JUDGMENT OF THE COURT (FIRST CHAMBER)
28 MAY 1970[1]

Franco Peco
Commission of the European Communities

Case 36/69

Summary

1. Officials — Grade and post — Correspondence — Rights of servants (Staff Regulations of Officials of the EC, Articles 5 and 7)

2. Officials — Directors-General — Posts — Varied nature — Adaptability essential

3. Officials — Post — Acceptance — Abilities required — Lack thereof alleged by the person concerned — Termination of service — Compulsory retirement — Absence of any right to the benefit of these arrangements

1. Officials are entitled to rely on the rule of correspondence between grades and posts.

2. The administration is entitled to expect that senior officials shall be sufficiently adaptable to fill posts of different kinds.

3. If an official finds that the post to which he has accepted appointment does not suit his abilities, this does not entitle him to the benefit of the arrangements relating to termination of service or to compulsory retirement since such arrangements can only be applied in the interests of the service.

In Case 26/69

FRANCO PECO, a former official of the Commission of the European Communities, represented and assisted by Francesco Lanza, Advocate, with an address for service in Luxembourg at the Chambers of Pierre-Paul Schleimer, 78 Grand' Rue,

applicant,

v

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

1 — Language of the Case: Italian.

Armando Toledano-Laredo, acting as Agent, with an address for service in Luxembourg at the offices of Émile Reuter, its Legal Adviser, 4, boulevard Royal,

defendant,

Application for:

(1) the annulment of the decision of the Commission of the European Communities of 4 June 1969 to the extent to which it applies to the applicant Article 48 of the Staff Regulations of Officials and denies him the benefit of Article 42 of the Staff Regulations of Officials of the ECSC in order to determine the pecuniary rights arising from the termination of his service;

(2) damages;

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 — Statement of facts and of procedure

The facts and procedure may be summarized as follows:

The applicant entered the service of the ECSC on 1 February 1960 in Grade A2 as Director of the Directorate of Markets in the Directorate-General for Steel. He was promoted to Grade A1 on 9 April 1964 and appointed Director-General for Steel, performing these duties until March 1968. In July 1967 within the framework of the reorganization of the departments following the merger of the executives the said Directorate-General was incorporated as a Directorate within the new Directorate-General for Industrial Affairs. The applicant was appointed Assistant Director-General for Industrial Problems within the

new Directorate-General and was to deal with problems in the steel industry.

In December 1967 a new Directorate-General, 'for Dissemination of Information', was established and on 6 January 1968 the applicant was appointed Director-General thereof in the new detailed list of posts of the single administration.

On 27 March 1968 shortly before he was in fact to take up his new position, the applicant applied for the vacant post of Director-General for Industrial Affairs but was not appointed.

On 16 April 1968 he requested that his service should be terminated within the meaning of Article (1) 4 of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 and renewed this request on 17 May 1968 with the claim that: 'The post of Director-General for Dissemination of Information requires abilities, professional experience and training very different from mine'.

On 13 June 1968 the President of the Commission replied that the Commission considered that it could not dispense with his services and that consequently it could not accede to his request.

On 26 May 1969 the applicant sent a letter to the Commission in which, after setting out his complaints against it and holding it responsible for the poor state of his health, he wrote:

> 'In those circumstances and since the Commission in fact forces me to do so, it only remains for me to take the initiative and to make plain without further delay my formal consent to the severance of my service relationship with the European Communities and to state unequivocally the necessity of leaving the service of the institution definitively.'

Since the applicant considered that the termination of his service relationship with the Commission had been caused by a fault on the part of the latter, he requested that he be retired in the interests of the service, a measure provided for in Article 50 of the Staff Regulations and, invoking Article 99 of the Staff Regulations of Officials of the ECSC of 1962, he requested that his pecuniary rights should be calculated on the basis of the provisions of Article 42 of the former Staff Regulations of Officials of the ECSC.

By a registered letter of 5 June 1969 — which constitutes the decision which is partially contested — the Commission declared that it rejected the complaints which were addressed to it. It added that it took note of the applicant's wish to resign and that consequently it had decided to grant his request and accept his resignation as from 10 June 1969. The Commission stated that it was consequently unable to take account of his request for retirement, as the pecuniary rights arising on voluntary resignation were governed by Article 12 of Annex VII to the Staff Regulations.

After lodging the application the applicant was appointed Vice-Chairman of the Costruzioni Metallichi Finsider Company, Milan.

This application was lodged on 4 August 1969. The written procedure followed the normal course.

On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

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

The Advocate-General delivered his opinion on 6 May 1970.

