JUDGMENT OF THE COURT
24 JUNE 1971[1]

Willem Vinck
v Commission of the European Communities

Case 53/70

Summary

1. *Officials — Application — Implied rejection — Expiry of limitation period for appeal — Express rejection — Absence of any new factor — Confirmatory nature — No act adversely affecting applicant*

2. *Action for damages — Connexion with action for annulment (Staff Regulations, Article 91)*

1. A decision which is confirmatory of an earlier implied decision of refusal does not cause time to begin to run afresh for the purpose of bringing proceedings.
2. An action for damages which is only designed to obtain for the applicant the equivalent of benefits which he has been refused by a decision against which an action for annulment is inadmissible must meet the same fate as the latter action.

In Case 53/70

WILLEM VINCK, an official of the Commission of the European Communities, residing at Overijse (Belgium), represented by Jacques Putzeys, Advocate of the Cour d'appeal, Brussels, with an address for service in Luxembourg at the Chambers of Nicolas Wennmacher, huissier, 17 boulevard Royal,

applicant,

v

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

defendant,

Application relating, at the present stage of the proceedings, to the admissibility of Mr Vinck's application for, on the one hand, the annulment of the decision by the President of the Commission of 21 May 1970 rejecting his application of 16 February 1970 for compensation for the 'exceptional damage' arising from 'irregular development of his career' as well as for 'career compensation' and, on the other hand, for damages,

1 — Language of the Case: French.

THE COURT (Second Chamber)

composed of: A. Trabucchi, President of Chamber, P. Pescatore (Rapporteur) and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

On 5 May 1958 Mr Willem Vinck entered the service of the Commission of the EAEC, with a basic salary corresponding to Grade A 5, as Secretary of the Directorate-General for Industry and the Economy, it being his particular task to be concerned with questions of re-cycling and technical security.
On 1 May 1961 Mr Vinck's basic salary was raised to the level corresponding Grade A 4, Step 1.
Mr Vinck was established in Grade A 4 with effect from 1 January 1962.
On 14 May 1963 Mr Vinck applied for the post of Head of Division in Grade A 3 in the Directorate-General for Industry.
This application was not granted.
On 1 July and 11 October 1965 Mr Vinck again unsuccessfully applied for two posts which had been declared vacant in the departments of the Commission.
By internal notice of 30 March 1966 the Directorate-General for Industry and the Economy decided that 'work concerning safety on the nuclear installations shall be . . . carried out by the safety department under the direction of Mr Vinck . . . under the direct responsibility of the Director for Industry'.
On 2 December 1966 Mr Vinck requested that the establishment of the specialized department managed by him be put on an official basis and be incorporated in the Commission's detailed list of posts.
By memorandum of 24 August 1967, which was confirmed on 25 September 1967, Mr Vinck asked the Director-General at the Directorate-General for Personnel and Administration that decisions be taken during 1967 in regard to his promotion to Grade A 3.
On 19 October 1967 he received the reply that promotion is not a question of right but one of eligibility and that failure to promote cannot constitute an act having adverse effect within the meaning of the Staff Regulations.
At its 25th meeting on 13, 14 and 15 February 1968 the Commission adopted the new detailed list of posts for its departments, which was published in the Staff Courier of 11 March 1968.
Also on 11 March 1968 Mr Vinck asked the President of the Commission under the provisions of Article 90 of the Staff Regulations for further details on the structure of the establishment plan in so far as his own sphere of work was concerned.
On 14 March 1968 Mr Vinck requested the Directorate-General for Industry and

the Economy to consider his application for promotion to Grade A 3 during the course of 1968.

By decision of 30 May 1968, which was notified to Mr Vinck on 12 June 1968, the Commission appointed him, in the framework of its new detailed list of posts made as part of the restructuring and rationalization of the whole of its departments to the post of Principal Administrator in the Industrial Promotion of Nuclear Energy and Advanced Technology Division of Directorate C of Directorate-General III (Industry).

