JUDGMENT OF THE COURT (FIRST CHAMBER)
9 JULY 1970[1]

Fulvio Tortora
v Commission of the European Communities

Case 32/69

Summary

1. *Officials — Leave — Powers of organization of the administration — Harmonization of the interests of officials with administrative requirements*
(Staff Regulations of Officials of the European Communities, Article 57)

2. *Officials — Termination of service — Annual leave not used up — Compensatory payment — Grant only in cases justified by the exigencies of the service*
(Staff Regulations of Officials of the European Communities, Annex V, Article 4)

1. In dealing with leave, an institution has powers of organization enabling it, in each particular case, to harmonize the legitimate interests of the official with the requirements of effective functioning of its activities and of sound administration. With particular regard to this harmonization, the institution has the right to ensure that an official whose service is being terminated uses up his annual leave before his departure.
2. An official is only entitled to the compensation set out in the second paragraph of Article 4 of Annex V to the Staff Regulations in so far as the exigencies of the service have prevented him from using up all his annual leave before he leaves the service.

In Case 32/69

FULVIO TORTORA, a former official of the European Coal and Steel Community, residing at 22, Via Badia San Salvatore, Rome, represented and assisted by Gaston Vogel, Advocate of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Robert Krieps, 12 avenue Marie-Thérèse,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser,

1 — Language of the Case: French.

Louis de la Fontaine, acting as Agent, 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 decision of the Commission of 30 April 1969 refusing the applicant compensation for the annual leave not used up when he left the service,

THE COURT (First Chamber)

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

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

On 4 December 1963 the applicant was engaged as a temporary servant by the High Authority of the ECSC to fill the post of deputy principal private secretary to the President; on 11 November 1964 he was appointed to Grade A4 (in the Directorate of Inspection).

On 15 December 1965 he was made principal private secretary and temporarily graded A2 whilst continuing to hold the A4 post in that Directorate.

As the President of the High Authority had resigned on 5 March 1967 and the merger of Executives was imminent, the High Authority decided, in the course of its meetings of 21 and 22 June 1967, to retain the applicant — and the staff of the other private offices — at the disposal of its members for the month of July 1967, and to repost him as Principal Administrator in the Directorate of Inspection as from 1 August 1967.

As the merger of the Executives had taken place, the Commission of the European Communities decided to accept with effect from 1 October 1968 the applicant's request under Article 4 of Regulation No 259/68 of the Council that his service be terminated.

On 21 June 1968, in notifying him of this decision, the Director-General for Personnel and Administration requested him to take the leave which was due to him by the date on which his notice took effect, unless he was prevented from doing so for urgent service reasons.

In replying to a demand by the applicant for

payment for the leave which was not used up when he finally left the service, the Directorate-General for Personnel and Administration in a letter of 30 April 1969 wrote that, as no service reasons had prevented him from using up all the leave remaining due to him, there were in his case no grounds justifying payment of the compensation claimed.
On 22 July 1969 the applicant brought the present application.

2. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the First Chamber of the Court decided to open the oral proceedings without holding any preparatory inquiry.
The parties presented oral argument at the hearing on 13 May 1970.
The Advocate-General delivered his opinion on 28 May 1970.

II — Conclusions of the parties

The applicant claims that the Court should:

— declare that this application is admissible on the basis of Article 91 of the Staff Regulations of Officials of the European Coal and Steel Community;

— rule that by virtue of the second paragraph of Article 4 of Annex V to the Staff Regulations of Officials of the ECSC, the applicant has a right to compensation for all the leave which he had not used up when he left the service;

— as a result, vary the decision of 30 April 1969 of the Directorate-General for Personnel and Administration of the Commission of the European Communities rejecting his claim;

— rule and adjudge that the Commission of the European Communities is under an obligation to pay the applicant compensation for 67 days' leave which had not been used up (32 days for 1967 and 35 days for 1968) in accordance with the abovementioned second paragraph of Article 4 of Annex V, the compensation for the leave for 1967 to be calculated on the basis of the remuneration for Grade A2;

— rule that the Commission of the European Communities shall bear all the costs of the proceedings;

— otherwise permit the applicant to show by all legal means, particularly:

(a) *by producing official documents*

that the carrying forward of leave which had not been used up in the years 1964, 1965, 1966 and 1967 was on each occasion accepted by the competent authorities;

(b) *by expert opinion or else by witnesses*

that even after the closing down of the private office of the President of the High Authority, the applicant was not able to use up all the leave to which he was entitled becuase of the obvious requirements of the service;
that putting the records of the private office in order, and may other tasks connected with the closing down of the private office on the one hand and the sudden departure of President Del Bo on the other hand, obliged the applicant to remain in Luxembourg to ensure that the department which had just been closed down was properly wound up;
that the Directorate of Inspection was aware of this extremely serious situation and from 1 August 1967 to 1 October 1968 had not given Mr Tortora any other general duties;

— make all other orders which are necessary by law;

— suspend a decision as to costs.