II — Conclusions of the parties

The *applicant* claims that the Court should: Whilst upholding the individual decision of the Commission of the European Communities on 4 June 1969 in so far as it relates to the termination of his service and the date from which that measure takes effect, annul that decision in so far as it relates to the ground of 'voluntary resignation' in accordance with Article 48 of the Staff Regulations of Officials and, in so far as it relates to the applicant's pecuniary rights, consequently rule that the applicant is also entitled, as compensation for the material damage suffered by him, to have his retirement rights determined on the basis of Article 42 of the Staff Regulations of the ECSC together with Articles 50 and 99 of

the Staff Regulations of Officials and grant Mr Peco the nominal sum of 1 lira for the non-material damage he has suffered;
Order the defendant to pay the costs.
The *defendant* contends that the Court should:

(a) Dismiss Mr Franco Peco's application, dated 4 August 1969, as unfounded;

(b) order the applicant to bear the costs as provided for in Article 70 of the Rules of Procedure.

In his reply the applicant contends that the Court should:
If it considers it to be necessary, order the following measure of inquiry:

A — Proof by witnesses of the following circumstances

(1) Is it true that at the time of the discussion between Mr F. Hellwig and Mr Peco on 12 January 1968 the latter learned that when the Commission decided to appoint him as Director-General for Dissemination of Information it was under the impression that he had pressed for this position?

(2) Is it true, as is in fact known in Community circles close to the Commission, that the choice and appointment of Mr Peco were decided by a majority of the Commission and, in particular, despite the opposition of the Commissioner in charge of the department who, even subsequently and up to 4 June 1969 continued to hold an opinion with regard to Mr Peco which differed from that of the Commission, for reasons which the Court should ask the witnesses?

Witness: Mr F. Hellwig, Vice-President of the Commission of the EEC. The right to call further witnesses is reserved.

B — Order the Commission of the European Communities to produce:

(a) a true copy of the *ordinary* and *special* minutes of the Commission and of the Working Party on Administrative Problems concerning all the meetings when Mr Peco's administrative position was discussed, from *July 1967 to 4 June 1969;*

(b) a copy of the letter dated 12 February 1969, sent by the Commissioner, Mr Collonna di Parliano, to Mr Mario Scelba, President of the European Parliament.

III — Submissions and arguments oft he parties

The submissions and arguments of the parties may be summarized as follows:
The *applicant* maintains that he has been obliged to request that his service relationship should be terminated, owing to the wrongful conduct of the Commission. Accordingly this does not constitute voluntary resignation, but the termination of the service relationship for just cause. The arrangements laid down in the article of the Staff Regulations on voluntary resignation, consequently do not apply to his case and he is, moreover, entitled to compensation for the injury which he has suffered.
Consequently he contests the decision of 4 June 1969 only to the extent to which it declares that, referring to Article 48 of the Staff Regulations, it accepts the applicant's voluntary resignation and to the extent to which it determines his pecuniary rights on the basis of Article 12 of Annex VIII to the Staff Regulations, and not as compensation for the alleged damage, on the basis of retirement in the interests of the service.
The applicant also claims nominal damages of one lira for the non-material damage which he has suffered.

1. *The wrongful conduct of the Commission*

The *applicant* alleges that, on the rationalization of the departments at the time of the merger of the executives, he was assigned to the post of Director-General for Dissemination of Information, a post for which he found that he lacked the appropriate ability, experience and training.
The fact that he was given duties which he

did not feel capable of performing seriously damaged his health. Such ill-health lasted from March 1969 to May 1969 but fear of a relapse led him to send his letter of 26 May 1969 to the Commission.

Furthermore there was an infringement of his right that the duties entrusted to him should be in accordance with the post relating to his grade, in that the result of the abolition of the Directorate-General for Steel and his transfer to the Directorate-General for Dissemination of Information was, *de facto*, a reduction in status. The latter Directorate-General carries out duties which are essentially executive and are not comparable in importance and prestige either with the former Directorate-General for Steel of the ECSC or with the other Directorates-General now in existence which work in close cooperation with the Commission in determining the basic guidelines of Community policy.

The *defendant* replies that in the present case the applicant's rights have not been injured. Although Article 7 of the Staff Regulations requires that the post to which a servant is assigned shall correspond to his category and grade, it does not follow that officials have a particular right to fill a specific post. Moreover the case-law of the Court removes any possible doubt in this respect (Judgment of 6 May 1969 in *Huybrechts* v *Commission*, Case 21/68, Rec. 1969, pp. 96–97). The Commission thus has powers of organization which allow it to assess, from case to case, under a discretionary power which is not subject to review by the Court, which official is the most suited to fill a specific post and to assign him to it.

