JUDGMENT OF THE COURT (FIRST CHAMBER)
25 NOVEMBER 1976 [1]

Berthold Küster
v European Parliament

Case 122/75

Summary

1. *Officials — Applications to the Court — Periodic reports — Admissibility (Staff Regulations, Article 91)*

2. *Officials — Applications to the Court — Periodic reports — Date of signing by the head of the administration — Commencement (Staff Regulations, Article 91)*

3. *Officials — Periodic report — Nature (Staff Regulations, Article 43)*

1. It is clear that periodic reports generally constitute a more or less important factor each time the official concerned is considered for any promotion or takes part in competitions within the meaning of Article 29 of the Staff Regulations. Although it is true that these reports are made up of assessments which it is difficult for a court to review, this fact does not prevent their adoption from being vitiated for irregularity of form and procedure or patent error and misuse of discretionary powers — defects capable of making them unlawful. Accordingly an application to the Court against a periodic report is admissible.

2. The periodic report does not become definitive until signed by the head of the administration. Accordingly the fact that the official concerned has in accordance with the procedure prescribed for the drawing up of periodic reports had knowledge of the content before that date is not capable of causing the period for lodging an appeal to start to run or of shortening it.

3. Periodic reports do not come within the category of decisions within the meaning of Article 25 of the Staff Regulations but are governed by the special provisions laid down by or by virtue of Article 43 of the Staff Regulations.

In Case 122/75

BERTHOLD KÜSTER, an official of the European Parliament, residing at Bertrange (Luxembourg), represented by Victor Biel, Advocate of the

1 — Language of the Case: French.

Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the said Victor Biel, 18 A rue des Glacis,

applicant,

v

EUROPEAN PARLIAMENT, represented by its Secretary-General, Hans Robert Nord, acting as Agent, assisted by Alex Bonn, Advocate of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the said Alex Bonn, 22 Côte d'Eich,

defendant,

Application for annulment of a periodic report,

THE COURT (First Chamber)

composed of: A. M. Donner, President, A. O'Keeffe and G. Bosco, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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

I — Facts and procedure

The periodic reports made under Article 43 of the Staff Regulations for 1969-1970 and 1971-1972 describe Mr Berthold Küster as 'excellent' with regard to ability and efficiency and 'very good' with regard to his conduct in the service. The general assessment for 1969-1970 added: '... this official undoubtedly deserves promotion as soon as possible' and that for 1971-1972 stated: 'Mr Küster by his initiative, ability and sense of responsibility has shown that he is capable of performing duties corresponding to a higher grade'.

In his periodic report for 1973-1974 Mr Küster's ability, efficiency and conduct in

the service were described as 'very good' and the general assessment was as follows: 'A very capable official who performs tasks entrusted to him carefully and punctiliously. His ability enables him to undertake difficult and sometimes delicate work which arises in the performance of his duties'.

On 5 March 1975 Mr Küster expressed some reservations in commenting on the last report.

On 17 June 1975 Mr Küster lodged a complaint under Article 90 (2) of the Staff Regulations against the implied decision rejecting his request that his periodic report for 1973 and 1974 be amended in accordance with the comments which he had made on 5 March 1975.

He requested that the entries 'Very good' given for his ability and efficiency should be replaced by 'Excellent' and that the general assessment should be supplemented by the statement that he deserved promotion or that he was capable of performing duties of a higher grade.

This complaint was rejected by letter dated 21 October 1975 on the one hand as inadmissible for being out of time and on the other, so far as concerns the matters raised in the action, as unfounded.

On 16 December 1975 Mr Küster brought the present action against the express rejection of his complaint.

The written procedure followed the normal course.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court (First Chamber) decided to open the oral procedure without a preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— Rule that this application is admissible as to form and that it has been made within the prescribed period;
— Declare the decision rejecting the complaint through official channels, dated 21 October 1975, to be null and void;
— Annul the periodic report for 1973-1974 and rule that it must be withdrawn from the applicant's personal file;
— Order the European Parliament to pay the applicant one franc by way of damages;
— Order the European Parliament to pay the costs.

The *defendant* claims that the Court should:

— Rule that the action is inadmissible; Or alternatively unfounded;
— Dismiss it;
— Make an order as to costs in accordance with the relative provisions.

