

OPINION OF MR ADVOCATE-GENERAL ROEMER
DELIVERED ON 11 MARCH 1970¹

*Mr President,
Members of the Court,*

The case before the Court today concerns the application of the special provisions of Regulation No 259/68 of the Council of 29 February 1968 which have already occupied the Court on several occasions and which were intended to allow the single Commission to reduce the number of established posts and rationalize its services. The applicant in the present case was one of those entitled to benefit under these provisions. On 14 March 1968, in accordance with Article 4 (3) of Regulation No 259/68, he submitted an application for his service to be terminated, which the Commission granted in principle by decision of 21 May 1968. Subsequently, the Commission further decided, on 20 June 1968, that the applicant's service would be terminated with effect from 1 October 1968. The applicant was informed of this decision in a letter from the Directorate General for Personnel and Administration dated 21 June 1968, which contained the following words: 'La sopra-indicata decisione della Commissione ... avrà effetto dal 1° ottobre 1968 ...' (The above-mentioned decision of the Commission shall take effect as from 1 October 1968). This date is the cause of the difficulties of the present case. On the basis of his previous career, as a result of which he had attained the position of head of division in Grade A3, the applicant was due for automatic advancement to the next step in his grade on 1 October 1968, pursuant to Article 44 of the Staff Regulations, on condition that on that date he was still in active employment with the Commission. This fact is of importance *inter alia* for the calculation of his severance grant in accordance with Article 6 of Regulation No 259/68 in conjunction with Article 12 of Annex VIII to the Staff Regulations, since this is effected on the basis of the *last basic salary*. As the Court is aware, the Commission is of the opinion that the relation-

ship of master and servant came to an end on 30 September 1968 and that therefore the calculation must be effected on the basis of his salary at that date. This view was intended to be conveyed in a letter from the Directorate General for Personnel and Administration dated 25 June 1969, in which the applicant received details regarding the calculation effected according to Article 12 of Annex VIII to the Staff Regulations. The applicant is however of the opinion that his service was terminated only at the end of the first day of October 1968 and that therefore the calculation of the severance grant should be effected on the basis of the salary to which he would have been entitled on 1 October 1968. He therefore made an application to the Court on 23 September 1969, claiming the annulment of the communication which he received from the Directorate General for Personnel and Administration on 1 July 1969.

1. In deciding what ruling to give in this action the Court should first consider the question of admissibility, notwithstanding the fact that the Commission has raised no objection on this issue. In this connexion account must be taken above all of the *nature* of the contested measure. It has already been emphasized in earlier cases that, in principle, in matters concerning the law relating to officials only those measures adopted by the appointing authority itself can be contested. The appointing authority for officials in Category A and the body competent to decide questions such as that which concerns us here is not the Director General for Personnel and Administration, who took the decision at issue in this case. This is clear from the general decision taken by the Commission on 6 July 1967 pursuant to Article 2 of the Staff Regulations for the purpose of defining the appointing authority and determining the extent of its powers. Strictly speaking therefore it would be appropriate to conclude that the application

1 — Translated from the German.

for the annulment of the calculation contained in the letter from the Director General for Personnel and Administration dated 25 June 1969 should be dismissed as inadmissible. It does not seem to me however that in the present case the matter at issue should escape judicial review in this way. We must not overlook the fact that basically this case is concerned with a claim for the enforcement of *pecuniary rights* which arise by law under certain conditions when the master and servant relationship is terminated. The Staff Regulations do not require that this claim should be preceded by an administrative procedure, in the sense that a ruling may be sought from the Court only after the taking by the appointing authority of a definitive decision.

It must therefore be recognized that, although the appointing authority has not made any final pronouncement, the examination of the questions raised does not appear to be excluded and that the simplest solution is to interpret the application for annulment as an application for the payment of a sum of money or recognition of his right thereto.

2. In assessing the matter at issue, to which I shall now turn after this brief preliminary survey, the Court is solely concerned to ascertain when the applicant's service was terminated. It will be clear from the answer to this question whether the relevant basis for calculation of his pecuniary rights is his basic salary as at 30 September 1968 or as at 1 October 1968.