The *defendant* contends that the Court should:

— dismiss the action as being without foundation;

— 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 — *The principal argument*

The *applicant* maintains that the decision of 30 April 1969 refusing him compensation for the leave which had not been used up, was a violation of the second paragraph of Article 4 of Annex V to the Staff Regulations as in this case all the conditions for the application of the article have been fulfilled.

The *defendant* points out that, because of the obvious connexion between leave and the requirements of the service, as confirmed by Article 55 of the Regulations:

— the administration may only refuse the leave requested by officials in so far as this is made necessary by the requirements of the service;

— an official, on the other hand, can neither claim the right of carrying forward to the following year leave in excess of the amount prescribed by the Staff Regulations, nor the right to compensation for leave which has not been used up where the official is leaving the service unless it was the requirements of the service which prevented him from taking his leave.

In this case, after permitting the applicant to carry forward to 1968 the leave which had not been used up in the previous year, the administration requested him in a letter of 21 June 1968 to use up completely the leave remaining due to him before he left the service unless this was not possible because of urgent requirements of the service. There were no such reasons. In fact:

— As the mandate of its members had ended on 4 July 1967, the High Authority decided to retain the staff of the private offices at the disposal of its members for the month of July 1967 and to move these officials to the posts which they were to hold as from 1 August 1967. At the end of this time all the private offices had been able to complete all the work involved in closing them down, whereas according to the applicant the winding up of the work of the President's private office kept him occupied until 30 September 1968.

— The Directorate of Inspection, the defendant claims, was never informed by the applicant of the 'heavy burden of work' arising from his former position as head of private office and did not relieve him of 'all other general duties' for the period from 1 August 1967 to 30 September 1968.

The defendant further maintains that the request for compensation for all the leave not used up in 1967, on the basis of the remuneration corresponding to Grade A2, lacks foundation. Quite apart from the fact that as from 1 August 1967 the applicant was paid on the basis of the remuneration corresponding to Grade A4, it should be noted that:

— the carrying forward of leave from one year to the next is done by incorporating the leave from the previous year into that of the following year, in such a way that in this case it would no longer be possible to distinguish between the leave from 1967 carried forward to 1968 and the leave for 1968 itself;

— in accordance with the second paragraph of Article 4 of Annex V to the Staff Regulations, the compensation for leave has not been used up is calculated on the basis of the monthly remuneration at the time of leaving the service.

Finally it states that the number of days of leave not used up by the applicant when he left the service amounts to 54 and not 67.

The *applicant* replies:

— It is common knowledge that the work involved in winding up the private

offices took much longer than the time stated by the defendant. In this case it was complicated by the resignation of the President and by the size of his private office. The Commission is invited to give the exact dates on which the staff of the other private offices were given new postings.

— The Commission is further invited to produce the decision posting the applicant to a new post, other than that of principal private secretary because by law every official shall have a post. The purely formal return to the offices of the Directorate of Inspection on 21 June 1967 is not sufficient in this respect.

— Refusal to grant annual leave can only be justified, in exceptional circumstances, by the requirements of the service and even in this case the Staff Regulations are careful to guarantee the official his rights by guaranteeing him that either his leave will be carried forward or that he will receive financial compensation.

— As an official in active employment may carry forward his leave, an official who has left the service has a right to a compensatory payment provided that he has not used up all his annual leave when he leaves the service. There is no legislation nor any principle which provides that he may be deprived of this right by an administrative act, such as an order to use up his leave before leaving the service.

Finally the applicant states that the Commission cannot demand that he prove 'urgent requirements of the service' to justify his presence in the office. On the one hand it may be asked whether it is admissible to make his presence in the office dependent on 'urgent requirements', whilst on the other hand, as the Commission itself judged that the collaboration of the applicant was necessary until 30 September 1968, its contention contradicts its own judgment and its own decision.