In taking the view, upon reorganizing its departments, that the applicant would, as Director-General for Dissemination of Information, be in a position to make a real contribution to the efficient running of the institution and in appointing him to this position, the Commission in no way adversely affected his legal status. There can be no question of a 'reduction in status' resulting from the abolition of the Directorate-General for Steel and his transfer to the post of Director-General for Dissemination of Information.

According to the defendant, the applicant's argument amounts to establishing a scale of values amongst the various Directorates-General provided for in the detailed list of posts of the Communities and to attributing more importance to some than to others, which would result in the creation of differences in rank for servants in the same category and in the same grade.

The applicant replies that the Commission did not use its discretionary power in the interests of the service, since that use was vitiated by misuse of powers.

First, according to the applicant, the reduction in status of the Directorate-General for Steel of the ECSC to an ordinary Directorate, the appreciable reduction in its staff, the suspension for practical purposes of many provisions of the ECSC Treaty and above all the acquiescence of the Commission in external interference and requests are factors of such a nature as to prove that the decision of July 1967, reducing the number of Directorates-General, constitutes a misuse of powers.

Secondly, in selecting him in December 1967 and appointing him in March 1968 as Director-General for Dissemination of Information, the Commission laboured under the misconception that the applicant had applied for such a post, which the applicant offers to prove by witnesses and by the correspondence exchanged by Mr Scelba and Mr Colonna di Paliano.

Furthermore the Commission conferred upon him duties without stating what they involved because it knew that if it defined these duties it would be obvious that the applicant was not qualified for them. The vacancy notice, recently issued when the same post again became vacant, further proves that the applicant did not have the necessary qualifications to fill it.

Thirdly, by appointing an official of French nationality in Grade A2 to the post of Director-General for Industrial Affairs following Internal Competition COM/2, the Commission intended to reserve this post for an official of the same nationality as its previous holder. Another purely geographical consideration, namely that the applicant was of the same nationality as the Commissioner for Industrial Affairs, also prevented him from obtaining the post of Director-General for Industrial Affairs.

Fourthly, the letter of 15 June 1968 which denied him the benefit of the system of Article 4 of Regulation No 259/68 and retained him in his post, did not comply with the requirements with regard to a statement of reasons imposed by Article 25 of the Staff Regulations of Officials.

The *defendant* replies that in all those cases it acted in the interests of the service.

The decision to merge the Directorate-General for Steel with the Directorate-General for Industrial Affairs was prompted by the need to rationalize the departments. This is also true with regard to the assignment of the applicant to the Directorate-General for Dissemination of Information, which, moreover, took place with his full consent, as is clear from the terms of his letter of 15 March 1969 to President Scelba and from the fact that he did not contest the appointment of Mr Toulemon as Director-General for Industrial Affairs.

The defendant finally adds that although it had placed the applicant in the new detailed list of posts it was entitled under Regulation No 259/68 to adopt a restictive attitude as regards the voluntary resignation submitted by the applicant in the same way as it did, moreover, with regard to all the requests submitted by senior officials who had been previously integrated into the new detailed list of posts.

The defendant finally observes that the applicant has made no application for the annulment of any measures which he alleges are illegal and it concludes that no proof has been submitted either of the alleged misuse of powers or of a wrongful act on the part of the Commission.

2. *The nature of the letter of 26 May 1969*

The *applicant* alleges that by his letter of 26 May 1969 he had not voluntarily resigned but had recorded the existence of a factual situation brought about by the Commission which made it impossible to continue his service relationship.

The defendant was mistaken in interpreting his letter as a voluntary resignation. It failed to distinguish between the unequivocal intention required by the Staff Regulations (Article 48) and in the letter of 26 May the 'unequivocal declaration of the *necessity* of ending all work'. There is thus a difference between the subjective intention mentioned by Article 48 of the Staff Regulations and the objective necessity mentioned by the applicant.

The applicant had not proffered his voluntary resignation but declared that he was for just cause terminating the service relationship binding him to the Commission.

The *defendant* replies that the applicant knew perfectly well that only a voluntary resignation by the official could terminate the service relationship and that he had in fact given this resignation.

The wording of the letter of 26 May 1969 is a faithful copy, almost word for word, of the first paragraph of Article 48 of the Staff Regulations. When he referred to the *necessity* of leaving the service, the applicant merely referred to a *subjective necessity* arising from his state of health.