On 13 June 1968 the Commission published a decision of the Commission involving changes in the administrative structure of Directorate C of Directorate-General III.

On 14 June 1968 Mr Vinck applied for posts declared vacant by Notices COM/76 and COM/77 respectively.

On 17 June 1968 Mr Vinck drew the attention of the President of the Commission under Article 90 of the Staff Regulations to the fact that the individual decision of 30 May 1968 and the Commission's measure of 13 June 1968 on the alteration of the administrative structure of Directorate C of Directorate-General III 'might imply a refusal to keep (him) in the post of the head of an independent department' and requested that he be allowed to retain his 'administrative independence as head of department'.

On 10 July 1968 Mr Vinck informed the President of the Commission, under Article 90 of the Staff Regulations, *inter alia* that the decision to alter the administrative structure of the Directorate-General to which he belonged constituted a new measure of a general nature which caused new limitation periods to begin to run, and as regards the notification on 12 June 1968 of the decision of 30 May, that the date of 12 September 1968 could be treated as the last day for bringing an appeal against an individual measure.

In July 1968 Mr Vinck applied for a post declared vacant under No COM/42.

On 11 March 1969 he was notified that his application was refused.

On 26 July 1968 the President of the Commission informed Mr Vinck in reply to his request of 11 March 1968 that 'it was . . . with full knowledge of the facts that the Commission was able to decide on the organization of the detailed list of posts of its departments' and confirmed to him that it had not considered it necessary to create a specialized department in respect of work involving the safety of nuclear installations.

On 7 August 1968 Mr Vinck, relying on Article 90 of the Staff Regulations, pointed out to the President of the Commission that his letter of 26 July 1968 only amounted to a partial reply to the requests addressed to the appointing authority and that in particular it did not refer to the formal request of 17 June 1968.

On 23 August 1968 Mr Vinck, by a note addressed to the President of the Commission, renewed his application for the post declared vacant under No COM/77 and asked for an acknowledgement of receipt of his requests of 17 June and 7 August 1968.

On 4 September 1968 Mr Vinck again applied for a post declared vacant.

On 29 January 1969 he was notified that this application had been refused.

On 18 December 1968 the President of the Commission confirmed to the applicant in reply to his requests of 17 June, 10 July, 7 August and 23 August 1968 that the Commission had decided with full knowledge of the facts on the organization of the detailed list of posts of its departments and that this list did not include a specialized department relating to questions involving safety of nuclear installations since these only represented part of the work of the division within which he was required to discharge responsibilities appropriate to his grade, more specifically in so far as questions of safety of nuclear installations were concerned.

On 25 January 1969 Mr Vinck reminded

the President of the Commission under Article 90 of the Staff Regulations of his 'legitimate aspirations to be promoted to the post of Head of Division III—C-4' and informed him that since the Commission refused to continue the specialized department for 'Safety of Nuclear Installations' and since as of now it appeared to prejudge his ultimate position in the administration, he felt obliged to consider the letter of 18 December 1968 as amounting to a measure of an individual character in the sense of Article 91 (2) of the Staff Regulations.

On 27 January 1969 Mr Vinck submitted his application for the internal competition opened for the purpose of filling the post declared vacant under No COM/77.

On 6 May 1969 Mr Vinck drew the attention of the President of the Commission under the provisions of Article 90 of the Staff Regulations to *inter alia* the fact that the absence of a reply to his request of 25 January 1969 amounted under Article 91 (2) of the Staff Regulations to an implied decision of rejection but that since he was unable to assess in what manner such a rejection might be interpreted, he did not have available to him official data that would enable him to decide whether or not an application to the Court was appropriate.

On 14 May 1969 the Commission decided not to reply to the complaint made by Mr Vinck on 25 January 1969.

On 1 August 1969 the President of the Commission informed Mr Vinck in reply to his request of 6 May 1969 *inter alia* that the post declared vacant under No COM/42 had been filled under the provisions of Article 29 (2) of the Staff Regulations.

