JUDGMENT OF THE COURT (SECOND CHAMBER)
14 JULY 1965[1]

Götz Schoffer
v Commission of the EEC

Case 46/64

Summary

Procedure — Judgment granting annulment — Legal effects — Limited to the parties and to the persons directly concerned by the measure annulled — Judgment constituting a new fact — Concept

Cf. paragraph 4, summary in Case 43/64.

In Case 46/64

GÖTZ SCHOFFER, an official of the European Economic Community, residing at 147, avenue Madoux, Brussels 15, assisted by J. Mechelinck, advocate at the Cour d'Appel, Brussels, with an address for service at the Chambers of Ernest Arendt, advocate at the Cour d'Appel, Luxembourg, 27, avenue Guillaume,

applicant,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, Brussels, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, with an address for service in Luxembourg at the offices of Henry Manzanarès, Secretary of the Legal Department of the European Executives, 2, place de Metz,

defendant,

Application for the annulment of the decision rejecting the applicant's request dated 19 June 1964 concerning his grading, being a decision implied from the fact that no reply was given within two months of that date;

THE COURT (Second Chamber)

composed of: A. M. Donner, President of Chamber, W. Strauß (Rapporteur) and R. Monaco, Judges,

1 — Language of the Case: French.

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:
On 1 May 1959 the applicant was given the post of assistant to the Director-General of External Relations of the EEC, and was classified in Grade A4. A decision of 21 December 1962 established him in this grade as from 1 January 1962.
By letter dated 19 June 1964, he lodged with defendant a request based on Article 90 of the Staff Regulations of officials of the EEC and of the EAEC to be classified in Grade A3 as from 1 January 1962.
By letter dated 8 September 1964, the defendant sent him a provisional reply, saying that a definite decision would be taken later. However the applicant received no notice of any such decision.
On 16 October 1964 the applicant lodged the present application.

II — Conclusions of the parties

The *applicant,* in his application, requests the Court:
'to annul the implied decision of rejection taken by the Commission of the EEC concerning the applicant—being a decision resulting from the fact that no reply was given to the request made on 19 June 1964 within two months thereof— and to say that the Commission should give effect to the request of 19 June 1964'. In his reply he maintains these submissions by implication.
The *defendant,* in its statement of defence and in its rejoinder, requests the Court:
'to dismiss the application as inadmissible, or alternatively as unfounded, and to order the opposite party to bear the costs in accordance with the relevant provisions'.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

1. *Admissibility*

The *defendant* considers the applicant to be out of time, because he did not contest his grading within the appropriate time-limit running either from the date of his appointment or from the decision of 19 July 1963 whereby the defendant, pursuant to Article 5 of the Staff Regulations of officials, adopted the table of definitions of duties attaching to each basic post (hereinafter called the 'table of definitions').
(a) The judgment of 19 March 1964 in the *Maudet* case (Rec. 1964, p. 219 et seq.) cannot be considered as a new fact capable of reviving the right of action. This was the case in which the Court recognized that every servant integrated in the grade which he held

before the Staff Regulations came into force has the right to have his position regularized, where this is called for, in accordance with the principle that duties and grades should correspond.

The Maudet case is not a new fact because:

— the force of *res judicata* of the said judgment only applies to the parties to the dispute in that case;

— unlike the present case, in the Maudet case the level of the duties performed by the person concerned was not in dispute;

— therefore the applicant cannot rely on the fact that after the judgment in the Maudet case the defendant regraded a number of officials who, like Mr Maudet, had been left in grades which were undeniably lower than the grade corresponding to their respective posts. Besides, even in the case of those officials, the defendant only acted by virtue of a *moral* obligation.

(b) The decision of 9 June 1964 whereby the defendant appointed Mr Stefani, assistant to the Director-General of Economic and Financial Affairs, to Grade A3 is not a new fact either. This appointment was made for reasons strictly personal to the official appointed, and also 'it does not introduce a new conception of the duties of an assistant'. It constitutes an application of the principle, adopted by the Commission when it met on 27 and 28 November 1962, namely of 'taking decisions on the grading of assistants case by case for the future'. Moreover the said appointment was not the first application of this principle.

