JUDGMENT OF THE COURT (FIRST CHAMBER)
17 MAY 1973 [1]

Letizia Perinciolo
v Council of the European Communities

Joined Cases 58 and 75/72

1. *Proceedings — Admissibility — Objection of 'lis pendens' — Examination by the Court of its own motion*
   (Rules of Procedure, Art. 92)
2. *Officials — Incapacity for work — Dispute — Invalidity Committee — Reference for opinion — Restriction to cases of sick leave*
   (Staff Regulations, Art. 59)
3. *Officials — Employment — State of health — Incompatibility — Obligations*
   (Staff Regulations, Art. 36)

1. The Court must raise the objection of 'lis pendens' of its own motion.
2. Only disputes relating to sick leave may be referred to the Invalidity Committee.
3. When an official considers that the employment to which he has been assigned is not suitable in view of his state of health, he may request another assignment, but while awaiting such a transfer he is obliged to present himself at his employment and carry out the duties pertaining thereto.

In Joined Cases 58 and 75/72,

LETIZIA PERINCIOLO, an official in the Secretariat General of the Council of the European Communities, residing at 11, rue Major Pétillon, Brussels, represented by Maître Emile Drappier, Advocate of the Brussels Court of Appeal, with an address for service in Luxembourg at the chambers of Maître Ernest Arendt, 34B IV rue Philippe-II,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Maître Gonzague Lesort, Legal Adviser in the Secretariat General of the Council in Brussels,

1 — Language of the Case: French.

with an address for service in Luxembourg at the chambers of Maître Emile Reuter, Legal Adviser of the Commission of the European Communities, 4 boulevard Royal,

defendant,

Application

— for annulment of the decision of assignment of the applicant dated 24 May 1972, and

— for annulment of the decision of 20 June 1972 applying Article 60 of the Staff Regulations to the applicant and of the decision of 20 July 1972 confirming the application of the said Article, as well as of the letter of 28 August 1972 confirming the application of the aforementioned decisions,

THE COURT (First Chamber),

composed of: R. Monaco (President of Chamber), A. M. Donner (Rapporteur) and C. Ó Dálaigh, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

The facts of the case and the procedure may be summarized as follows:

The applicant, an official Grade C 3 in the Secretariat General of the Council of the European Communities, had a riding accident on 6 November 1965.

As a result of that accident, she was for a certain time totally incapacitated from working and thereafter partially incapacitated.

On 28 October 1968, she was, for the purposes of the statutory insurance scheme against accidents in private life, found to be suffering from a 15 % permanent invalidity.

By a decision of the Director of Administration dated 24 May 1972, the applicant, who was at the time assigned to the records department, was transferred to the Italian section of the typing pool with effect from 25 May 1972.

Signorina Perinciolo protested against this decision maintaining that, according

to the reports of the doctors whom she had consulted, she was not allowed to do any typing work. The Director of Administration informed her by letter of 2 June 1972 that examination of the certificates produced by her confirmed unreservedly her ability to do typing work. At an interview on 5 June 1972 with two officials of the Administration, it was pointed out to the applicant that the fact that she did not agree with the note of 2 June 1972 did not justify her absence from the post to which she had been assigned and that her continued absence from the typing pool would thenceforth be regarded as unauthorized absence.

The Director of Administration informed her by note dated 20 June 1972 that, by application of Article 60 of the Staff Regulations, her unauthorized absence as from 2 June 1972 would be deducted from her annual leave and that, in the event of the applicant continuing to absent herself, she would lose her right to remuneration as from 3 July 1972.

The Secretary-General of the Council confirmed by letter of 20 July 1972 that Article 60 of the Staff Regulations should apply in the case of the applicant.

On 28 August 1972 the Principal Administrator informed the applicant that the suspension of payment of her salary would continue to have effect in accordance with the letter of 20 July 1972.

On 9 October 1972 Signorina Perinciolo submitted to the appointing authority a complaint against the application of Article 60 of the Staff Regulations.

The present applications were lodged at the Registry on 16 August 1972 (Case 58/72) and 20 October 1972 (Case 75/72) respectively.

On 12 December 1972 the First Chamber of the Court ordered that the two cases be joined for the purposes of procedure and judgment.

After hearing the report of the Judge Rapporteur and the opinion of the Advocate-General, the First Chamber decided to open the oral procedure without any preparatory inquiry.

