

JUDGMENT OF THE COURT (FIRST CHAMBER)
13 MAY 1970¹

Bernard Fournier
v Commission of the European Communities

Case 18/69

Summary

Officials — Recruitment — Compulsory procedures

The appointment and establishment of servants may only be effected in accordance with the procedures and requirements laid down by the Staff Regulations.

In Case 18/69

BERNARD FOURNIER, a member of the temporary staff of the Commission of the European Communities, represented by Philippe Waquet, Advocate, residing at 36, avenue Georges-Mandel, Paris, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Avocat-Avoue, 34 bis, rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Louis de la Fontaine, with an address for service in Luxembourg at the offices of Émile Reuter, Legal Adviser to the Commission, 4, boulevard Royal,

defendant,

Application for the annulment of the implied decision of the Commission rejecting the applicant's request to be established as an official in Grade A 4 and a request for a declaration that he should be established in that grade,

¹ — Language of the case: French.

THE COURT (First Chamber)

composed of: R. Monaco, President of Chamber, A. M. Donner and J. Mertens de Wilmars (Rapporteur), Judges,

Advocate-General: K. Roemer

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The applicant was appointed as a member of the auxiliary staff of the EEC in Group I of Category A on 12 August 1964 for a period of six months with effect from 1 September 1964, and had his contract renewed for successive periods until 31 December 1968.

Over the years he applied for various vacant posts and took part in a number of internal competitions: in one instance (Competition No 5768, Annex 55 to the application) he was included on the list of suitable candidates but was not appointed.

On 19 December 1968 he submitted a request through official channels 'for his position to be regularized, in particular that he be established in Grade A 4'.

By a decision of 23 December 1968 the Commission appointed him to the temporary staff in Grade B 1 (Step 3) for a period of three months, and informed him in a letter of 20 January 1969 'that this post was offered him pending a decision on his appointment as an official'; this contract as a temporary servant was extended on a number of occasions, the last time until 30 June 1970.

The present application, directed against the implied decision to refuse his request of 19

December 1968, was lodged on 21 April 1969.

II — Conclusions of the parties

The *applicant* claims that the Court should:

- annul the implied decision of refusal by the Commission of the European Communities,
- in doing so, rule that the applicant should be established as an official in Grade A 4,
- order the Commission of the European Communities to pay the entire costs.

The *defendant* contends that the Court should:

- declare the application inadmissible, or alternatively not well-founded;
- order the applicant to pay the costs.

III — Submissions and arguments of the parties

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

A — Admissibility

It is alleged by the *defendant* in the first place that the application should be declared inadmissible on the ground that it has no purpose: establishment of an official is only possible where there is a vacant post, and after an appointment and completion of the probationary period described in Article 34 of the Staff Regulations (first paragraph of Article 4, Articles 27 and 31 of the Regulations). The purpose of this application is therefore impossible of achievement having regard to the present legal position of the applicant.

Secondly it claims that the application should be dismissed on the ground that its purpose is insufficiently defined, for to request establishment in a particular grade without indicating either the post or the recruitment procedure relative thereto, and *a fortiori*, to request that 'his position be regularized' without further elaboration, has no meaning in law.

The *applicant* replies that the object of the application is to have his position redefined with regard to the relevant legal provisions and thus to secure an acknowledgement of his right to be established.

This object is in no way impossible since the applicant's rights have been infringed and the duty of the Court is to ensure respect for legal rights.

The applicant claims that the defendant kept him arbitrarily in the position of an auxiliary servant for more than four years when such status cannot continue for more than one year; it failed to respond to his applications for posts and it acted illegally in altering his position as an auxiliary servant in Group A I to that of a temporary servant in Grade B I when he was entitled to be established in Grade A.

Moreover, the Court of Justice has frequently intervened in similar cases to reinstate applicants in accordance with their rights and duties (judgment of 19 March 1964, Case 18/63 *Mrs E. Wollast v EEC* [1964] E.C.R. 85; judgment of 1 July 1964, Case 26/63 *Pistojs v Commission of the European Economic Community* [1964] E.C.R. 341).