III — Submissions and arguments of the parties

A — Admissibility

The *defendant* considers the action inadmissible on several grounds:

(a) The periodic report cannot be regarded as an act which may be contested within the meaning of Article 90 (2) of the Staff Regulations. To be contested by means of a complaint a measure must amount to a decision. The periodic report is an assessment and the right of the official in question to contest it is limited to his power to make possible objections to the assessment made.
(b) The periodic report cannot by its very nature be the subject of a legal action. In proceedings before the Court an official can only avail himself of an

action contesting legality and an action for annulment; the ultimate objective of an action against a periodic report is the drawing up of a report containing a different assessment. The Court of Justice cannot substitute itself for the authority responsible for giving an assessment which depends on the latter's discretion.

(c) According to Article 90 (2) of the Staff Regulations the complaint can be directed only against an act adversely affecting a party. A periodic report does not however come within the definition of such acts given by the Court (Joined Cases 177/73 and 5/74, *Reinarz* v *Commission* [1974] ECR 819).

(d) Further in the present case the complaint through official channels was not lodged within the period of three months. The action before the Court of Justice does not therefore satisfy the conditions laid down by Article 91 (2) of the Staff Regulations. Although it is true that the report in question was drawn up and submitted to the applicant before it was signed by the Secretary-General, it is the notification of the report to the person concerned which makes the period for lodging a complaint start to run.

(e) Even assuming that a periodic report may in principle be regarded as capable of adversely affecting an official, this could not be the position in the present case: the remarks and the 'general assessment' must be regarded as a first-class assessment.
With regard to the comparison of the report in question with those for previous periods, the defendant observes that there is a new practice to the effect that the remark 'Excellent' is to be awarded henceforth only in exceptional cases.

The *applicant* challenges these arguments on the following grounds:

(a) A positive act open to challenge according to Article 90 (2) need not necessarily be a decision; the said article also mentions the case of failure to adopt a measure prescribed by the Staff Regulations.
In requiring a periodic report Article 43 of the Staff Regulations contemplates a correct report; the contested report in the present case is neither correct nor appropriate. Further it has not been shown that a periodic report is not a decision. The Bureau of Parliament by rules adopted in December 1966 (Staff Memorandum dated 21 December 1966, Doc. P.E. 16.808, *vide* Annex 3 to the application) and duly brought to the knowledge of all staff delegated the right to make reports to certain highly-placed officials and thus allow them to take decisions. Moreover the contested act in the present case is the decision taken by the appointing authority, namely the express rejection of the complaint contained in the letter of 21 October 1975 prior to the initiation of legal proceedings.

(b) If the periodic report could not be the subject of an action before the Court on the grounds outlined by the defendant, the question must be asked why the Court annuls appointments when it cannot put itself in the shoes of the appointing authority and take a new decision.

(c) The defendant's view is quite without foundation and entirely unrealistic; it is contrary to all experience and would deprive officials of the necessary legal protection. It is obvious that a bad report is capable of putting an end to a career and not only when it relates to a promotion within the meaning of Article 45 of the Staff Regulations but also when it is a question of taking part in a competition.

(d) The period for lodging a complaint through official channels should start to run in the present case from the date on which the report became definitive. According to the aforesaid memorandum, 'Periodic reports made by Directors-General are however

definitive only after being signed by the Secretary-General'. Since this signature was appended on 17 April, the complaint through official channels was thus lodged within the prescribed period. In the reply the applicant refers to the correspondence between the parties with regard to the report in question *(vide* Annexes 1 to 3):

— The letter from Mr Friedel, Head of the Personnel Management Section, dated 21 March 1975;
— Memorandum addressed to the Secretary-General by Mr Buyse, Director-General, dated 12 March 1975 relating to the applicant's comments on his report;
— The applicant's observations of 16 April 1975.

Until 16 April 1975 there was thus no definitive report.

The defendant considers these arguments irrelevant. The documents produced simply show that the observations of the applicant on his report were duly taken into account by the administration.

(e) A change in the report from 'Excellent' to 'Very good' constitutes a worse report. A less favourable report necessarily affects an official adversely.

