JUDGMENT OF THE COURT (FIRST CHAMBER)
14 APRIL 1970[1]

Theo Nebe
v Commission of the European Communities

Case 24/69

Summary

1. *Officials — Applications — Time-limits — Nature — Extension — Not permissible*
(Staff Regulations of Officials, Article 91)

2. *Officials — Applications — Failure to act on the part of the administration — Concept*
(Staff Regulations of Officials, Article 91)

3. *Officials — Applications — Implied rejection — Expiration of period for bringing application — Express rejection — Absence of new factor — Confirmatory nature — No act adversely affecting the official*
(Staff Regulations of Officials, Article 91)

1. The two periods mentioned in Article 91 of the Staff Regulations are intended to ensure within the Community institutions the legal certainty indispensable to their proper functioning.
It is not therefore for the parties concerned to extend them at their pleasure.

2. A notice to the applicant that his complaint is under consideration cannot of itself have any legal effect and cannot be considered as a decision within the meaning of Article 91 of the Staff Regulations.

3. The express rejection of a request or complaint, after expiry of the period for lodging an application on the ground of its implied rejection, which contains no new factor relating to the position in law or in fact existing at the time of rejection is a purely confirmatory measure and is not capable of adversely affecting an official.

In Case 24/69

THEO NEBE, an official of the Commission of the European Communities, residing at 65 rue Solleveld, Brussels, represented by Alex Bonn, Advocate of Luxembourg, and residing there at 22, Côte D'Eich,

applicant,

1 — Language of the Case: German.

V

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Jürgen Utermann, with an address for service in Luxembourg at the office of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application for the annulment of:

(a) the decision of the Commission of the European Economic Community of 23 May 1966 appointing the applicant to a post in Grade A 5, in so far as it lays down 1 May 1966 as the date on which it is to take effect;
(b) the decision of the Commission of the European Communities of 14 March 1969 rejecting the applicant's complaint based on Article 90 of the Staff Regulations.

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 and procedure

The applicant entered the service of the Communities as a member of the auxiliary staff on 1 September 1962 and was on 6 January 1964 with effect from 1 November 1962 appointed an administrator in Grade A 6 in the Directorate-General for Agriculture, Directorate of Market Organization for Animal Products, Milk Products Division.

The supplementary budget for the financial year 1964, adopted by the Council of Ministers on 14 November 1964 (OJ of 8. 12. 1964 p. 3460) provided, *inter alia*, that the Commission was authorized to meet the cost of the salaries of seven additional A 5 officials during the course of the financial year 1964.

Availing itself of this opportunity, the Commission on 4 March 1965 published Vacancy Notice No 2079 relating to a post of Principal Administrator in Grade A 5 in the Directorate and Division to which the applicant belonged; the latter submitted his candidature on 9 March 1965 and was by decision of 23 May 1966, taking effect on 1 May 1966, appointed to this post.

In his acknowledgement of receipt of his notification of appointment the applicant expressed reservations as to the date when that decision ought in his view to have taken effect; on 30 August 1966 he made a complaint under Article 90 of the Staff Regulations, stating that he had performed the duties of the post since the beginning of 1964 and requesting first, that his promotion be back-dated to 1 November 1964, the date on which he had completed two years' service in Grade A 6, and secondly that, under Article 7 of the Staff Regulations, he be granted meanwhile a temporary posting to this position in respect of the period from 1 May to 30 October 1964.

After the applicant had sent a reminder to the Commission on 2 October 1968 the latter rejected this complaint by a decision of 14 March 1969, which was notified to him on 10 April 1969 and in support of this refusal of his application the Commission argued that by virtue of its decision of 26 May 1965, laying down the general provisions as to the date when appointments and promotions take effect, the new duties should have been undertaken with the agreement of the appointing authority which in its view had not been the case.

The applicant brought an action before the Court of Justice on 5 June 1969.

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

The parties were heard on 14 January 1970. The Advocate-General delivered his opinion on 4 February 1970.