In any event the applicant wished to reconcile the irreconcilable by obtaining the higher allowances pertaining to retirement in the interests of the service which, however, can only take place at the initiative of the appointing authority, and thought out for this purpose a solution based on an alleged retirement for just cause. The applicant, moreover, in no way sought that his post be taken from him in the interests of the service. He could have done so and could have contested any decision refusing this, but he merely stated unequivocally his intention to leave the service.

3. *The provisions governing the applicant's pecuniary rights*

The *applicant* maintains that his pecuniary rights cannot be governed by the provisions of Article 12 of Annex VIII to the Staff Regulations because this article relates to the official's voluntary resignation.

The rights in question must on the contrary be determined on the basis of the provisions providing the most favourable terms of retirement for the official if the latter was obliged for good reasons to terminate the service relationship. This can be proved in two ways:

First, by analogy: the existence of a situation preventing an official from continuing the service relationship is strongly

analogous to the situation provided for by Article 50 of the Staff Regulations. The interests of the service which justify retirement also serve to justify the severance of the service relationship for just cause.
Further, an application of the general principle contained in Articles 5 and 7 of the Staff Regulations show that the applicant had been *de facto* reduced in status and this implies the right to obtain compensation for material and non-material damage.
With the aim of simplifying the Court's task, the applicant maintains that his rights to compensation for material injury would be satisfied if he were dealt with under Article 42 of the Staff Regulations of the ECSC together with Articles 50 and 99 of the Staff Regulations of Officials.
The defendant replies that the applicant cannot claim to have applied to him rules relating to retirement in the interests of the service since such a measure may be taken only by decision of the appointing authority and not at the instigation of the official.
Since the Staff Regulations draw a clear distinction between these two measures they may not be confused, and the present case is indubitably concerned with resignation.
Furthermore the applicant may not invoke an alleged 'resignation for just cause' which does not exist in Community law and is provided for only in Article 2129 (*sic.*) of the Italian Civil Code and moreover only in the context of contractual relationships.
In addition, the defendant considers that there were no serious grounds.
The applicant replies that he does not request the application of retirement in the interests of the service, merely the allowances provided for in Article 42 of the Staff Regulations of the ECSC, taking account of the reasons which were conclusive for the purposes of the termination of the service relationship.
He considers that this system of allowances could be applicable to his case, even though it is not provided for in the Staff Regulations.
Resignation for just cause exists in Italian law; it also applies to relationships under the Staff Regulations and a Community regulation cannot reduce the pre-existing or vested rights of the citizens of Member States of the Community, the more so as the rights in question are not contrary to the aims pursued by the said Community.
Furthermore the Staff Regulations do not give an exhaustive list of the rights of officials, since they are acknowledged to have certain unwritten rights.

4. *The amount of the material and non-material damages*

The *applicant* states that if the service relationship had not been terminated in the particular circumstances which he has set out, there would have been nothing to prevent his continuing his career as an official until he reached the age of 65 years, that is to say for another 18 years.
Throughout this period he would have been able to enjoy all the benefits provided for European civil servants to obtain a pension calculated on a basis of 28 years of service.
His material damages might be assessed by the difference between the salary under the Staff Regulations and that which he presently enjoys in Italy and which he will continue to enjoy for the remaining 18 years of his career, to which should be added the difference existing between the two pension schemes. The total difference is presently in the region of Lit. 4 000 000 per annum, without taking into account the increase in taxation.
The applicant nevertheless maintains, as a compromise, that his rights to compensation would be satisfied by the retirement pension provided for by Article 42 of the Staff Regulations of Officials of the ECSC.
The *defendant* replies that the applicant cannot speak of compensation since there has been no infringement of his rights and it does not appear that he has suffered the least injury.
The alleged material damages were moreover assessed in the application as not less than Lit. 3 000 000 and in the reply at Lit. 6 000 000 without any explanation being given for the alleged damages. Furthermore, in order to establish the existence of an injury it is necessary to add the pension paid by the Communities to the benefits of the new post.

Grounds of judgment

1 The application seeks in the first place the partial annulment of the Commission's decision of 4 June 1969 accepting the applicant's resignation, to the extent to which that decision applies to him the pecuniary system relating to voluntary resignation.

2 Secondarily it seeks to have recognized that the applicant is also entitled 'as compensation for material damage suffered' to have his retirement pension determined on the basis of Articles 42 of the Staff Regulations of the ECSC and 50 and 99 of the Staff Regulations of Officials of the EC and that he should be granted as compensation for non-material damage the sum of 1 Italian lira.

3 The applicant was formerly Director-General for Steel with the ECSC and an official in Grade A1, and on the merger of the executives he was appointed Assistant Director-General with the Directorate-General for Industrial Affairs in the Commission.