By note of 5 September 1969 Mr Vinck requested the President of the Commission under Article 90 of the Staff Regulations to be informed of the result of Internal Competition No COM/77.

On 8 September 1969 Mr Vinck asked the President of the Commission under Article 90 of the Staff Regulations that, should it be confirmed that his application to take part in Internal Competition COM/77 was not successful, the department concerned with technical aspects of 'safety of nuclear installations' be re-established with the status of a division and that procedures be put in hand to enable him to be appointed to Grade A 3 as the head of that department.

On 12 November 1969 the President of the Commission informed Mr Vinck that although he had appeared on the list of suitable candidates, his application for the post declared vacant in Notice of Competition No COM/77, had not been successful.

On 24 November 1969 Mr Vinck applied for the post declared vacant in Notice of Competition No COM/783/69.

On 6 April 1970 the President of the Commission informed Mr Vinck in reply to his request of 8 September 1969 that a change in the administrative structure of the Directorate-General for Industrial Affairs was under consideration and that the Commission which alone was competent in the matter of the organization of its departments would have occasion to examine the considerations which he had put forward.

On 16 February 1970 Mr Jacques Putzeys, Mr Vinck's Legal Adviser, addressed a request to the President of the Commission under Article 90 of the Staff Regulations which primarily sought an award of compensation 'for the exceptional damage arising from the irregular development of Mr Vinck's career' and secondarily 'the termination in a reasonable manner of the presently continuing damage by way of career compensation'.

By letter of 21 May 1970 the President of the Commission in reply to the request of 16 February 1970 informed Mr Vinck that the Commission had taken its decision in full knowledge of the facts on the organization of the detailed list of posts relating to its departments; that it was for the Commission alone to de-

cide whether to increase, to continue or to reduce activity in any particular field and to organize its departments in a manner which it considered most appropriate; that the applications submitted by Mr Vinck for various posts of head of division had been examined under the conditions laid down by the Staff Regulations; that no irregularity had appeared in the procedures which had resulted in the appointment of other candidates; that promotion to Grade A 3 could not be considered as right; finally, that the Commission could not consider Mr Vinck's request to be well founded.

II — Procedure

On 28 August 1970 Mr Vinck brought an action in which he claims that the Court should:

(a) in the first place
- — annul the decision of the President of the Commission dated 2 May 1970 and notified on 29 May 1970;
- — in the exercise of its unlimited jurisdiction, declare that by reason of the acts and omissions of the Commission he has suffered exceptional damage, the amount of which to be assessed in a sum which the Court shall consider fair and reasonable;
- — order the Commission to terminate in a reasonable manner the presently continuing damage by way of career compensation;

(b) alternatively, award him compensation for exceptional damage since his legitimate expectations had been deceived as the result of the Commission's conduct;

(c) in any event order the Commission to pay the costs.

By document lodged on 3 October 1970 the Commission asked the Court pursuant to Article 91 of the Rules of Procedure to rule on a preliminary objection relating to the admissibility of the application and to find against the applicant by declaring the application wholly inadmissible.

In his observations lodged on 11 December 1970 the applicant asked the Court to declare his application admissible or at least to reserve its decision on the objection for the final judgment and to fix fresh time-limits for the continuation of the proceedings on the substance of the case.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure in relation to the objection.

The parties presented oral argument on the admissibility of the application at the hearing on 1 April 1971.

The Advocate-General delivered his opinion on the admissibility of the application at the hearing on 9 June 1971.

III — Submissions and arguments of the parties on the admissibility of the application

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

The *defendant,* as the *applicant in connexion with the interlocutory application,* objects to the admissibility of the application on several grounds:

(a) As regards the application for annulment of the decision of the President of the Commission of 21 May 1970, rejecting the applicant's request of 16 February 1970, made before the institution of proceedings:

According to the case-law of the Court, although a party may proceed by way of action founded on the liability of the administration without being obliged to seek the annulment of the illegal measure causing him damage, he cannot by this device evade the inadmissibility of a claim founded upon that same illegality and having the same financial ends.