The Court will recall from the hearing that the principal basis of the applicant's case is that, according to a generally accepted principle, in calculating a period of time, the *dies ad quem* is included in that period. In view of the fact that the date 1 October 1968 was given in the relevant Commission decision regarding the applicant's termination of service as the date on which this was to take effect, the applicant claims that pursuant to the above-mentioned principle it must be accepted that the decision took effect only on the expiry of 1 October 1968. It can however readily be shown, in agreement with the Commission, that this line of argument is mistaken. The principle relied upon by the applicant, so far from

being of general application, is relevant only for the calculation of *periods*, that is to say the calculation of a specific number of days which are to elapse after a given date, and before the expiration of which a certain measure must be adopted. The situation with which we are concerned does not correspond to these conditions, since here it is a matter of fixing the day upon which a certain decision was to take effect. This fact should not be forgotten in considering the statement contained in the letter from the President of the Commission dated 22 May 1968, according to which the applicant was to fulfil certain functions *until* the termination of his service. This does not in fact constitute the fixing of a period within the meaning set out above but merely an indication of how the applicant was to spend his time up to the moment when the decision terminating his service was to take effect. I am therefore convinced that there can be no doubt on the question of the intention lying behind the fixing of the time at which the decision of 20 June 1968 was to take effect. The only construction which can be put upon the words 'avrà effetto dal 1° ottobre 1968' in the letter of 21 June 1968 from the Directorate General for Personnel and Administration is that the measure was to take effect *at the beginning* of the stated day or, put in another way, *at the end* of the previous day. This corresponds moreover to general practice. It would have been very unusual to terminate the service of an official at the end of the first day of a calendar month.

Nor can the applicant's argument be justified by reference to the Commission's intention to accord certain advantages to departing officials. The applicant has in mind here the provisions of Article 8 (3) of Annex VII to the Staff Regulations, to the following effect: 'An official whose service is terminated in the course of a calendar year ... shall, if he is in active employment in the service of an institution of the three European Communities for less than nine months of that year, be entitled only to part of the payment provided for in paragraph (1)' (that is to say a lump sum payment in respect of travel expenses from the place where he is employed to his place of origin). In this connexion the applicant

claims that the Commission in fact paid him the *full* lump sum payment for travel expenses in respect of 1968. However, it will easily be seen that from the Commission's point of view such an action was possible since, on the assumption that the applicant's service was terminated on 30 September 1968, the nine months within the meaning of Article 8 of Annex VII were completed at the end of 30 September 1968. This provision could therefore be applied unreservedly without having recourse to the applicant's argument, according to which the master and servant relationship was terminated only at the end of 1 October 1968.

Furthermore the applicant's statement that, if account is taken of his seniority as originally fixed, his advancement to the next step fell due on 1 August 1968 is beside the point. Although this may be true, what is important is that following appeals by other officials and by reason of formal defects in the original appointment procedure the applicant's seniority was amended by a *subsequent* Commission decision dated 26 February 1965. This decision, according to

which 1 October of every second year was to be the date upon which he was to advance to the next highest step, was never challenged by the applicant. In the present context it alone is relevant. It would be a mistake to take account of some such considerations of justice as those put forward by the applicant and to refer to an earlier estimate of seniority for the purpose of arranging for the applicant a more favourable calculation of his claim.

Finally, the Court can reject the applicant's statement that on 1 October 1968 he was still fulfilling the functions connected with his post. It may well be that he was present in his office on that day and that he signed official documents, although the Commission has challenged the accuracy of this statement. The important question is not whether *in fact* the applicant fulfilled obligations flowing from his previous functions, but rather whether in so doing he was acting under official instructions. This the applicant was not able to claim. This concords with the fact that no salary was paid for the day of 1 October 1968.

3. My opinion may accordingly be summarized as follows:

The letter addressed to the applicant by the Director General for Personnel and Administration dated 21 June 1968 is to be understood as meaning that as from 1 October 1968 the applicant would no longer be in the service of the Commission. As the Commission's administrative services have maintained, his pecuniary rights must be calculated, pursuant to Article 12 of Annex XIII to the Staff Regulations (and his claim to an allowance pursuant to Article 5 of Regulation No 259/68), on the basis of the salary due to the applicant in respect of September 1968. The applicant should therefore be dismissed as unfounded with the further consequence that the applicant must bear his own costs.