The *defendant* replies:

— Since the applicant was relieved of his position as principal private secretary to Mr Del Bo and re-assigned to his post as from 1 August 1967, he could not properly continue to perform the same duties.

— Moreover as steps had been taken for his service to terminate, his name could not appear in the new detailed list of posts. As his normal service duties were thus suspended, the Commission was justified in asking him to use up his leave before he left.

— Because of the special nature of the situation the applicant was in, as from July 1968, the Commission was moreover within its rights in refusing him the compensation which he claimed.

— The applicant does not comply with the conditions in the second paragraph of Article 4 of Annex V. Whereas that article (cf. especially the Italian version) presupposes that the official has used up at least part of his annual leave in the year in which he leaves the service, the applicant did not take a single day's leave in 1968.

— Furthermore in accordance with a general principle in relation to leave, an official who does not use up his right to leave without being able to show the requirements of the service as the cause loses, if not all, then at least part of his leave. A distinction between an employee in active employment and one who has left the service is in no way justified in this respect.

B — *The alternative argument*

As to the offers of proof made by the applicant in the alternative, the *defendant* replies:

(a) the submission at (a) has no purpose as the carrying forward of leave which had not been used up in the course of the years 1964 to 1967 was duly authorized;

(b) the submission at (b):

— is, as to its *first paragraph* inadmis-

sible in that it should have stated that it was in 1968 that the applicant was prevented from using up his leave. Moreover it is categorically denied by his official superior who did not admit the existence of requirements of the service which prevented Mr Tortora from using up his leave (Schedule 11 to the application);

— as to its *second paragraph*, is equally inadmissible in that the claimant did not state precisely the period during which he was obliged to remain to deal with the work involved in closing down the President's private office. In any event this could only be the period from 1 January 1968 to 30 September 1968, the leave for 1967 having been carried forward to 1968;

— as to its *second* and *third paragraphs* is based on allegations which have already been shown to be false.

The *applicant* reiterates, first that the proof of the 'needs' justifying the 'presence' of the official follows from the supposition that the creation and maintenance of a post from both an administrative and a budgetary standpoint must correspond with the needs of the service and further offers to prove that the time-limit set for him in the letter of 21 June 1968 'did not allow him to arrange his leave in normal circumstances because, on the one hand, the season was too far advanced for him to arrange a trip to a holiday resort, and, on the other hand, his duties in connexion with the closing down of the private office were both a mental and physical bar to his going'.

The *defendant* maintains that this submission is inadmissible in that it is too vague to be taken into consideration and is quite irrelevant as leave cannot depend on the possibility of arranging a trip to a holiday resort.

C — *The procedural request*

The *applicant* requests the Court to order that the passage in the statement of defence, beginning with the words 'It is difficult to see ...' and ending with the words '... a period of 15 months' should be struck out as casting aspersions upon his honour.

The *defendant* argues that in that passage, in challenging the facts submitted by the applicant, it did not go beyond its right of reply.

Grounds of judgment

1 By an application lodged on 22 July 1969, the applicant has asked the Court to annul the decision of 30 April 1969 which denied him compensation for leave which he had not used up and to order the Commission to pay him this compensation for 67 days' leave which he had not used up.

2 Under the terms of the second paragraph of Article 4 of Annex V to the Staff Regulations 'Where an official at the time of leaving the service has not used up all his annual leave, he shall be paid compensation equal to one-thirtieth of his monthly remuneration at the time of leaving the service for each day's leave due to him'.

3 The applicant was previously attached to the private office of Mr Del Bo and after he resigned as President of the High Authority on 5 March 1967, the applicant was responsible for the winding up of the work of the private office.

4 Following the entry into force of the Treaty of 8 April 1965 setting up a Single Council and a Single Commission of the European Communities the closing down of all the private offices of the former High Authority was decided upon; however by a decision of 4 July 1967 the staff was retained at the disposal of the former members until 31 July 1967.

5 On 1 August 1967 the applicant was re-assigned to his post of Principal Administrator in the Directorate of Inspection.

6 In April 1968 he asked for measures to be taken to terminate his service as provided by Regulation No 259/68 of the Council, his request being granted with effect from 1 October 1968.

7 On 21 June 1968, following the abovementioned request, the Commission requested him to take the leave to which he was still entitled, before 1 October 1968.