II — Conclusions of the parties

The applicant claims that the Court should:

1. Declare null and void, or at any rate illegal, the decision of the Commission of the European Communities of 14 March 1969 rejecting the complaint made by him based on Article 90 of the Staff Regulations, and annul that decision;
2. Declare null and void, or at any rate illegal, point 3 of the decision of the Commission of the European Economic Community of 23 May 1966 relating to the applicant's posting to a post in Grade A 5, his appointment as Principal Administrator and his promotion to Grade A 5, and annul this provision;
3. Rule that
   — the applicant must be appointed to Grade A 5 with effect from 1 November 1964,
   — the appointing authority must under Article 7 (2) of the Staff Regulations take a decision with effect from 1 May 1964 and that this decision must apply until the coming into force of the applicant's appointment to Grade A 5;
4. Remit the case to the appointing authority;
5. Order the defendant to bear the costs.

The *defendant* contends that the Court should:

1. Reject the appeal as unfounded;
2. Order the applicant to bear the costs.

The *applicant* by way of reply further claims that the Court should:

— reject the defendant's application and accordingly accede to the applicant's claim;

as a subsidiary point and so far as may be necessary:

(a) Order that Mr Korth, Head of Division, Mr Amiet, Director, and Mr Heringa, Deputy General, be heard on the facts set out under point 2;

(b) Order that Mr Heinz Bruns, Assistant to the Director General for Agriculture be heard on the facts set out under point 3 above;

(c) Order the production of the complete correspondence which passed between the Directorate General for Agriculture and the Directorate General for Personnel and Administration on the subject of the applicant's promotion, based on the declarations by the latter under points (2) (e) and (7).

III — Submissions and arguments of the parties

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

In the *applicant's* view, the duties assigned

to him by the contested decision of 23 May 1966 have been exercised by him as from the beginning of 1964, this post having resulted from the supplement to the budget of 1964 which was adopted by the Council in the course of its meeting of 4 and 5 February 1964.

He deduces therefrom that he should have been appointed to Grade A 5 with effect from 1 November 1964, this being the date on which he fulfilled the conditions of seniority required under Article 45 of the Staff Regulations and further that in respect of the period from 1 May to 31 October 1964 a decision ought to have been taken granting him a temporary posting to this position within the meaning of Article 7 (2) of the Staff Regulations.

1 — *The retroactive effect of the appointment*

(a) *The applicant* submits that whilst the Staff Regulations are silent on the retroactive effect of appointments or promotions, it nevertheless allows this and the provisions being silent on the point, the case ought to have been dealt with according to the practice currently followed by the Commission, as required by the principle of equality of treatment and this all the more so since the recruiting and promotion procedure has in the event taken more than two years for no obvious reason.

The coming into force of an appointment with retroactive effect has been common practice until the Commission's decision of 26 May 1965, as the applicant is prepared to prove both by the evidence of Mr Bruns and by examples of retroactive appointments which occurred in 1965.

The Commission is wrong in basing its refusal on its decision of 26 May 1965 which, being subsequent to the vacancy notice of 4 March 1965, does not apply to the applicant.

The *defendant's* reply contests the allegation that retroactive appointments have previously been common practice. This has only happened in cases where these were delayed by the coming into force of the Staff Regulations of 1962, a fact from which the applicant himself benefited at the time.

In any event, a prior administrative practice, had it existed, could still only bind the appointing authority during the period when it applied and for as long as it was not expressly modified or discontinued.

In the absence of an established practice the right to retroactive treatment can only be based on a general regulatory measure on the part of the appointing authority and this was precisely the purpose of the decision of 26 May 1965 which applied to all promotion and appointment procedures pending at that time and in particular that of the applicant, which took place in the main after the month of May 1965.

According to the defendant the applicant does not comply with the conditions which are in fact laid down by the said decision.

In the first place he did not perform in advance of promotion duties corresponding to his present post.

This results mainly from the fact that the applicant's present post could only have been created and therefore occupied at the beginning of 1965, after the grant of the budgetary A 5 posts in the 1964 supplementary budget, which was only adopted on 14 November 1964.

This also follows from the fact that the applicant's new post falls within the career bracket A 5–A 4, whilst the previous post came within career bracket A 7–A 6; a comparison of the vacancy notices relating to the two posts successively occupied by the applicant shows that they relate to separate posts involving different duties. Finally, the fact that after the applicant had left, his previous post was filled by a new official contradicts his statement.