The *defendant's* response is that the previous case-law of the Court cannot be relied on

here since the present application has nothing in common with those involving the judgments to which the applicant refers. According to the *defendant* the application is also inadmissible because in seeking a ruling 'that the applicant should be established as an official in Grade A 4' the applicant is asking the Court of Justice to give instructions to the appointing authority which encroach on the Commission's prerogatives. It refers in this context to the judgments of 16 December 1960 (*Fiddelaar v Commission of the EEC* Case 44/59, Rec. 1960 page 1093) and 15 December 1966 (*Serio v Commission of the ECSC*, Case 62/65 [1966] E.C.R. 571).

The Court has allowed applications from officials submitting claims under the provisions of the Staff Regulations for a grade corresponding to the duties carried out by them; but this case-law cannot be relied on by the applicant who has never been appointed an official and who has never carried out, in that capacity, duties specifically attached to a permanent post.

The *applicant* replies that the Court of Justice has unlimited jurisdiction and can therefore give a ruling as to which grade the applicant is entitled to claim (judgment of 9 June 1964, *Reynier and Erba v Commission of the EEC*, Joined Cases 79/63 and 82/63, [1964] E.C.R. 259; judgment of 19 March 1964 *Maudet v Commission of the EEC*, Joined Cases 20 and 21/63, [1964] E.C.R. 113). Consequently the Court of Justice can establish the illegality of the downgrading of the applicant from Category A to Category B, for his qualifications and references as well as his classification in career bracket A for the duration of his service as an auxiliary employee demand that he be classified in Category A.

In the rejoinder the *defendant* points out that the request for the annulment of his classification in Category B set out by the applicant in his reply is inadmissible because it is out of time. Moreover the object of the request is incomprehensible: if the Court holds that the applicant should be established in A 4 there is no point in making such a request and if the Court refuses such establishment but allows the application for the annulment of the classification the applicant would be without employment.

The *applicant* replies that this request was by implication but necessarily contained in the application.

The *defendant* lastly objects to the admissibility of the application on the ground that the applicant nowhere indicates what might be the legal basis for the alleged illegality of the refusal which he is challenging and therefore the application does not fulfil the requirements of Article 38 (1) (c) of the Rules of Procedure (judgment of 14 December 1962 *Meroni and Co. v High Authority of the ECSC*, Joined Cases 46 and 47/59, [1962] E.C.R. 419; judgment of 14 December 1966, *Alfieri v European Parliament*, Case 3/66, [1966] E.C.R. 447).

The *applicant* replies that his grounds for the application were briefly but sufficiently set out, namely: infringement of Article 52 of the Conditions of Employment for Other Servants; misuse of powers constituted by the hostile and unjust attitude consistently taken towards him, whether in respect of the persistent refusal to accord him the proper position to which he was entitled as of right, or on the occasion of his classification in Category B.

B — Substance

1. Infringement of Article 52 of the Conditions of Employment of Other Servants and infringement of the applicant's rights

The *applicant* alleges that his contract as an auxiliary servant was renewed on many occasions between 1 September 1964 and 31 December 1968 whereas Article 52 of the Regulations provides that the period of employment of auxiliary staff shall not exceed one year unless the servant is a temporary replacement for another member of staff; therefore when this period came to an end the defendant should have either terminated his employment or confirmed his position by making him an established official. According to the applicant all the conditions for establishing him were present. In the first place he had applied for many vacant posts, thereby giving the appointing authority an opportunity to appoint him, and on the other hand, as shown by the particulars furnished by him, he possessed

the capabilities, qualifications and references to merit his being appointed.

Lastly both the letter of 3 April 1968 from the applicant's superior and that addressed to him by the Commission on 20 January 1969 acknowledged the applicant's right to be established.

