JUDGMENT OF THE COURT (SECOND CHAMBER)
24 JUNE 1971[1]

August Josef van Eick
v Commission of the European Communities

Case 57/70

In Case 57/70

AUGUST JOSEF VAN EICK, a former official of the Commission of the European Communities, residing at Amsterdam, represented by B. Hamburger, Advocate of the Rotterdam Bar, with an address for service in Luxembourg at the Embassy of the Kingdom of the Netherlands, 5 rue C-M. Spoo,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. H. J. Bourgeois, acting as Agent, 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 the decision of 14 July 1970 by which the Commission refused a request by the applicant for 'the restoration to him of his right to be heard in accordance with the provisions of the third paragraph of Article 7 of Annex IX to the Staff Regulations, for compensation for the decision of 18 December 1968 to remove him from his post and for redress for the material consequences of the said decision,

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

1 — Language of the Case: Dutch.

JUDGMENT

Issues of fact and of law

I — Facts

On 4 July 1967 the Commission of the EAEC decided, consequent upon disciplinary proceedings, to terminate as from 1 August 1967 the service of Mr A. J. van Eick, a scientific officer attached to the Ispra Research Centre.
By judgment of 11 July 1968 (Case 35/67, [1968] ECR 329) the Court (First Chamber) annulled this decision to remove him from his post because the Commission, as the appointing authority, had not itself heard Mr van Eick as required by the third paragraph of Article 7 of Annex IX to the Staff Regulations but had delegated this power to one of its officials.
On 20 November 1968 the Director-General of Personnel and Administration summoned Mr van Eick to attend a hearing conducted by the members of the Commission on 10 December 1968.
By letter of 6 December 1968 Mr van Eick informed the Commission that the reasons for the hearing had not been made known to him, that 'in view of the circumstances' he would have 'nothing to say except to put forward (his) reservations and that he would consider, unless the Commission expressly required something else from him, that he had properly complied with its request.
On 18 December 1968 the Commission decided to remove Mr van Eick from his post and to terminate his service as from 1 January 1969.
By judgment of 4 February 1970 (Case 13/69 (Rec. 1970, page 3)) the Court (First Chamber) dismissed the application whereby Mr van Eick sought in particular the annulment of the Commission's decision of 18 December 1968.
By letter of 12 May 1970 Mr van Eick, referring to the judgments of the Court of 11 July 1968 and 4 February 1970, asked the Commission for the restoration to him of his right to be heard in accordance with the third paragraph of Article 7 of Annex IX to the Staff Regulations, for the revocation of the decision of 18 December to remove him from his post and for compensation for the material consequences of the said decision.
On 14 July 1970 the Commission informed Mr van Eick that in its view his case was settled once and for all by the Court's judgment of 4 February 1970.

II — Procedure

On 18 September 1970 Mr van Eick lodged the present application.
The written procedure followed the normal course.
Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.
The parties presented oral argument at the hearing on 5 May 1971.
The Advocate-General delivered his opinion at the hearing on 9 June 1971.

III — Conclusions of the parties

The *applicant* claims that the Court should:
— declare to be well-founded his request for the restoration to him of his right to be heard by the Commission in accordance with the third paragraph of Article 7 of Annex IX to the Staff Regulations;
— direct the Commission to re-open the disciplinary proceedings in his case;
— alternatively, take such decisions as shall appear to it to be just;
— order the Commission to bear the costs.

The *Commission* contends that the Court should:

— dismiss the application as inadmissible or in any event as unfounded;

— order the opposite party to bear the costs in accordance with the provisions in force.

IV — Submissions and arguments of the parties

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

A — *Admissibility*

The Commission considers that the application is inadmissible for various reasons:

(a) Its purpose is to obtain from the Court recognition that the applicant still has the right to be heard.

However, even assuming that this hearing, which is a preparatory measure for a possible disciplinary decision, could be regarded as an 'act' within the meaning of Article 91 (1) of the Staff Regulations, the fact that the competent authority did not comply with this formal condition would not of itself have direct consequences on the legal position of the official in question.

In the context of an appeal to the Court the hearing of an official cannot be regarded as an administrative decision which can be dissociated from a decision pronouncing disciplinary action. But an appeal can only be brought against decisions which have direct consequences on the legal position of an official. For it to be possible to contest a preparatory measure by way of appeal the measure must, of itself and directly, have an adverse effect on the interests of the official and must do so from the point of view of the final decision. It must as it were anticipate the final decision, for example by laying down at that stage certain conditions detrimental to the official. The fact that there has been no hearing of the official in the context of disciplinary proceedings has no significance in itself so long as no disciplinary decision has been taken. It cannot therefore constitute an 'act adversely affecting' an official within the meaning of Article 91 (1) of the Staff Regulations. The same applies as regards the Commission's refusal to accede to the request for 'the restoration to the person concerned of his right to be heard'.

