

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 6 MAY 1965¹

*Mr President,
Members of the Court,*

Mr Alfred Willame, a French national, who had taken part in union activity and who was from 1950 a member of the French Economic and Social Council, entered the service of the EAEC on 18 August 1958. He was assigned in Grade A3 to the Directorate of Health and Safety as head of the division dealing with social problems and documentation. From November 1958 he was involved in the formation of a Euratom staff association; he was elected by his colleagues to the original Joint Committee (comité mixte) and thereafter sat on both the provisional Staff Committee and the present Joint Committee (commission paritaire).

On the opening of the integration procedure on 13 April 1962 his immediate superior, Dr Recht, made the following assessment of him: on the occasions on which he had actually been engaged on the work of the Directorate he showed neither the knowledge nor the abilities needed to deal with the tasks allotted to him and this in an area in which only properly conceived, positive action, performed in a spirit of initiative and with steadfastness was capable of producing results. It must be added here that the Vice-President of Euratom, Mr Medi, made the following note on this report: 'Above opinion not agreed, particularly as regards the very severe strictures on certain points. After integration it will be advisable to reorganize the duties of the post'.

On 18 December 1962, having received this report the Establishment Board heard Dr Recht who, after describing the post held by the applicant, made a detailed criticism of the way in which

he performed his duties. On 8 February 1963, the Board heard both Mr Willame and the colleague who was assisting him. It received from both 'parties' documents to which I shall refer later and on 19 February issued a seasoned report indicating that Mr Willame was not fitted to perform the duties to which he was assigned; the Board added, however, that the appointing authority should consider his establishment in the grade immediately below.

On 3 April 1963 the applicant was informed verbally of the intention of the Commission of Euratom not to integrate him and on 8 May, together with several of his colleagues; he demanded a review of the integration procedure; this was refused and he was so informed on 30 May. Some rather confused discussions took place with a view to giving him a new contract as a temporary servant; these were suspended, reopened and finally completely broken off. Eventually, on 2 October 1963 Mr Willame was informed that, following the unfavourable opinion of the Establishment Board, the Commission had decided to terminate his contract.

In the main he is asking you to annul the decisions contained in this letter refusing him integration and terminating his contract, as well as the measures taken in support of these decisions, to order his integration in Grade A3, Step 4, with retroactive effect and to order the Community to pay him arrears of remuneration together with Bfrs 150 000 as compensation for the non-material damage which he has suffered.

He also presents a subsidiary plea, the object of which is, as I understand it, the reopening of the integration pro-

1 — Translated from the French.

cedure and an order that the defendant pay him his salary from the date on which he gave up his duties until a valid, new decision is taken. As yet a further subsidiary plea, should the contested decisions not be annulled, he increases his claims for damages to Bfrs 1 500 000 for the material damage and Bfrs 150 000 for the non-material damage.

You will have to rule on two submissions: first, the regularity of the procedure and, secondly, the accuracy of the reason given by the Establishment Board on which the decision of the Commission of the EAEC was based. I shall examine them in turn.

A — Regularity of the procedure

Although the complaints, certain of which were already set out in the official claim, are numerous they are by no means all of equal weight.

1. You will immediately set aside the complaint based on the fact that contrary to Article 110 of the Staff Regulations no general provision for giving effect to these Regulations had been drawn up for the integration procedure after consulting the Staff Committee and the Staff Regulations Committee. You have in fact held that this Article does not apply to this essentially transitional procedure (Case 26/63, *Pistojs*, Rec. 1964, p. 696).

You will also set aside the criticism or finding that, although the consequences of this procedure may be more serious than those in disciplinary proceedings, it contains fewer safeguards; for example, the Board did not include a staff representative. Mr Willame here refers to both the former EAEC Staff Regulations and the Staff Regulations of the Brussels Communities. To do so is, however, to confuse the position of members of the staff who, by reason of their establishment, benefit from steady employment and security of

tenure, with that of servants who are not yet integrated. In entrusting consideration of the case of the latter to a Board composed only of representatives of the official side, Article 102 of the Staff Regulations has infringed neither the Treaty nor any general principle of law.