The Commission cannot rely on a purely legal formality as an excuse by claiming that a competition is a necessary pre-condition for appointing the applicant. It has kept 600 officials, including the applicant, in the position of auxiliary staff for years and should now bear the consequences of its actions and establish the applicant in conformity with the consistent practice followed in such matters with respect to 'former auxiliary staff'. Once the applicant's right to establishment has been proved, there is no doubt that such establishment can only be in Grade A 4.

The facts are that the applicant was an auxiliary servant in Category A, Group I, that is to say, according to the definition in Article 53 of the Conditions of Employment of Other Servants, a 'Researcher with a high degree of experience in one or more fields', which corresponds to the descriptions of the duties attaching to Category A to be found in Article 5 of the Staff Regulations; in the second place his duties cannot be assimilated to those of Category B which are 'executive duties which require an advanced level of secondary education or equivalent professional experience'.

Moreover, the other auxiliary servants in Group A I who have been established were established in Grade A 4, the grade which the applicant is seeking.

The *defendant* replies that although it is true that Article 52 has not been observed that fact alone is not sufficient to confer on the applicant a right to be appointed an official in Grade A 4.

The conditions of employment for 'other servants' contain no provision relating to the appointment of auxiliary staff as officials. For temporary servants, the second paragraph of Article 8 of the conditions explains that on the expiry of their contracts such servants may be assigned to established posts in the institution only if they are appointed as officials in accordance with the Staff Regulations. According to the de-

fendant the same rule must apply *a fortiori* to auxiliary servants.

Recruitment of officials is subject to specific rules from which the Commission may not deviate as the applicant wishes. The latter was successful in only one internal competition, and even in that case the Commission selected another auxiliary servant who obtained a higher place in preference to him. When the Commission decided to end the employment of all auxiliary servants by 1 January 1969 it substituted for their contracts as temporary servants, thus giving those concerned an opportunity to be established. To that end former auxiliary servants in Category A were classified in two categories: those who might become eligible for establishment in Category A, who were employed as temporary staff in Category A, and those who, for various reasons, would not be eligible for establishment in Category A and were employed as temporary staff in Category B. That was the position of the applicant and, moreover, says the defendant, it was on humanitarian grounds that he was offered this contract of employment when initially it had been intended to dispense with his services altogether in view of his inadequate performance.

2. Infringement of the applicant's vested rights

Next, the *applicant* alleges that the defendant acknowledged his right to be established both in a letter from Mr de Monts of 3 April 1968 and in the note from the Commission of 18 December and in the letter of 20 January 1969 addressed to him by the Director General for Personnel and Administration.

Such recognition, even if it were to constitute irregular establishment without a competition, has created a right for the applicant for which he claims recognition.

The *defendant* replies that it has never acknowledged that the applicant had a right to be established. The letter of 3 April 1968 from Mr de Monts merely spoke of a possible establishment, and the letter of 20 January 1969 should be interpreted as an offer of a contract as a temporary servant in the expectancy of an appointment to be

made should the applicant be successful in a competition.

Moreover, in giving the applicant a contract dating from 1 January 1969 as a temporary servant in Category B the Commission not only showed that it did not recognize his right to be established but also that it had not taken a decision to establish him without his taking a competition.

3. Misuse of powers and irregular competition procedure

The *applicant* claims that he is the victim of animosity.

He claims that after applying on 34 occasions to take part in competitions, only twice was he told the result of his application.

He claims that the competitions were a mere fiction because the results were known in advance; it is also claimed by the applicant that the only reason he never had any success in these irregular procedures was because of the animosity of a number of his superiors and colleagues.

The *defendant* replies that no proof has been given of this alleged misuse of powers.

As regards, first of all, the failure of the applicant's applications to meet with any response it observes that in 26 of the 34 cases competitions did not in fact take place in the end; in the other cases the delay complained of was due to the fact that the administration only notified the unsuccessful candidates after the appointing authority had made its choice.

Moreover, the failure to establish the applicant was due to the fact that the selection boards did not consider him suitable for the post he sought. This removes any suspicion of misuse of powers, in the absence of a claim that the members of the selection board failed in their duty to be objective by allowing themselves to be influenced by the alleged intrigues of certain officials.