In the second place even if—*quod non*— the applicant had actually performed the duties in question in advance does not in any event comply with the conditions that the appointing authority should have officially authorized the performance of his duties in advance. This requirement, even though it is not specifically formulated in the decision of 26 May 1965, is self-evident. If it were sufficient to have performed the duties of a higher grade for an official to be subsequently able to benefit from retroactive treatment, the Commission would be deprived of its sole power of creating and organizing departments and posts which clearly emerges from the power to make appointments, for the Directors General might thus force the Commission to effect certain appointments.

In the present case the appointing authority did not give the necessary authorization and moreover no application to this effect had been submitted to it.

The *applicant* replies that he fulfilled the conditions to which the decision of 26 May 1965 renders a retroactive appointment subject, in that he has effectively performed the duties attaching to the post and that he was instructed to carry out those duties.

The decision in question lays down no other condition and certainly does not require that the appointing authority should itself have authorized that the duties of the higher grade be performed in advance; this would amount to an indefensible idea for it would imply that an official entrusted with new duties could not execute the orders of his superiors before the appointing authority had called on him in writing to do so.

As regards the first condition the applicant asserts that he was actually performing the duties attaching to his present post from the beginning of 1964.

In his view these new responsibilities derived from the adoption of Regulation No 13/64 of 5 February 1964 on the gradual establishment of a common organization of the market in the milk and milk products sector in 1964. It was the adoption of this regulation which induced the Council in its deliberations of 4 and 5 February 1964 to create various additional posts, including that to which he was promoted. Whilst the budget was only approved on 14 November 1964, it nevertheless applied by virtue of Article 203 of the EEC Treaty to the whole of 1964 and the posts must be treated as vacant from 1 January 1964.

Since 1964, the applicant has been instructed to carry out duties different from those which he was previously performing and which had been the subject of Vacancy Notice No 303 of 1962. In 1962 his duties had been limited to preparing and putting into operation the regulation on the organization of the market in milk products, whilst as from the coming into force of this regulation he had been instructed to ensure its implementation.

The applicant further states that he is not aware of anyone else who could carry out these new duties. A note on the part of his Director, confirmed by a number of statements by witnesses as well as by his personal file and exchanges of correspondence prove this assertion.

Finally, he notes that he had from the outset requested the retroactive application of his appointment which is proved, *inter alia*, by the fact that the note of 17 June 1966, under cover of which the letter appointing the applicant was sent to Mr Amiet, refers to his previous misgivings.

As regards the second condition, the applicant states that he had been instructed to carry out these new duties as is shown by a note of 1 December 1965 in which the Director, Mr Amiet, states that for two years the applicant was performing the duties corresponding to the post for which he had applied. Further evidence is available to prove this to the full.

The applicant concludes that in basing its refusal on the argument that the conditions required for retroactive appointment were not present, the defendant has taken a decision based on incorrect grounds.

The *defendant* replies that since the express authorization of the appointing authority is required, the suggested proofs and evidence cannot be relevant for they would merely go to show that the applicant performed his duties in advance of promotion with the agreement of his superiors.

(b) The *applicant* alleges that whatever the rules in the matter of retroactive appointment, the defendant has acted towards him in a discriminatory manner. According to him other appointments with retroactive effect were made at the same time as his and he offers to provide proof of this fact.

The contrary decision taken in the case of the applicant establishes a discrimination against him as compared with other officials and violates the principle of equality of treatment.

The *defendant* denies that in cases similar to those of the applicant retroactive appointment has been granted to the officials involved. There has therefore been no discrimination.

The *applicant* replies by stating that he can prove the contrary and refers by way of example to Vacancy No 2108 (Staff Bulletin No 132 of 22 March 1965) the holder of which was retroactively appointed in circumstances similar to his.

