the temporary staff.

- 34 It is necessary to examine, on the one hand, the respective characteristics of contracts for the employment of auxiliary staff and contracts for the employment of temporary staff and, on the other, the duties performed by the applicant and the conditions under which she carried them out, and to draw the appropriate conclusions from this twofold examination as regards her administrative position.
- 35 Article 3 of the Conditions of Employment provides that "auxiliary staff" means staff engaged for the performance of duties in an institution but not assigned to a post included in the list of posts appended to the section of the budget relating to that institution, or staff engaged to replace an official who is unable for the time being to perform his duties and whose post could not be filled by temporary posting of another official.
- 36 Article 52 provides that the actual period of employment of auxiliary staff shall not exceed the period of temporary assignment for the purpose of replacing an official or a member of the temporary staff who is unable for the time being to perform his duties, or one year in all other cases.
- 37 Thus the characteristic of this contract is its precariousness in time, since it can be used only to effect a temporary replacement or to allow the performance of administrative duties which are of a transitory nature which fill an urgent need or which are not clearly defined.
- 38 Since the purpose of these conditions of employment is to arrange for occasional staff to perform duties which — by their nature or by virtue of the absence of a holder of the post — are precarious, it is clear that the said conditions of employment cannot be wrongfully used to assign such staff to permanent duties for long periods, and thus employ them abnormally at the cost of prolonged uncertainty.
- 39 Moreover, of the four kinds of temporary staff defined in Article 2 of the Conditions of Employment, the one found in the present case must be regarded as being that provided for in Article 2 (b), "staff engaged to fill temporarily a permanent post included in the list of posts appended to the section of the budget relating to each institution".

- 40 This contract is characterized by the engagement of staff who are to perform well-defined, permanent, public service duties appearing in the organization plan of a Community institution, the posts of such staff being shown in a list of posts.
- 41 According to the second paragraph of Article 8 and for the same reasons as the contract for auxiliary staff, this contract is for a period of not more than two years and may be renewed not more than once for a maximum period of one year.
- 42 At the end of that time such staff shall no longer be employed as temporary staff: either their employment is terminated or they are appointed as officials.
- 43 The difference between auxiliary staff and temporary staff lies in the fact that a member of the temporary staff fills a permanent post included in the list of posts, whereas, except in the case of temporary replacement of an official, a member of the auxiliary staff performs administrative work without being assigned to a post included in the list of posts.
- 44 It therefore becomes necessary to look into the legal designation of the contracts between the applicant and the defendant, having regard to the duties performed by her and to the facts.
- 45 Her duties were defined as consisting in setting up European documentation centres in universities, organizing competitions for Community prizes, publishing theses, and arranging individual visits and group visits to the seat of the Community.
- 46 She took them up on 1 January 1961 and is still performing them at the present time, 18 years later; it can therefore be said that they are permanent, definite, Community public service duties.
- 47 Her contract designated as being with a member of the auxiliary staff began on 1 March 1964, but on 24 January 1963 the University and Cultural Affairs Division had been allocated a post of Principal Administrator

A 5/A 4, the definition of which corresponded to the duties performed by the applicant and this post appeared in the list of posts appended to the section of the budget relating to that institution.

- 48 An open competition procedure to fill it was initiated by a notice published in the Journal Officiel of 18 January 1965.
- 49 Although the applicant was placed first on the list of suitable candidates drawn up by the selection board following the competition and was proposed for appointment by her Director General in particularly laudatory terms regarding the quality of her work, her experience, her devotion to duty and the need to regularize her administrative situation, another candidate was chosen and was appointed to that post.
- 50 This other candidate did not fill the post mentioned in the competition, and the duties corresponding to the post continued to be performed by the applicant.
- 51 Therefore it appears that at all events as from 1 March 1964, the date of her first contract as a member of the auxiliary staff, the agreement between the applicant and the Commission should have taken on the form of a contract for the employment of a member of the temporary staff, because the applicant had been assigned to a permanent post appearing in the list of posts appended to the budget.
- 52 The formal nature of the various contracts which the Commission then offered the applicant in no way alters the fact that she performed the same duties until her establishment, which was merely a regularization of her over-long *de facto* situation as a temporary official.
- 53 Therefore the contracts entered into by the Commission with the applicant since 1 March 1964 must be regarded as having been entered into with a member of the temporary staff.
- 54 The defendant must act accordingly in calculating the applicant's years of pensionable service in relation to her periods of employment under the incorrect designation of member of the auxiliary staff.

- 55 As regards the applicant's complaint concerning the pension rights for the period covered by the experts' contracts, since the defendant stayed the proceedings in order to carry out a comprehensive examination of the question on a general basis, as appears from the third paragraph of the letter of 15 February 1978 from Mr Tugendhat, the member of the Commission, it rests with the applicant to give the defendant notice for her complaint to be rejected by express decision or by implied decision according to Article 91 (2) and thereupon to take such steps as she considers appropriate.

Costs

- 56 Since the applicant has been successful in the major part of her submissions, the Commission must be ordered to bear all the costs.

On those grounds,

THE COURT (Second Chamber),

hereby rules:

1. All contracts entered into since 1 March 1964 by the Commission with Mrs F. Deshormes must be regarded as having been entered into with a member of the temporary staff.
2. The Commission must act accordingly in calculating the years of pensionable service of Mrs F. Deshormes.
3. The Commission is ordered to bear the costs of the action.

Mackenzie Stuart

Sørensen

Touffait

Delivered in open court in Luxembourg on 1 February 1979.

J. A. Pompe
Deputy Registrar

A. J. Mackenzie Stuart
President of the Second Chamber