In addition these criticisms, which in fact go to the very root of the integration procedure, there are others which deal with the way in which this procedure was applied. Although it is formally disputed by the Commission, Mr Willame considers that each institution drew up its establishment reports in a different manner and that, in the absence of definite criteria, there was no uniformity in the standards of reporting. However, what else could the administration do but lay down a sufficiently detailed framework within which reporting officials are required to assess the various aspects of the personality of the servant? If in spite of that it is inevitable that some report more generously than others, it is reasonable to leave the Establishment Board to strike a balance between them.

2. More serious are the complaints concerning the consideration of Mr Willame's case by the Board. Mr Willame maintains that although the Board was made up of nine members it sometimes sat with only eight of them present although it is nowhere authorized to hold its discussions in the absence of one or more of its constituent officials. An examination of the minutes in fact shows that Mr Guazzugli Marini was not present at certain meetings, in particular, that on 19 February 1963 during which the opinion on the case of Mr Willame was issued by the eight members present. But this in no way constitutes any irregularity. In the absence of a rule fixing the majority required to give an opinion you have held that a simple majority was sufficient (judgment in the case of *Weighardt* of 7 April 1965, Rec.

1965, p. 365) and we know that the majority was ample in this case.

In particular, the applicant maintains that the Board infringed the rights of the defence in several ways: it did not allow him the necessary time in which to prepare for his hearing; it made its decision on the basis of an incomplete file by issuing its opinion without having been able to examine important documents which the applicant had said that he had produced; it did not consider the documents to which he referred in order to show his ability to perform his duties. The latter point is certainly the most delicate and the one which leaves an unsavoury taste.

Let me reconstruct the time-sequence of the case as far as this is possible. On 5 February 1963 Mr Willame was advised that he would be heard by the Board on 8 February. Only on 7 February was he invited to study the 36 documents running to some 150 pages which had been produced by Dr Recht which, he claims, covered only part of his professional career and could therefore only be usefully considered when complete. At the beginning of his hearing on 8 February he expresses a willingness to offer his observations while making a reservation on this point. Today he claims that this period was too short to enable him to prepare his defence since only during the meeting was he informed of what was held against him. To this the administration replies in defence that the documents produced by Dr Recht were memoranda drafted by the applicant who was thus in a position to acquaint himself with them rapidly. This reply is not entirely convincing for two reasons. First, the documents in question, on which Dr Recht no doubt intended to base his case for Mr Willame's inadequacy, were some what ill-assorted and it was difficult for Mr Willame to realize the effect that they were to have on the development of the procedure; secondly, certain of these documents bore critical annota-

tions by Dr Recht and the applicant needed time in which to acquaint himself with them and where possible to refute them. The least one can say is that for this purpose the period of 24 hours was rather short.

At his hearing the applicant was informed by the Chairman of the Board that he might submit to the Board any documents which he considered would help his case; on 12 February Mr Willame submitted three documents and on the following 8 May, despite the fact that the unfavourable opinion had already been given on 19 February, he submitted 85 other documents running to 450 pages, by which he claimed to prove his ability and the various tasks which he had undertaken. The applicant emphasizes that as he had been given no time-limit in which to produce these documents the Board could not give its report without examining them. This is a doubtful point. The documents sent on 12 February, addressed to the Chairman of the Board, were submitted in order to *complete* his file and naturally the administration relies on this term. As regards the massive bundle sent on 8 May, this was addressed to the Director-General of Administration on the very day on which the applicant lodged a complaint through official channels against the opinion of the Board, of which he had been unofficially aware for a month. The explanation given here is that, in reply to a request for fuller information from you, Euratom maintained that since these documents were not addressed to the Establishment Board there was no obligation on the body to examine them. This is quite feasible but it would be more convincing if in the rejoinder the institution had not claimed that the documents in question had *actually* been *examined* by the Establishment Board. What conclusion must finally be drawn from that? Contrary to the allegation of the applicant, although he had indicated in writing on 7 February