The oral observations of the parties were made at the hearing on 13 March 1973.

The Advocate-General presented his opinion at the hearing on 5 April 1973.

II — Submissions of the parties

In Case 58/72 *the applicant* submitted that the Court should

1. Declare null and void the decision contained in the note from the Director of Administration of the Secretariat General of the Council dated 24 May 1972 placing the applicant at the disposal of the Italian section of the typing pool, Directorate General A, as a secretary/shorthand typist.

2. Declare null and void the decision contained in the note from the Director of Administration dated 20 June 1972 whereby Article 60 of the Staff Regulations was applied to the applicant.

3. Declare null and void the decision contained in the letter from the Secretary-General of the Council dated 20 July 1972 confirming the application of Article 60 of the Staff Regulations to the applicant.

4. Order the opposing party to pay the costs of the action.

In Case 75/72, the *applicant* in essence reiterated her last three submissions in Case 58/72 and in addition submitted that the Court should.

— Declare null and void the notification of 28 August 1972 by the Principal Administrator confirming that the suspension of the payment of the applicant's remuneration would continue to have effect in accordance with the letter of 20 July 1972 from the Secretary-General.

The *defendant* submits that in Case 58/72 the Court should

— dismiss the application as being unfounded,

— order the applicant to pay the costs; and in Case 75/72

— dismiss the application as being inadmissible,

— alternatively, dismiss the application as being unfounded,

— order the applicant to pay the costs.

III — Pleas and arguments of the parties

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

In Case 58/72, the *applicant* contends that, by acting solely on the opinion of doctors of its choice as to her state of health, the Council acted unlawfully in assigning her to the typing pool.

As there was a conflict of opinion between the doctors consulted by the applicant and those consulted by the Institution, it would have been in keeping with the spirit of Article 59 of the Staff Regulations to refer to the Invalidity Committee for an Opinion. It was not open to the defendant to make a unilateral decision when confronted with conflicting medical opinions, as it did not have the necessary medical qualifications.

The applicant could not be blamed, therefore, for not having presented herself to carry out the duties of secretary/shorthand typist assigned to her 'while she was present at the office for other duties for which she was suited'. Consequently, it was wrong of the defendant to apply Article 60 of the Staff Regulations, as that Article presupposes an unauthorized absence.

The *defendant* states that the fact that the applicant was transferred to the typing pool did not necessarily imply that she was to be given typing work only.

While admitting that the applicant was, for a certain time, handicapped in carrying out her duties, the Council submits that by then she was fully capable of doing typing work.

The defendant gives a summary of the favourable treatment accorded to Signorina Perinciolo from the date of the accident up to 24 May 1972. It emphasizes particularly that this favourable treatment had only been discontinued three years after the Institution's medical adviser had withdrawn any reservations he had as to the ability of the applicant to carry out her duties.

At the time when the decision to transfer the applicant to the typing pool was taken, the defendant was able to base that action on a detailed and objective examination by the medical adviser of the Institution.

In order to be as certain as possible of the correctness of his diagnosis, the medical adviser referred Signorina Perinciolo's case to Dr Castiaux, the head of the Institut d'Orthopédie et de Traumatologie, who fully confirmed the opinion that the applicant was capable of doing typing work.

In regard to the argument of the applicant that the Invalidity Committee should have been consulted, as provided for in Article 59 of the Staff Regulations, the defendant points out that that Committee is not competent to decide whether an employee is ill or not but merely whether or not any invalidity exists. A careful interpretation of Article 59 (3) leads to the conclusion that that provision refers only to cases where the provisions relating to additional sick leave due to incapacity or automatic leave in a situation analogous to invalidity apply.

Further, the intervention of the Invalidity Committee does not come within the framework of the sickness scheme of the Staff Regulations, as the procedure for appointing an Invalidity

Committee to decide in each case whether an official is ill or not would be far too unwieldy and onerous a task. Finally the defendant maintains that the relevant provisions of the Staff Regulations in this case are based on the assumption that the employee is fit for service in his employment and that such employee must be assigned to a post corresponding to his employment. If the employee is not fit for service, he must be retired on grounds of invalidity, either at his own request or at the request of the authority. The Staff Regulations do not contain either a scheme for partial invalidity or for assignment for reasons of partial invalidity to employment other than that given to the employee on appointment or promotion. Moreover, there is no special procedure for determining whether the person concerned satisfies particular conditions which do not constitute either fitness or invalidity.