Moreover, where the applicant fails to contest in good time the measures from which the damage relied upon clearly stems, he cannot repair this omission and in a certain sense obtain a fresh opportunity of appealing by means of a claim for damages. If therefore the administration is entitled to plead the inadmissibility of such an action for damages, it must also be able to do so in relation to an action for annulment of a decision—whether express or implied—rejecting such a claim for damages.

In the present case the damage which the applicant claims to have suffered is based on the alleged 'irregularities' in the development of his career, all of which in the final analysis amount to the fact that he was not appointed to a post in Grade A 3. However, the applicant could in fact have contested in good time the measures in question in order to avoid the damage of which he now complains.

As regards more particularly the Commission's refusal to continue an independent department for the 'Safety of Nuclear Installations', intended to be transformed into a division directed by the applicant, the latter ought, not later than four months after his request of 17 June 1968, to have brought an action either against the Commission's decision published on 13 June 1968 on the organization of the detailed list of posts relating to its departments, or against the Commission's decision of 30 May 1968 notified on 12 June 1968, which defined his duties. Even if against all likelihood one could treat the reply from the President of the Commission dated 18 December 1968 as not merely confirmatory, the applicant ought to have made an application to the Court before 19 March 1968.

As regards the failure to promote him to Grade A 3 during 1966 and 1967, the applicant ought at least to have contested the decisions appointing other officials not more than three months after becoming aware of the insufficient information in the Commission's hands to which he attributes the damage to his career.

As regards the failure to appoint the applicant to a post in Grade A 3 after there had been several vacancies, he could and ought to have contested the appointments made not more than three months after being officially informed of the matter by the letter of the President of the Commission of 26 July 1968.

As regards the rejection of the applicant's request, made before the proceedings were instituted, for the termination of the continuing damage to the applicant by way of career compensation it must be said that this request was inadmissible: it is wholly lacking in precision; it does not pursue an objective capable of being attained at law; it invites the Court to issue instructions to the Commission.

(b) As regards the application for damages in respect of exceptional damage allegedly suffered by the applicant 'by reason of the act and failure to act on the part of the Commission' and the application for 'career compensation', these are equally inadmissible for the reasons set out above.

(c) As regards the application for compensation in respect of exceptional damage by reason of the applicant's having been deceived in his reasonable expectations, it cannot be accepted that an official who failed to contest measures which allegedly caused him damage and the illegality or the irregular nature of which was not proved in good time, may obtain compensation by putting forward *ex post facto* and, moreover, in a very vague manner, such a complaint.

The *applicant (the defendant in the interlocutory proceedings)* takes the view that at the present stage of the proceedings all that has to be done is to consider the admissibility of the application *ratione taemporis;* a discussion as to the admissibility of the application *ratione materiae* would go to the substance of the case. The only question to decide is that whether the applicant was barred from making his complaint of 16 February 1970 and the present application.

(a) As regards the admissibility of the

application as a whole, the applicant argues that the request made by him on 16 February 1970 under the provisions of Article 90 of the Staff Regulations was a new request in that for the first time it was based on the failure to respect his career prospects.

Moreover, the recognition of subjective rights which the Staff Regulations accord to officials in questions relating to their careers cannot be qualified by any limitation as to time.

(b) As regards the admissibility of the application for annulment it must be said that this application is not intended once more to call in question the legality of individual measures which have become final or of obtaining the same result; it is purely a matter of the Court's being asked to find, by annulling the decision of 21 May 1970, that the Commission by a series of measures, actions and attitudes has disregarded the applicant's right to a normal development of his career and to his career 'prospects'.

This subjective rights results in particular from Articles 5 (3), 29 and 45 of the Staff Regulations as well as from Annex 1 thereto.

The first ground of application is admissible since it is based on an objective finding of failure to appoint or promote the applicant ever since he was established, a failure which is contrary to career prospects recognized by the Staff Regulations.

The second ground is admissible on the basis of an objective finding of disregard of the principle of equality of rights of officials eligible for promotion, a right which is recognized by Article 45 of the Staff Regulations.