(b) Even supposing that the lack of a hearing could, as such, constitute a ground of appeal, the present application would run into the obstacle of the force of *res judicata*. The Court's judgment of 4 February 1970 dismissed the applicant's request for the annulment of the entire disciplinary proceedings initiated against him.

(c) The distinction which the applicant seeks to draw between 'acts adversely affecting' an official and 'detrimental measures' fails to take account of Article 152 of the EAEC Treaty which refers to the Staff Regulations as regards disputes between the Community and its servants.

(d) The Court's findings in its judgment of 4 February 1970 as regards the delay with which the decision of 18 December 1968 to remove the applicant from his post was taken cannot constitute an important new factor in relation to the lack of a hearing. The appeal is therefore out of time.

(e) If one were to take the view that the applicant is not seeking the annulment of an act adversely affecting him but is asking for a new hearing by way of compensation for damage in the context of an action founded on the liability of the administration, it would have to be said that an action which is in a sense one for compensation and the subject-matter of which is essentially the same as the applicant's previous action is inadmissible.

(f) Furthermore, the appeal would not be admissible if it were accepted that the applicant is only contesting as a procedural matter the alleged failure on the part of the Commission to hear him and that he is in fact bringing a new

appeal against the decision of 18 December 1968 which provided for disciplinary action. This is because the appeal must fail in face of the force of *res judicata* and, what is more, it cannot be regarded as a request for the revision of the judgment delivered by the Court on 4 February 1970.

The *applicant* puts forward the following arguments against the Commission's objections:

(a) Even if the hearing of the official concerned in the context of disciplinary proceedings were not to be regarded as an 'act' within the meaning of Article 91 (1) of the Staff Regulations it would still remain an act having an effect of its own on the legal position of the official, since its substance or consequence is the preparation of a decision to be taken concerning him.

By not hearing an official at a time when it is preparing a disciplinary decision, the Commission is acting in a manner which violates fundamental legal principles.

(b) The Commission is wrong to distinguish between an 'act adversely affecting' an official and an 'act requiring it to make good the damage which it has caused'. The failure to hear the applicant at least amounts to an act causing damage to him. By virtue of Articles 146 and 148 of the EAEC Treaty, such an act gives rise to a right of action, since the Commission refused to comply with the reasoned request contained in the applicant's letter of 12 May 1970.

(c) The Commission cannot hope to succeed in its attempt to have the appeal dismissed by relying on the principle of *res judicata* since the subject-matter of the present appeal differs from that of the two previous ones.

The applicant's present claim is in the first place to be given the opportunity of exercising a right to which he is entitled and which he has not exhausted: the right to be heard in the course of an investigation concerning him.

(d) The wrongful act or omission on the part of the Commission and its duty to make good the damage caused to the applicant, as found by the Court in its judgment of 4 February 1970, were not established and did not come to the applicant's knowledge until after that judgment had been delivered. The judicial finding of the said wrongful act or omission constitutes a new factor in the legal relationships between the applicant and the Commission of such a nature as to justify the present claim.

B — *The substance of the case*

The applicant maintains that he has a legitimate interest in having his right to be heard recognized.

He was the subject of disciplinary proceedings under which he was not heard at all. This state of affairs is due to the fact that the Commission's letter of 20 November 1968 contained no mention of the reasons why it was necessary to hear him.

When an official fails to answer a summons or does so inadequately it is the Commission's duty to draw his attention to the interests which are at issue instead of resorting immediately to the text of the regulation in order to come to a decision to his detriment in the disciplinary proceedings which have been set afoot. Having adopted a different attitude in the present case, the Commission has not measured up to its responsibilities as an employer.

In the present case it was not without reason that the applicant failed to comply with the summons of 20 November 1968 since it was lacking in clarity and gave inadequate notice.

Owing to a wrongful act or omission on the part of the Commission, the applicant was not in a position to ascertain what was the exact significance of the summons at the time when he received it. The purpose of hearing an official is not to inform him in the course of the hearing of the reasons why he is being heard but to give him the opportunity of submitting arguments in his defence. An official must therefore be summoned in good time and in the appropriate

manner and the reasons for the hearing should be mentioned.

The failure to comply with the time-limit laid down in the third paragraph of Article 7 of Annex IX to the Staff Regulations had the effect of severing, from the administrative point of view, the connexion with the previous proceedings before the Disciplinary Board. The Commission was thus under a duty to answer the applicant's letter of 6 December 1968 and to summon him to a hearing, giving him the reasons why he should be heard. Its failure to do so entails the sanction which the Court, in its judgment of 4 February 1970, attached to the unjustified failure to comply with the said time-limit, that is to say, the obligation to restore to the applicant his right to be heard.

The direct consequence of the failure to answer the applicant's letter of 6 December 1968 was that he was not heard before the decision of 18 December 1968 to remove him from his post was taken. However if he has been heard he would have had the opportunity of calling in issue certain aspects of the opinion of the Disciplinary Board which formed the basis of the decision to remove him from his post.