It follows that the objection that the Council acted unlawfully by failing to consult the Invalidity Committee at the time the applicant was assigned to the typing pool cannot be justified either in fact or in law.

In regard to the application of Article 60 of the Staff Regulations, the defendant submits that, after a decision to assign an official has been adopted, the person concerned has no choice other than to comply with that decision or to dispute its lawfulness by the legal methods of recourse open to officials. As the applicant merely refused to appear at her post, all the signs point to a situation of unauthorized absence within the meaning of Article 60 of the Staff Regulations. In these circumstances Article 60, which leaves no area of discretion to the authority, must be applied.

In Case 75/72, the *defendant* pleads that the action is inadmissible, pointing out that it covers the same facts, is based upon the same pleas and makes the same claims as the application brought by the applicant against the defendant in Case 58/72. It quotes the judgment of the Court in Joined Cases 45 and 49/70 *Bode* v *Commission* (Rec. 1971, p. 465) following which the objection of *'lis pendens'* would apply Moreover the Court cannot give judgment at the same time in these two actions by virtue of the principle *'non bis in idem'* which the Court called to mind in its judgment of 5 May 1966 in Joined Cases 18 and 35/65 *Gutmann* v. *Commission of the EAEC* (Rec. 1966, p. 195).

The *applicant* draws attention to the fact that it is only partly true that the application in Case 58/72 makes the same claims as the application in Case 75/72, as the application in Case 58/72 asks primarily for the annulment of the decision of assignment of 24 May 1972, while the application in Case 75/72 is concerned solely with the application of Article 60 of the Staff Regulations.

The *defendant* makes a careful comparison between the submissions of the applicant in Cases 58/72 and 75/72 and arrives at the conclusion that the only fresh factor in Case 75/72 is the application for annulment of the notification of 28 August which, however, cannot be considered as a fresh act itself capable of being the subject of an action as it is merely confirmatory of the letters of 20 June and 20 July 1972.

Finally the defendant points out that, by virtue of Article 91 (2) of the Staff Regulations, any application to the Court must be preceded by the submission to the appointing authority of a request or complaint within the meaning of Article 90 (2) and by a decision explicitly or impliedly rejecting that request or complaint.

As no request or complaint was submitted against the decision of 20 June 1972 within the prescribed time-limit, that is before 20 September 1972, any application to the Court is time-barred, even under the special procedure provided for in Article 91 (4).

The argument that the letter of 20 July constitutes a definitive decision cannot be justified as that letter is purely

confirmatory of the letter of 20 June 1972.

The complaint submitted to the competent authority on 9 October 1972 is therefore out of time, so that the conditions contained in Article 91 (4) are not satisfied.

In regard to the merits of Case 75/72, the parties refer for the main part to their arguments in Case 58/72.

Grounds of judgment

1 By application of 10 August 1972 the applicant brought before the Court an action for annulment firstly of the decision of the Administration of the Secretariat General of the Council dated 24 May 1972, placing the applicant at the disposal of the Italian section of the typing pool, Directorate General A, as a secretary/shorthand typist, secondly of the decision of the said Administration dated 20 June 1972, applying Article 60 of the Staff Regulations to her and thirdly of the letter of 20 July 1972 from the Secretary General confirming that latter decision.

2 By an application to the Court dated 17 October 1972 the applicant brought a second action for the annulment not only of the decision of 20 June 1972 and the letter of 20 July abovementioned but also of the notification of 28 August 1972 from the said Administration confirming that the suspension of the payment of the applicant's remuneration would continue to take effect in accordance with the letter of 20 July 1972.

As to the admissibility of the actions

3 The defendant admits that the action in Case 58/72 is admissible but contests the admissibility of the action in Case 75/72 on several grounds.

4 In regard to the application for annulment of the notification of 28 August 1972, that act is merely a consequence and a confirmation of the decision of 20 June 1972 and the letter of 20 July 1972 from the Secretary General, which acts are already the subject of the action in Case 58/72.

5 Moreover, insofar as the action in Case 75/72 is directed against those latter acts by reiterating the submissions in the action in Case 58/72, its admissibility runs counter to the objection of *'lis pendens'* which the Court must raise of its own motion.