4 After he had been appointed Director-General of the Directorate-General for Dissemination of Information on 20 March 1968, an appointment which he accepted, he applied on 27 March 1968, immediately prior to commencing his duties, for the post of Director-General for Industrial Affairs which had in the meantime fallen vacant but to which another official was promoted on 9 April 1968.

5 Since he considered that he did not have the qualifications for the post of Director-General to which he had been appointed he sought on 16 April to have his service terminated as provided for in Article 4(1) of Regulation No 259/68/EEC and then requested that he be retired in the interests of the service within the meaning of Article 50 of the Staff Regulations.

6 The defendant considered that the applicant was capable of performing his duties and refused to grant those requests.

7 On 26 May 1969 the applicant, relying on his poor state of health, which was attested by medical certificates and which he attributed to the adverse conditions under which he was performing duties for which he felt himself to be unqualified, wrote to the Commission in the following terms: 'since the Commission in fact forces me to do so, it only remains for me to take the initiative and make plain without further delay my formal consent to the severance of my service relationship

with the European Communities, and to state unequivocally the necessity of leaving the service of the institution definitively'.

8 He added that the termination of his service relationship was due to a wrongful act on the part of the Commission and under those circumstances he claimed the benefit of the pecuniary system relating to retirement in the interests of the service.

9 By the contested decision the defendant accepted the applicant's resignation but refused to apply to him the system relating to retirement in the interests of the service, stating that the financial system applicable to him was that relating to voluntary retirement.

10 Both the application for annulment and that for damages are based on the allegation of the illegal and wrongful conduct of the Commission.

11 This allegation must therefore be considered first.

12 In the first place the applicant claims that his nomination as Director-General for Dissemination of Information constitutes a *de facto* reduction in status, because this Directorate-General only performs 'essentially executive' duties so that by assigning him to that post the Commission infringed the rule of correspondence between grades and posts.

13 He further maintains that he was appointed to this post although he did not possess the necessary qualifications for it.

14 The post of Director-General for Dissemination of Information carries the grade of A1 which corresponds to that of the applicant.

15 Although the difference in the powers of the various Directorates-General might justify a personal preference on the part of the applicant for another post, it does not however infringe the rule of correspondence between grades and posts on which officials are entitled to rely.

16 Furthermore the applicant had accepted his appointment without the slightest reservation and it was only after his application for the post of Directorate-General for Industrial Affairs was rejected that he considered that the post which he occupied did not correspond to his abilities.

17 Furthermore the Commission is entitled to expect that senior officials shall be sufficiently adaptable to fill posts of different kinds.

18 It was all the more in the applicant's case since the activities of Director-General for Dissemination of Information were appropriate to his university education.

19 In appointing him to this post the defendant has neither infringed any provision of the Staff Regulations nor committed a wrongful act involving its liability.

20 Nor does its refusal to accede to the applicant's wish to benefit from arrangements relating to termination of service or of compulsory retirement constitute an illegality or wrongful act.

21 In this connexion it must be observed in the first place that the applicant did not contest at the time the Commission's decisions, refusing him, before his resignation, the benefit of those arrangements.

22 Furthermore if an official finds that the post to which he has accepted appointment does not suit the abilities which he considers himself to have, this does not entitle him to the benefit of one of those two special systems.

23 Since both the arrangements relating to termination of service and relating to compulsory retirement can only be granted in the interests of the service, the defendant, in the circumstances of the case, did not exceed the limits of its discretionary power in considering that the interests of the service did not justify granting the measures requested.

24 Furthermore the applicant has adduced no evidence in support of his statement that the defendant was guilty of a misuse of powers in his case.

25 Finally the circumstance that the reason for his resignation was the fact that he had been appointed — with his consent — to a post for which he considered himself poorly qualified, is not of such a nature as to call in question the voluntary character of his resignation.

26 The Commission was consequently entitled to regard the letter of 26 May 1969 as constituting a voluntary resignation and to apply to the applicant the appropriate pecuniary arrangements.

27 It consequently appears that the application is unfounded and must be dismissed in its entirety.

Costs

28 Under the terms of Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The applicant has failed in his submissions. However under Article 70 of the Rules of Procedure, in actions by officials 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 Articles 5, 7, 50, 90, 91 and 99,

THE COURT (First Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the parties to bear their own costs.

Delivered in open court in Luxembourg on 28 May 1970.

Monaco Donner Mertens de Wilmars

A. Van Houtte R. Monaco

Registrar President of the First Chamber