8 Nevertheless the applicant maintains that he remained engaged in winding up the work of the private office of President Del Bo until 30 September 1968 and that this had prevented him from taking the leave in question.

9 He thus claims that the refusal of the Commission to pay him compensation for the leave which had not been used up on that date unlawfully deprives him of the benefit of the second paragraph of the said Article 4.

10 Since under the first paragraph of Article 57 of the Staff Regulations, an institution is obliged to guarantee every official the right to annual leave, this right must be exercised with due regard to the interests of the service.

11 In dealing with leave, the institution has powers of organization enabling it, in each particular case, to harmonize the legitimate interests of the official with the requirements of effective functioning of its activities and of sound administration.

12 With particular regard to this harmonization, the institution has the right to ensure that an official whose service is being terminated, uses up his annual leave before his departure.

13 The first paragraph of Article 4 of Annex V to the Staff Regulations, relating to the carrying forward of leave not used up by an official who is still in active employment, confirms by implication that failure to use up annual leave must be regarded as exceptional.

14 Consequently an official is only entitled to the compensation set out in the second paragraph of Article 4 of the said Annex, in so far as the exigencies of the service have prevented him from using up all his annual leave, before he leaves the service.

15 It is clear that by 31 July 1967 all the other private offices had been able to complete the work involved in their closing down.

16 Whilst the winding up of the work of the private office of the President of the the High Authority may have taken longer than in the case of the other private offices, the applicant was in a position to start on it in March 1967 at the time when the President of the High Authority tendered his resignation and the closing down of his private office was already in prospect.

17 The applicant himself states that no specific task had been entrusted to him in the Directorate to which he had been re-assigned on 1 August 1967 and that he was able to devote himself to winding up the work of the private office as far as was necessary.

18 All the same having been subject to a measure terminating his service in the terms of Regulation No 259/68 of the Council effective as from 1 October 1968 and for which he had volunteered in April 1968, the applicant was, after this decision, in an exceptional situation in that his service was due to end shortly and in that he no longer had to deal with important long-term tasks.

19 In these circumstances it has not been established that his work could have prevented him from complying with the request sent to him on 21 June 1968 to use up before 1 October of that year the leave to which he was still entitled.

20 For these reasons there appears to be no point in accepting the offers of proof made by the applicant.

21 The applicant further maintains that when he received the request from the Director-General for Personnel and Administration to use up his leave it was no longer possible for him to arrange a trip to a holiday resort.

22 Whilst the administration must take account of the actual possibilities open to an official when it requests him at short notice to use up the leave to which he is entitled, it cannot be accepted that it must also take into consideration each individual official's prospects with regard to resorts.

23 Therefore it may be concluded that the request sent to the applicant in June 1968 to use up his leave before 1 October 1968 did not adversely affect his legitimate interests.

24 For these reasons the applicant has no right to compensation.

25 The application is without foundation and must be dismissed accordingly.

The procedural request

26 As a matter of procedure the applicant requests that the following passage should be struck out from the statement of defence as casting aspersions upon his honour: 'it is very difficult to see how the applicant... can properly maintain today that the work involved in closing down the private office of the President of the High Authority kept him until 30 September 1968 that is, for a period of 15 months'.

27 In expressing its doubts as to the necessity for extending the work of winding up the private office of the President of the High Authority over 15 months the defendant has in no way impunged the applicant's honour.

28 The procedural request is without justification and must therefore be dismissed.

Costs

29 The applicant has failed in his application.

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

31 However, Article 70 of the Rules of Procedure provides that, in proceedings commenced 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 Treaties establishing the European Communities;
Having regard to the Protocols on the Statutes of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 55 and 57 and Article 4 of Annex V;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders each party to bear its own costs.**

Monaco Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 9 July 1970.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 28 MAY 1970[1]

Mr President,
Members of the Court,

Today's proceedings are concerned with the conditions under which an official who has left the service of the Communities may obtain monetary compensation for leave which he had not used up. The following is a brief introduction to the case.
The applicant entered the service of the European Communities in April 1958 and was at first an official of the Euratom Commission in Grade A5. As from 10 October 1963 he became a temporary servant (under Title II of the Conditions of Employment of Other Servants of the Communities) and was employed as deputy principal private secretary to the President of the High Authority of the European Coal and Steel Community. He was made a permanent official of the High Authority by a decision of 15 April 1964, taking effect as from 16 April 1964. In spite of his continuing employment as deputy

1 — Translated from the German.