There is therefore no question of once again calling in issue the promotions or appointments which have taken place, or the Commission's detailed list of posts, or even of obtaining the same result by indirect means; it is merely a matter of furnishing proof, by replying on objective factors which can no longer be disputed, that the rights to which the applicant is entitled under the Staff Regulations have not been respected by the Commission.

(c) The application for compensation is also admissible, since it is based on the Commission's misuse of powers: it is apparent from the circumstances surrounding the applicant's career that the Commission deliberately intended to deny him a normal career; the refusal to appoint or promote him to one of the numerous vacant posts for which he had applied cannot be justified on grounds based on the interests of the service but amounts to a genuine disguised disciplinary penalty and accordingly to a misuse of powers.

Grounds of judgment

1 The application seeks the annulment of the communication of 21 May 1970 by which the President of the Commission rejected certain requests made by the applicant in relation to his position in the administration and to the development of his career.

2 Furthermore, the Court is asked to find proved the exceptional damage which the applicant claims he has suffered by reason of the Commission's attitude towards him and to draw the consequences from this finding by awarding him either a 'career compensation' or appropriate financial damages.

3 The Commission, pursuant to Article 91 of the Rules of Procedure, has asked the Court to rule on the admissibility of the application without going into the substance of the case.

[4] The admissibility of the different heads of claim must be considered in the light of what preceded the communication of 21 May 1970, which is the subject-matter of the application.

[5] It appears from the file that the applicant repeatedly submitted his application for vacant posts which would have entailed his promotion to Grade A 3 but that his applications were not granted by the Commission.

[6] Moreover, he repeatedly addressed requests to the Commission relating to the creation of an independent department in his field the management of which he could have assumed under conditions which would have ensured his promotion.

[7] The Commission nevertheless did not accept any of the proposals which the applicant made on this subject.

[8] Faced with the Commission's attitude towards him, the applicant, by letter of 16 February 1970, asked for the award of compensation 'for exceptional damage arising from the irregular development of career' and secondarily for 'the termination in a reasonable manner of the presently continuing damage by way of career compensation'.

[9] In his reply of 21 May 1970 the President of the Commission reminded the applicant of the fact that it is for the Commission, and for the Commission alone, to decide on the organization of its departments, that the applications made by him for several posts of head of division had been examined under the conditions laid down in the Staff Regulations, that no irregularity had been found in the procedures which resulted in the appointment of other applicants, and finally that promotion to Grade A 3 cannot be considered as a right and that the Commission could not therefore accept as well founded the requests formulated in the letter of 16 February 1970.

[10] On the one hand the period for bringing an action relating to the implied decision of rejection, resulting from the Commission's silence on the applicant's last request dated 16 February 1970 had expired before the application was made.

[11] On the other hand by its letter of 21 May 1970 the Commission did no more than confirm the position which it had previously taken on the applications which the applicant had made on the proposals which he had made in relation to the re-organization of the departments and the creation of an independent department under his authority.

[12] This communication did not therefore have the effect of causing time to run afresh in favour of the applicant for the purposes of an appeal to the Court.

[13] The secondary conclusions formulated for the purpose of obtaining 'career compensation' or a finding of 'exceptional damage' are only designed to obtain for the applicant the career benefits which have hitherto been refused to him, or their equivalent in the form of damages.

[14] These heads of the application must therefore meet the same fate as the principal claim.

[15] It follows from the foregoing that the application must be dismissed as inadmissible in its entirety.

Costs

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

[17] The applicant has failed in his application.

[18] Nevertheless, under the terms of Article 70 of the Rules of Procedure, institutions shall bear their own costs in proceedings commenced by servants of the Communities.

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 Staff Regulations;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure, especially Article 91;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as inadmissible.**
2. **Orders the parties to bear their own costs.**

Trabucchi Pescatore Kutscher

Delivered in open court in Luxembourg on 24 June 1971.

A. Van Houtte
Registrar

A. Trabucchi
President of the Second Chamber