IV — Procedure

On 17 September 1969 after hearing the views of the Advocate-General and receiving the written observations of the parties, the Court decided to reserve the defendant's objection of inadmissibility for the final judgment.

After hearing the views of the Advocate-General and the preliminary report of the Judge-Rapporteur the Court decided to open the oral procedure without any preparatory inquiry.
The written procedure followed the normal

course.

The parties presented oral argument at the hearing on 4 February 1970.

The Advocate-General delivered his opinion at the hearing on 11 March 1970.

Grounds of judgment

- 1 The applicant was engaged on 12 August 1964 as an auxiliary servant of the EEC in Group I of Category A for a period of six months, and his contract was extended by successive periods until 31 December 1968.
- 2 On 19 December 1968 he submitted a request to the Commission under Article 90 of the Staff Regulations asking to be established in Grade A 4.
- 3 On 23 December 1968 he was appointed a temporary servant in Grade B 1, Step 3, for a period of three months which was later extended by successive periods until 30 June 1970.
- 4 The application is for the annulment of the implied decision refusing the request for establishment resulting from the failure of the Commission to reply within a period of two months to the applicant's complaint through the official channels and for a ruling that the applicant is to be established in Grade A 4.

Admissibility

- 5 The applicant bases his request for establishment on the fact that he remained an auxiliary servant in the service of the Commission for several years, whereas under Article 52 of the Conditions of Employment of Other Servants the period of employment of an auxiliary servant may not exceed one year unless he is a temporary replacement for another member of staff, and besides this on the fact that his superiors in the service have acknowledged his eligibility for a Grade A 4 post.
- 6 He adds that during the preceding years he applied on a number of occasions for vacant posts, in particular those in Grade A to be filled by way of competition, and he suggests that irregularities occurred in connexion with these competitions.

- 7 None of these competitions however has been made the subject of a complaint or an application for annulment by him.
- 8 Even if the illegality of the successive extensions of his contract alleged by the applicant were established, his complaint through official channels and his application to the Court have as their object something which the Commission has no power to do because the appointment and establishment of servants may only be effected in accordance with the requirements and procedures laid down by the Staff Regulations.
- 9 Furthermore he has failed to indicate the legal basis for any part of his application.
- 10 Accordingly the application must be dismissed as inadmissible.

Costs

- 11 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.
- 12 The applicant has been unsuccessful in his claims.
- 13 However, under Article 70 of the Rules of Procedure in proceedings by servants of the Communities institutions shall bear their own costs.

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 Treaty establishing the European Economic Community especially Article 179;
 Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
 Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

Having regard to the Staff Regulations of Officials of the European Communities, especially Article 91;

Having regard to the Conditions of Employment of Other Servants of the European Communities, especially Article 52;

THE COURT (First Chamber)

hereby:

1. Dismisses the application as inadmissible;
2. Orders each party to bear its own costs.

Monaco

Donner

Mertens de Wilmars

Delivered in open court in Luxembourg on 13 May 1970.

A. Van Houtte

R. Monaco

Registrar

President of the First Chamber

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

*Mr President,
Members of the Court,*

The two cases (18/69 and 39/69) on which I am about to give my opinion were dealt with in joint oral proceedings on 4 February 1970. Since the same applicant lodged both, I can discuss them in one opinion. One advantage of this is that at least the facts can be summarized together. The following are the main facts.

The applicant is a French national who, after successfully completing his studies at the École des Sciences Politiques and working for a time for the United Nations, the

French Civil Service and private concerns, entered the service of the Commission of the European Economic Community on 1 September 1964. He was engaged on the basis of a contract of 12 August 1964 made initially for a period of six months. In law the applicant's position was that of a member of the auxiliary staff under Title III of the Conditions of Employment of Other Servants of the Communities; his remuneration was that of Category A I-II under Article 63 of those Conditions. Subsequently, despite several adverse reports, the applicant's contract was extended and for the last time on 10 July 1968 with effect until

¹ — Translated from the German.