B — Substance

The lawfulness of the periodic report in question is contested on two grounds:

(a) Misuse of powers

The *applicant* considers that the special circumstances of the report permit the conclusion that there has been a misuse of powers. The years covered by this report are those during which the applicant's work was highly praised by the Institution itself. He temporarily acted as Head of Division for one third of the period covered. Further it may be seen from the replies given by the Parliament in Case 23/74, *Küster* v *Parliament* [1975] ECR 353 that in the letter from the Director of Personnel of 15 October 1973 he was recognized as fit for promotion. The Director-General even stressed the applicant's collaboration over a lengthy period and stated that the Directorate-General concerned had no objection to promotion.

The *defendant* contests any suggestion of misuse of powers. The report in question was drawn up on the basis of the facts relating to the applicant and in accordance with the rules in the matter.

Moreover the term 'Excellent' is no longer so frequently used as in the past. The Secretary-General and the Directors-General had agreed not to use the term 'Excellent' in future save in exceptional cases and to assess the greatest efficiency with the term 'Very good'. The applicant could therefore not complain of being given the latter assessment and in any event he had not been unfavourably treated in relation to other members of the staff. With regard to the 'general assessment' it may be wondered how such a laudatory assessment may be regarded as adversely affecting the person to whom it relates. Failure to mention that the applicant deserves promotion is not a matter for objection since the very favourable assessment by no means requires any observation on the possibility of promotion. Although the Director for Personnel previously recognized that the applicant qualified for promotion, he was simply confirming that the conditions under Article 45 of the Staff Regulations were satisfied from the point of view of minimum period in the grade.

The *applicant* in reply says that if there was an agreement on the use of entries in reports such a 'general provisions for giving effect' to it ought under Article 110 of the Staff Regulations to have been adopted after consulting the Staff Committee and the Staff Regulations Committee. It ought further to have been

brought to the attention of the staff. None of this was done.

The applicant admits that the wording of the general assessment is very favourable. It is even so to such an extent that it might be asked why it did not justify continuance of the entry 'Excellent' and why there was no longer any mention of suitability for promotion. If there is no agreement that suggestions of promotion should no longer be made it must in fact be agreed that the report in question is less good. In any event it is incorrect to claim that in the past the suggestion of promotion referred only to the minimum amount of seniority. The applicant stresses that for years he has not only been recognized as qualifying for promotion but also expressly recognized as capable of undertaking more responsible duties.

In the rejoinder the *defendant* observes that there is no provision in the Staff Regulations or elsewhere imposing any duty to say whether an official deserves promotion. The general assessment is the full and final expression of the discretion of the person making the report. Previous assessments containing a suggestion of promotion do not impose any obligation on those making subsequent assessments.

This applied likewise to the entries made.

(b) Adverse decision; no reasons given

According to the *applicant* the contested assessment is a decision taken by the authority delegated for this purpose by the Bureau of the Parliament. Since it is an adverse decision it ought under the second paragraph of Article 25 of the Staff Regulations to have stated the reasons on which it was based. The decision rates the applicant's merits considerably lower than was done previously. No longer is there even a mention of the possibility of promotion. In giving him a lower assessment in his periodic report than in several previous periods the person responsible for the report cannot exercise 'a discretion' without giving any explanation. The decision contained in the report ought under Article 25 to have stated the reasons on which it was based and ought therefore to be declared null and void for not having done so. The applicant stresses that he is not asking the Court to amend the report in question but is asking that this report which amounts to an unacceptable injustice should be withdrawn from his personal file. Finally this highly prejudicial report causes him serious non-material damage. The applicant claims that the appointing authority should pay him one franc as nominal damages.

The *defendant* maintains that since the periodic report does not constitute a decision, Article 25 of the Staff Regulations does not apply. This appears from the provisions contained in Article 25 taken together, providing that any decision relating to a specific individual must at once be communicated in writing to the official concerned. A periodic report is not a measure which must be communicated to the person to whom it refers. The object of giving notification of the report as laid down by the regulations is very different, namely to give the official the opportunity of contradicting it.