The applicant was therefore adversely affected by the failure to hear him.

The *Commission's* reply to the applicant's arguments runs essentially as follows:

It is obvious that it is possible to take a decision in a disciplinary matter without having heard an official who, without good reason, fails to appear.

There is no provision which requires the administration to remind an official of the import of the summons addressed to him. The applicant has wholly failed to prove that a new summons was essential for the proper conduct of the disciplinary procedure.

The reasons advanced *a posteriori* by the applicant to explain his absence cannot be accepted.

There can be no denying that he was summoned in good time. In view of the content of the applicant's letter of 6 December 1968 the fact that the summons was alleged to give inadequate notice could not, on any view, have placed the Commission under a duty to summon him a second time. The applicant himself did not ask for his hearing to be adjourned.

The applicant's reference to the judgment of 4 February 1970 cannot help him: that judgment is only concerned with the failure to observe the time-limit by which the appointing authority is bound to take its decision relating to the application of a disciplinary measure, and decided that the failure to observe the said time-limit did not render the decision taken by the defendant on 18 December 1968 null and void.

Moreover, the Commission's letter of 20 November 1968 expressly stated that the hearing would take place in accordance with the provisions of the third paragraph of Article 7 of Annex IX to the Staff Regulations. In view of all the circumstances which preceded this notification, it cannot seriously be claimed that it was essential to remind the applicant, by lengthy explanations, that the hearing would in fact relate to matters alleged against the applicant at an earlier stage of the disciplinary procedure. It cannot be inferred from the applicant's letter of 6 December 1968 that he wished to be given particulars of the exact subject-matter of the summons. Finally, the applicant's request of 12 May 1970 proves that he was in no doubt as to what that subject-matter was.

In the circumstances the applicant's relating to the failure to hear him before the disciplinary measure was issued on 18 December 1968 rebound on him and the Commission was perfectly justified in concluding that he was refusing, as he had done previously, to attend the proposed hearing. Thus the fact that the applicant was not heard cannot be regarded as an illegal act or as the infringement of an essential procedural requirement affecting the legality of the disciplinary measure.

The appeal would also be unfounded if

it were regarded as an action founded on the liability of the administration: in the present case there is no illegal conduct and no wrongful act or omission on the part of the Commission. The damage alleged by the applicant is due to his own conduct and it is doubtful whether it is of such a nature as to give rise to an action founded on the liability of the administration.

Grounds of judgment

1 The appeal is for the annulment of the decision of 14 July 1970 by which the Commission rejected the applicant's request of 12 May 1970 for the revocation of the decision of 18 December 1968 to remove him from his post and for the restoration to him of his right to be heard under the third paragraph of Article 7 of Annex IX to the Staff Regulations of Officials in the disciplinary proceedings initiated against him.

2 It should be recalled that a first decision issued on 4 July 1967 removing the applicant from his post was annulled by the judgment of the Court of 11 July 1968 for the sole reason that the Commission, as the appointing authority, had not itself, in accordance with the third paragraph of Article 7 of Annex IX to the Staff Regulations, heard the applicant, but had delegated this authority to one of its officials.

3 Following this judgment the applicant was summoned to appear at his hearing before three members of the Commission but failed to comply with the summons.

4 He was removed from his post by decision of 18 December 1968.

5 An application for the annulment of the said decision to remove him from his post was dismissed by the Court's judgment of 4 February 1970.

Admissibility

6 By reason of the force of *res judicata* it is not possible to call in issue again a part of the disciplinary proceedings which led to the decision of 18 December to remove him from his post, which decision was confirmed by the judgment of 4 February 1970.

7 The application must therefore be dismissed as inadmissible.

Costs

8-9 Under 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.

10 Although under Article 70 of the Rules of Procedure the costs incurred by the institutions in proceedings commenced by servants of the Communities shall be borne by the former, this provision makes an exception in the case of costs regarded as unreasonably or vexatiously occasioned within the meaning of the second subparagraph of Article 69 (3).

11 In view of the applicant's conduct during the disciplinary proceedings which led up to the decision of 18 December 1968 to remove him from his post and of the clear inadmissibility of the present application, his action must be regarded as an abuse of the process of the Court.

12 The mitigating provisions of Article 70 of the Rules of Procedure cannot be extended to an action brought in these circumstances.

13 Accordingly the applicant must be ordered to bear the entire costs of the proceedings.

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 judgment of the Court of 4 February 1970;
Having regard to the Protocols on the Statute of the Court of Justice and the Rules of Procedure;

THE COURT (Second Chamber)

hereby :

1. **Dismisses the application as inadmissible;**
2. **Orders the applicant to bear the entire costs of the proceedings.**

Trabucchi Pescatore Kutscher

Delivered in open court in Luxembourg on 24 June 1971.

A. Van Houtte
Registrar

A. Trabucchi
President of the Second Chamber