that the file was incomplete as regards his career, he had not at that point given notice of the production of 'numerous documents' and in the light of the terms in which the submission of the documents was made on 12 February, the Establishment Board was justified in believing them to be the final ones and in closing the proceedings. It had the power to reopen the proceedings as long as the Commission of Euratom had made no definite decision, but it was under no obligation to do so.

Moreover, the fact that at his hearing Mr Willame had referred to the weekly news-sheets prepared under his direction and to the welfare card-index started by him did not oblige the Board to obtain these documents; it was up to the applicant to produce them if he considered it useful so to do.

Final complaint: after hearing Dr Recht, the author of an unfavourable report, the Board did not feel obliged to hear Vice-President Medi who had indicated in writing his disagreement with the detailed assessments contained therein. Although this may be regrettable it does not constitute a procedural defect or an infringement of the rights of the defence.

Finally, and I repeat, the procedure followed in the inquiry before the Establishment Board leaves an unsavoury taste, but nowhere can I find a clear procedural defect; I am thus unable to consider this submission to be justified.

3. The complaint then refers to events occurring after the opinion of the Establishment Board was issued. Mr Willame complains that he was only informed of this opinion on 3 April 1963 when he was notified of the decision of dismissal. This is quite normal, since the opinion was addressed to the Commission of Euratom and had only to be communicated to the applicant with the decision of that body.

Moreover, notification was incomplete

as it made no mention of his possible integration in the lower grade. According to Article 102, although it is for the Establishment Board to assess the applicant's suitability or otherwise to perform the duties to which he is assigned, and although its unfavourable opinion is binding on the Commission of Euratom, it is the latter which has sole power to state whether, in such a case, integration may take place in a lower grade. The Staff Regulations make no provision for an opinion of the Establishment Board on this point; it appears that if such an opinion is given, the addressee is not bound to communicate it to the servant concerned.

It is therefore unreasonable to claim that the decision to dismiss him is vitiated by an absence of reasons or by inaccurate reasons because it does not reproduce the final paragraph of the opinion of the Establishment Board.

B—Correctness of the reason given by the Board

The decision is based on the unfavourable opinion issued according to Article 102 and binding on the appointing authority. Mr Willame's second submission thus contests the opinion of the consultative body.

You are aware of the terms of this opinion. The Commission maintains, first, that although by their nature the duties of the candidate as staff representative do not fall within its area of judgment the detrimental effect necessarily implied by this plurality of offices as regards his output in the post must be taken into account in his favour. Then, after acknowledging that he had 'some capacity for dealing with social problems', the Commission criticizes the applicant for certain failings as regards his ability, his sense of initiative and responsibility and his capacity to carry out in depth the work undertaken; it is on this point that the Board bases

its opinion that he was unsuited to perform the duties of head of division.

Mr Willame's criticism of this opinion, the reasons for which he considers inaccurate, insufficient and inappropriate, is based on two points.

1. First, he maintains that, although since 1959 he had played an important rôle in staff organizations, the Commission had taken no account of the importance and quality of this work on the pretext that it fell outside its area of judgment. In this way it had infringed Article 1 of Annex II to the Staff Regulations. At the least it should have inquired into the length of time which he was able to devote to the work of the Directorate of Health and Safety in order to examine, taking everything into account, the actual output of the applicant in his administrative post. Moreover, the Board should have taken these activities into account in order to assess his ability and conduct in the service.