6 It follows therefore that the action in Case 75/72 is inadmissible.

As to the merits of the action in Case 58/72

7 The applicant claims that, having regard to the medical certificates produced by her, the Administration was not within its rights in requiring her to comply with her assignment to the typing pool.

8 On the other hand, the difference between the opinions of the Administration's medical adviser and of the specialist which it consulted and those delivered in the certificates produced by the applicant should have caused the Administration to refer to the Invalidity Committee under Article 59 (3) of the Staff Regulations.

9 Having failed to do so, the Administration could not persist in implementing its decision of 24 May 1972 and, therefore, was not within its rights in regarding the refusal of the applicant to conform with that decision as unauthorized absence within the meaning of Article 60 of the Staff Regulations.

10 Article 59 of the Staff Regulations deals, on the one hand, with sick leave for an official prevented from performing his duties because of sickness or accident and, on the other hand, with automatic leave on the decision of the institution.

11 Therefore, as the third paragraph of that Article provides that cases of dispute shall be referred to the Invalidity Committee, it can only refer to cases of sick leave, without prejudice to the question of whether it refers only to the case laid down in paragraph 2 of the Article or also to that referred to in paragraph 1.

12 It is sufficient for the purposes of the present case to state that it does not concern sick leave of the applicant but the situation created by the objections she raised, because of her state of health, to her assignment to the typing pool.

13 In any case Article 59, and especially paragraph 3 thereof, does not refer to such a situation and cannot therefore be invoked in the present case.

14 Subject to the application of Sections 2 to 5 of Chapter 2 of Title III of the Staff Regulations, the normal status of an official is active status, defined in Article 36 as the status of an official who is performing the duties pertaining to the post to which he has been appointed as provided in Title IV.

15 When an official considers that the post to which he has been appointed is not suitable for him due to his state of health, he is obviously entitled to request another assignment but while awaiting such a transfer he is still obliged to present himself at his post and perform the duties pertaining thereto.

16 In any event, it cannot be admitted that in such circumstances the official may take the law into his own hands by considering that the submission of medical certificates dispenses him from appearing at his employment and allows him to absent himself while awaiting the offer of a post which he considers suitable.

17 Therefore both the action brought against the assignment of the applicant to the typing pool and the action brought against the application of Article 60 of the Staff Regulations must be dismissed as being unfounded.

Costs

18 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

19 The applicant has failed in her pleas.

20 But under the terms of Article 70 of the Rules of Procedure, the costs incurred by institutions in actions brought by employees of the Communities shall be borne by such institutions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 36, 59, 60, 90 and 91;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Dismisses the action in Case 75/72 as inadmissible;**
2. **Dismisses the action in Case 58/72 as unfounded;**
3. **Orders each party to bear its own costs.**

Monaco Donner Ó Dálaigh

Delivered in open court in Luxembourg on 17 May 1973.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 5 APRIL 1973

Mr President,

Members of the Court,

Signorina Letizia Perinciolo, the applicant in both these actions, first became an established official of the Communities on 16 July 1964, by a decision of the Secretariat General of the then Councils dated 7 July 1964. She was appointed by that decision to Grade C 4 and was assigned, as a typist, to the Italian section of the Secretariat General's typing pool, where she had served her probationary period pursuant to Article 34 of the Staff Regualtions.

On 3 May 1965 she underwent a routine medical check-up, pursuant to Article 59 (4) of the same Regulations, as a result of which she was found fit to perform her duties, as she had been, needless to say, at the initial medical examination required by Article 33.

On 6 November 1965, she had a riding accident following which she received extensive sick leave.

At her next annual medical check-up on 13 June 1966, she was found fit to perform her duties subject to these reservations: 'Fit for half-time work in June 1966. Further, is to avoid lengthy periods of typing for three months.' (My Lords, the originals of all the documents in these proceedings are either in French or in Italian. For the sake of simplicity my quotations from them will be throughout English translations).

My Lords, at the applicant's annual medical check-up on 11 July 1967 she was found fit subject to a reservation expressed as follows: 'Fit for full-time work but avoiding lengthy periods of typing and overtime for one month.'

On 13 July 1967 she was tranferred to the records department, Directorate General A, as a typist, but with an oral promise that in that department she would be given typing only occasionally.