The *applicant* argues first that the obligation of the defendant to grade its officials in accordance with the duties which they perform is not limited in time. At all events the time-limit for bringing an action could not have expired at a moment when the defendant was still dealing with questions resulting from the application of the principles in the Maudet judgment.

Quite apart from this, the application is not out of time because:

As to (a) The text of Article 102 of the Staff Regulations of officials could give rise to doubts. Therefore, until judgment was given in the Maudet case no official could be expected to take the risk of bringing proceedings. At the time of the request of 19 June 1964, the decision of the defendant on the grading of a series of heads of departments in application of the principle in the Maudet judgment had not yet been taken.

As to (b) The appointment of Mr Stefani was the first act by which the defendant acknowledged that the duties of an assistant to a Dirtctor-General come within Grade A3, and was also the first act whereby it applied the rules adopted at the meeting of 27 and 28 November 1962.

2. *The substance of the case*

A — Submissions and arguments of the applicant

(a) The *applicant* describes in very great detail the duties of an assistant to a Director-General. He emphasizes the fact that on occasions the assistant deputizes for the Director-General, namely:

— at meetings of the Administrative Committee, the members of which are Directors-General;

— during the summer, as is shown by 'the lists of responsible officials present during the summer recess from 1959 to 1964';

— in many cases, when the Director-General is absent.

(b) According to the table of definitions, such duties correspond to career bracket A3 and not to career bracket A4/5.

— Such an assistant is not comparable with an assistant to a Head of Division. The secretariat of which he is in charge is not a 'sector of

activity in a division'; nor is it a 'specialized department' either; its duties comprise tasks of a general nature.

— The assistant is 'the adviser of a body of the institution'; 'giving advice and support to the Director-General constitutes the substance of his duties in the service'.

— He is a 'highly qualified official'. The applicant argues in detail that 'the Commission has always judged the position of assistant to a Director-General highly, and has not rated it in order of importance below the position of a Head of Division or Adviser'.

Unlike the situation in the High Authority of the ECSC or the Commission of the EAEC, the Directorates-General of the Commission of the EEC are increasingly approaching the order of magnitude 'of administrative bodies comparable with national ministries'.

(c) There are nine assistants to Directors-General, of whom four are classified in Grade A3 and five in Grade A4 without there being any valid reason justifying such a difference. This arbitrary practice shows that the present application is well-founded even apart from the fact that the grade should correspond to the post. The definition of basic posts required by Article 5 of the Staff Regulations would lose all meaning if the same duties could be classfied differently. It is even a fact that not long ago the ratio of assistants in A3 and assistants in A4/5 was 5 to 4.

The defendant is wrong in arguing, in favour of the practice under criticism, that 'special circumstances relating to their work' apply to the assistants classified in Grade A3. These circumstances either do not exist or otherwise exist equally in the case of the applicant, whose tasks are neither less wide-ranging nor less difficult than those of his more favoured colleagues.

The truth is that the differences at issue are to be explained by reasons of a budgetary nature. This follows in particular from the abovementioned decision of 27 and 28 November 1962, according to which the grading of an assistant in Grade A3 must also depend on the availability of an A3 post in the Directorate-General concerned.

B — Submissions and arguments of the defendant

As to (a) The *defendant* agrees in general with the way in which the applicant describes his duties, but it does not agree that the assistant may be called upon to represent his Director-General. When the latter is absent the understudy is the official with the longest service in the highest grade in accordance with Article 26 of the defendant's internal regulations.

The factual arguments relied on by the applicant are not relevant. As for taking part in certain meetings this can also happen to officials who are well below the level of an assistant. More particularly as regards the Administrative Committee, this is a purely internal body which holds meetings for the purposes of information and for discussion. Furthermore the applicant cannot use the list relating to the long vacation because 'he never appears in it as a temporary substitute for the Director-General'.