Mr Willame appears to misjudge the scope of Article 1 of Annex II to the Staff Regulations. Where this Article provides that: 'The duties undertaken by members of the Staff Committee ... shall be deemed to be part of their normal service in their institution', this means that they are exempt within reason from carrying out what would normally be their work within the administration; in the performance of these duties, the members of the Staff Committee are entirely independent of their superiors who have no power to assess the manner in which their subordinates represent the interests of the staff. Any other solution could only be detrimental to the independence of the organizations representing the staff.

This reasoning applies also to the Establishment Board. It wisely declared that it had no authority to judge the manner in which Mr Willame performed his duties as staff representative and restricted its assessment to the abilities he showed in the post he held in the

Directorate of Health and Safety. And it correctly applies Article 1 of Annex II in stating that, although this plurality of offices necessarily involved a reduction in his output, the applicant could not be criticized on those grounds. In my opinion, therefore, this first criticism must be set aside.

2. Mr Willame also disputes the Board's assessment of his abilities. It is clear from what I have said above that we are dealing with one of the fairly frequent integration cases in which the dispute is not over one or more precise facts but over a lack of character or intellectual powers, or merely a failure on the part of the candidate to adapt himself to the duties involved, which renders him unsuited to the post held. It is usually said that the Board is required to make a complex value-judgment of the servant.

In order to refute the Board's judgment of him, Mr Willame points out that his work had never been the subject of any unfavourable assessments; the extremely critical report made by Dr Recht and his change of attitude can only be explained by the fact that in 1961 in his capacity as staff representative the applicant was obliged to take up a position in opposition to his superior. From this developed an animosity which was known to the authorities of the institution and which is shown by a personal letter which the applicant produces.

Euratom formally disputes the involvement of the Staff Association in the difference of opinion to which Mr Willame refers and maintains that from the beginning Dr Recht had shown his dissatisfaction with the applicant's shortcomings. The two documents referred to by the institution in support of this argument are unconvincing in that in November 1961 Mr Recht had denied that a departmental reorganization affecting Mr Willame represented a measure penalizing misconduct in the performance of his duties. On the contrary, it is clear from numerous docu-

ments which Dr Recht submitted to the Board that although his dissatisfaction scarcely revealed itself he had no high opinion of his immediate colleague.

Moreover, whatever the relationship between director and head of division, the only question before us concerns the accuracy and relevance of the opinion of the Establishment Board and I have no alternative but to find that there is nothing in the file to contradict it. It is not that the applicant was lacking in intellectual qualities apart from his acknowledged capacity for dealing with social problems. But he does not possess those required to perform the duties of head of division in an administrative unit. You will read this file composed of many different documents and no doubt you will form the impression, as I did, that the error lay in entrusting to a man with a gift for public relations and for disseminating information duties which consisted of gathering statistics on the risk of radiation drawing up a programme of professional training or analysing regulations on the compensation of workers exposed to the risk of radiation. Dr Recht gave to the Board a detailed statement of the shortcomings of his colleague and the 450 pages of docu-

ments produced by Mr Willame—which were not before the Board but which appear in your file—do not counter the criticisms made of him.

Finally, no evidence has been produced to upset the opinion of the Establishment Board and Mr Willame is therefore wrong in maintaining that the decision to dismiss him is based upon an inadequate and mistaken reason. Thus his claim that the decision should be annulled can only be dismissed.

It is true that, apart from the decisions the legality of which is in question, he also claims that Euratom incurred liability for wrongful acts or omissions occurring during the discussions between the parties held after the Establishment Board issued its unfavourable opinion. These discussions were held with a view to granting him a temporary contract but, as we know, they came to nothing. The parties disagree over the circumstances in which they took place and the responsibility for their failure. This, however, is not important. Mr Willame could not be integrated and Euratom was entitled to dismiss him as soon as the Board issued its opinion. These discussions, although fruitless, only delayed his dismissal and thus caused him no harm.

I am therefore of the opinion that:

- the application brought by Mr Willame should be dismissed;
- in accordance with Article 70 of the Rules of Procedure each party should bear its own costs.