2 — *The temporary posting*

The *applicant* alleges that the appointing authority ought under Article 7 (2) of the Staff Regulations to have taken a decision appointing him temporarily as from 1 May 1964 to the post until the coming into force of his appointment to Grade A 5, which could only take place as from 1 November 1964.
The *defendant* replies that as regards this point it may well be asked whether the application is not inadmissible as being out of time. The applicant in fact asked for the temporary posting in his complaint through official channels of 3 August 1966, that is to say two and a half years after the applicant had allegedly occupied the new post.
The defendant adds that Article 7 imposes moreover no obligation on the Commission to appoint a temporary occupant to the post (cf. opinion of the Advocate-General in Case 26/67, *Danvin* v *Commission of EC*, [1968] E.C.R. 323).
Finally it notes as a subsidiary point that Article 7 assumes that there should be a corresponding post. The post in question was not created until March 1965. Under the first and second subparagraphs of Article 7 (2) the temporary posting could therefore only have taken effect from 1 June 1965, neither, for that matter, could it have been granted for more than twelve months.
The *applicant* replies that the admissibility of his arguments in support of obtaining the status of an official subject to a temporary posting cannot be questioned: this complaint could only have been formulated after the rejection of his application for retroactive appointment.

Grounds of judgment

1 The application, registered at the Court on 5 June 1969, is first for annulment of the decision of the Commission of 23 May 1966 to the extent to which, in fixing 1 May 1966 as the date on which the promotion of the applicant to Grade A 5 takes effect, this decision refuses him the benefit of retroactive treatment as from 1 November 1964, to which he claims to be entitled.

Secondly the application is for the annulment of the decision of the Commission of 14 March 1969 rejecting the applicant's claim of 3 August 1966 under Article 90 of the Staff Regulations.

2 The applicant who claimed actually to have performed his duties since the beginning of the month of February 1964, in the Grade A 5 post to which he was subsequently appointed, sought by his complaint to obtain a modification of the decision of 23 May 1966 with a view to its taking effect as from 1 November 1964, a date on which he satisfied the minimum seniority in Grade A 6 required for promotion.

His request was further for the grant for the period from 1 May 1964 until the date when his appointment took effect, of the temporary differential allowance provided for by Article 7 (2) of the Staff Regulations.

The defendant notified him on 24 August 1966 that 'a detailed investigation of the matter was currently being undertaken' and that a reply would be given as soon as 'a definite conclusion' had been reached.

After a reminder addressed to it on 2 October 1968, the Commission rejected the complaint and the applicant's request on 14 March 1969, that is to say after more than three years.

3 By reason of the periods which have elapsed it is necessary to examine whether the appeal must not be regarded as out of time.

4 Under Article 91 of the Staff Regulations, failure on the part of the competent authority to give a decision in reply to a request or complaint must at the expiration of a period of two months be regarded as an implied decision rejecting the request or complaint and such decision may be contested within a period of two months.

5 The two combined periods under Article 91 of the Staff Regulations are intended to ensure within the Community institutions the legal certainty indispensable to their proper functioning.

They take into account *inter alia* the fact that in an administration decisions relating to the situation of a particular member of the staff may frequently affect the position of other officials. It is not therefore for the parties most immediately concerned to prolong these periods at their pleasure.

6 The letter of 24 August 1966 does not constitute a decision in reply to the applicant's complaint. It cannot moreover, of itself, have any other legal effect sinceit has the sole purpose of intimating the carrying out by the Commission of an obligation already provided for, as in Article 91 of the Staff Regulations.

7 It follows that if at the expiration of the period of two months the examination of which the applicant had been informed had not led to an express decision, the complaint must be regarded as rejected by implication.

The appeal must accordingly be considered as out of time and therefore inadmissible to the extent to which it is directed against the decision of 23 May 1966 and against the implied rejection.

8 As regards the express decision of rejection contained in the letter of 14 March 1969, whilst this letter sets out the grounds for adhering to the previous decision, it nevertheless contains no new factor relating to the position in law or in fact existing at the time of the implied rejection of the original decision.

Accordingly it amounts to a measure limited to confirming the previous measure and for that reason not capable of adversely affecting the person concerned.

Costs

9 The applicant has failed in his application.

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

Nevertheless under Article 70 of the Rules of Procedure, in actions by servants of the Communities the 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 Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Staff Regulations of Officials of the European Communities, especially Article 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

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

Delivered in open court in Luxembourg on 14 April 1970.

Monaco Donner Mertens de Wilmars

A. Van Houtte R. Monaco

Registrar President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 FEBRUARY 1970

Mr President,
Members of the Court,

In the proceedings with which I shall deal today we are concerned with the promotion of an official of the Commission of the European Economic Community. This promotion is not however being contested, as in other cases, by candidates who were passed over but by the person actually promoted,

1 — Translated from the German.