As to (b) 'By reason of its special nature, the post of assistant cannot be . . . integrated in a rigid and uniform manner into the framework' of the hierarchy of posts. The silence observed by the table of definitions on this subject shows that the defendant has even more discretionary power in grading the persons concerned than in other cases.

The grading of the applicant is in accordance with the consistent policy of the defendant. Already in 1959 it had decided to grade assistants 'in principle' in career bracket A4/5, and it confirmed this decision on 27 and 28 November 1962 when it was express-

ly agreed that it would not be changed.

If it be necessary to attempt to find a correlation between the duties under discussion and one of those set out in the table of definitions, the duties of a principal Administrator or a Head of Department should be chosen. This is because except in special circumstances the secretariat of a Directorate-General is not 'an administrative unit ... in a specialized field' within the meaning of the said table.

Nor can the applicant lay claim to the title of 'Adviser'. 'The description of "Adviser" applies to officials whose activities are comparable with those of a highly qualified expert' whereas the duties which the applicant performs in this respect do not go beyond the requirements of Article 21 of the Staff Regulations according to which an official, whatever his rank, shall assist and tender advice to his superiors.

As to (c) The different grading of the assistants is in accordance with the decision of the defendant of 27 and 28 November 1962 'in future to take decisions on the grading of assistants from case to case on the basis of the special features peculiar to this post'. The difference is justified 'because the duties attached to the post of an assistant are variable in nature and in extent in the different Directorates-General, the structure and tasks of which are also variable'.

It is open to the defendant to assign to an assistant other and wider duties alongside those which are normally allocated to him. The defendant may do so because of 'special circumstances . . ., which cannot easily be defined in advance, and which relate to the very nature (extensive, new, specialized) of the areas of activity entrusted to the Directorate-General, or relating to its organic structures, or even relating to the personality and to the abilities of the assistant himself'.

When the position of the assistants who have attained an A3 grading is analysed, it appears that special circumstances exist which are lacking in the case of the applicant. The facts are that three of the persons concerned had been classified in Grade A3 before they were established and thus had to be kept in this grade by virtue of Article 102 of the Staff Regulations. As regards the assistant to the Director-General of Transport, a number of departments, several of them placed under the responsibility of Principal Administrators, come under the authority of the person concerned.

At all events even if the argument that some assistants may be classified in Grade A3 be rejected, and supposing that the defendant were obliged to put all assistants in the same grade, the result would be not that the applicant's claims are well-founded, but that the A3 gradings would be illegal.

IV — Procedure

The procedure followed the normal course.

The oral arguments of the parties took place before the First Chamber on 19 March 1965.

The Advocate-General delivered his opinion on 16 June 1965.

Grounds of judgment

I — Admissibility

The defendant raises an objection of inadmissibility asserting that the application was not lodged in due time.

(a) The present application is brought under Article 91 (2) of the Staff Regulations of officials of the EEC and of the EAEC against the implied decision, to be inferred from the absence of an express decision, rejecting the request made by the applicant on 19 June 1964 to be classified in Grade A3 as from 1 January 1962. An analysis of the said implied decision shows that it confirmed the decision taken on 21 December 1962 whereby the applicant was integrated under the Staff Regulations, and appointed an official in Grade A4. It is not disputed that the applicant lodged neither an administrative complaint nor an appeal to the Court against this latter decision within the time-limit laid down in the said Article 91. This is equally true if it be considered that this time-limit starts to run from the publication of the table of definitions of duties and powers attaching to each post, as prescribed by Article 5 (4) of the Staff Regulations of officials, and published by the defendant in 1963.

However the applicant relies on two events, asserting that they consist of new facts enabling the period for lodging an appeal against the decision classifying him in Grade A4 to start to run afresh. He thinks that one of these new facts was the judgment given by the Court on 19 March 1964 in Joined Cases 20 and 21/63 (*Maudet* v *Commission* of the EEC; Rec. 1964, p. 215 et seq.), and that the other was the appointment of another assistant, Mr Stefani, to Grade A3.

(b) As regards the judgment in Cases 20 and 21/63, apart from the actual parties in proceedings before the Court, the only persons concerned by the legal effects of a judgment of the Court annulling a measure are the persons directly affected by the measure which is annulled. Such a judgment can only constitute a new factor as regards those persons.

It is not contested that the judgment in Cases 20 and 21/63 annulled a decision of the Commission of the EEC refusing to regularize the position of the party concerned in accordance with the principle that duties should correspond to the grades set out in Annex I to the Staff Regulations of officials. Since this decision only dealt with the individual position of the party concerned, it cannot directly concern third parties, such as the applicant. In these circumstances the said judgment cannot be considered as a new fact as regards the applicant, enabling the period for lodging an appeal, which has expired in this case, to start to run afresh.

(c) As regards the appointment of Mr Stefani, the applicant obviously thinks that this constitutes a decisive change in the defendant's administrative practice. It is sufficient for the purposes of this case to note that this allegation

is contrary to statements made by the applicant himself. It is therefore unnecessary to examine the premise according to which such a decisive change constitutes a new fact enabling the period for lodging an appeal to start to run afresh. First of all it is in fact clear from the allegations made by the two parties that in making the said appointment the defendant did no more than apply the criteria which it had adopted in a decision of principle adopted in November 1962 and according to which it would thenceforth decide 'from case to case on the grading of assistants'. Furthermore the applicant has himself claimed that during recent years and amongst the assistants to Directors-General the number of officials classified in Grade A3 has decreased from 5 out of 9 to 4 out of 9.

(d) Finally the applicant argues in a general way that the obligation on the part of institutions to grade their officials in a manner which is in accordance with the Staff Regulations, and to avoid discrimination, is not limited in time. In itself this assertion is correct but it is not relevant because it fails to distinguish between the admissibility of the application and its substance.

It follows from the above considerations that the application is inadmissible.

II—Costs

The applicant has failed in his application.

Therefore, pursuant to the combined provisions of Articles 69 (2) and 70 of the Rules of Procedure, he must bear the costs of the proceedings, except those incurred by the defendant.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 70;
Having regard to the Staff Regulations of officials of the European Economic Community and of the European Atomic Energy Community, especially Article 91,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to bear the costs of the proceedings, except those incurred by the defendant.**

Donner Strauß Monaco

Delivered in open court in Luxembourg on 14 July 1965.

A. Van Houtte
Registrar

A. M. Donner
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 16 JUNE 1965[1]

Mr President,
Members of the Court,

Mr Götz Schoffer was engaged by the Commission of the EEC with effect from 1 May 1959 as assistant to the Director-General of External Relations. He was classified in Grade A4, Step 1, in accordance with a decision of a general nature, taken on the previous 23 April by the Commission, under which these servants would in principle —and subject to the proviso that positions already obtained would not be affected—be classified in career bracket A5-A4.

During the integration procedure he was maintained in his previous duties and was established with effect from 1 January 1962 in Grade A4, Step 2. Notice of the decision to this effect was given to him at the latest in February 1963.

On 19 June 1964 he submitted a request to the Commission based on Article 90 of the Staff Regulations. He maintained that the nature of the duties of assistants of Directors-General justified their being classified in Grade A3. And, relying on the principle established by you in the Maudet judgment of 19 March 1964, he asked to be reclassified in this grade as from the effective date of his establishment. Having received an interim reply on 8 September, he lodged an application on 16 October 1964 at the Court Registry. He asks you to nullify the implied decision of rejection taken in respect of him and rule that the Commission should give effect to his request.

A — Admissibility

Both in the written procedure and during the oral proceedings, the defendant institution has raised the objection of inadmissibility against the applicant saying that his application calls in question a classification which, not having been contested in due time, was already finally settled when he made the request of 19 June 1964. The implied decision of rejection, which came about through

1 – Translated from the French.