The last paragraph of Article 25 listing the specific decisions shows clearly the difference between the decisions referred to and the periodic report. In support of this argument the defendant refers to legal theory (Holtz, Handbuch des Europäischen Dienstrechts, 1965, Note 1 to Article 25) and the case-law of the Court in Cases 16/64, *Rauch* v *Commission* [1965] ECR 135 and Joined Cases 27 and 30/64, *Fonzi* v *Commission* [1965] ECR 481.

The *applicant* in reply says that it is Article 43 of the Staff Regulations and not simply a regulation which provides

for communication of the periodic report. The definitive report, that is to say after signature by the Secretary-General, constitutes a true decision. The argument based on the last paragraph of Article 25 of the Staff Regulations is not well founded. It was obvious that the periodic report could not be included as one of the measures which must be published. The previous paragraph of Article 25 on the other hand relates to any decision relating to a specific individual which has been taken under the Staff Regulations (here Article 43) and provides for communication at once and for reasons to be stated.

The theory put forward by Holtz cannot frustrate the clear provisions of the Staff Regulations and the implementing Staff Memorandum.

The case-law referred to is not relevant in the present case. At most the case of *Fonzi* v *Commission* simply shows that the Court cannot substitute its own value-judgment for the assessment of the administration. It should also be pointed out that in that case it was a queston of a report by a promotion committee whereas in the present case it is a report prescribed by the Staff Regulations.

In the *rejoinder* the defendant maintains its previous arguments. It adds that the applicant is wilfully confusing Articles 43 and 25 of the Staff Regulations. Article 43 requires notification of the periodic report to give an opportunity for comment by the official. Article 25 contemplates notification of a decision relating to a specific individual (which is to be 'communicated in writing') for the purpose of any appeal.

It is this latter decision for which reasons have to be stated if it adversely affects an official.

IV — Oral procedure

The parties presented oral argument at the hearing on 14 October 1976.

The Advocate-General delivered his opinion at the hearing on 11 November 1976.

Law

1 By an application lodged on 16 December 1975 the applicant claimed the annulment of his 'periodic report for 1973-1974' and annulment of the rejection by letter of the President of the European Parliament of his complaint in respect of this report.

2 It is alleged that this report was worse in comparison with the previous periodic reports (1969-1970 and 1971-1972) by reason of the fact that in the first place the assessments of his ability and his efficiency were altered from 'Excellent' to 'Very good' and that in the general assessment there was no longer any mention of his suitability for promotion.

3 The defendant, the European Parliament, alleges that the application is inadmissible on several counts.

4 It is alleged that the periodic report cannot be regarded as an act which may be contested under Article 90 (2) of the Staff Regulations because it is only a purely internal act the remedies for which lie solely in the right of the person affected to add any objections and observations.

5 Moreover it is claimed that since the periodic report consists of a series of assessments, the Court cannot, in the nature of things, substitute its own assessments for those of the appointing authority.

6 Finally the Parliament states that the report was notified to the applicant before 5 March 1975 so that his complaint on 17 June was out of time.

7 Since Article 43 of the Staff Regulations provides for the making of a periodic report every two years these are thus mandatory measures which must be communicated to the person concerned.

8 It is clear that these periodic reports generally constitute a more or less important factor each time the official concerned is considered for any promotion or takes part in competitions within the meaning of Article 29 of the Staff Regulations.

9 Although it is true that these reports are made up of assessments which it is difficult for a court to review, this fact does not prevent their adoption from being vitiated for irregularity of form and procedure or patent error and misuse of discretionary power — defects capable of making them unlawful.

10 Accordingly the argument that an application against a periodic report is *ipso facto* inadmissible cannot be accepted.

11 It is established that the report in question was signed by the Secretary-General of the Parliament on 17 April 1975.

12 It became definitive only on that date.

13 Accordingly the fact that the applicant, in accordance with the procedure prescribed for the drawing up of periodic reports, had knowledge of the content before that date is not capable of causing the period for lodging an appeal to start to run or of shortening it.

14 The action is therefore admissible.

Substance

15 The applicant considers in the first place that the report in question is vitiated for misuse of power and alleges that the less favourable assessments and the absence of any recommendation for promotion is due to the fact that during 1974 he repeatedly made use of the periodic reports for 1969-1970 and 1971-1972 to vindicate in Court his alleged rights to promotion.

16 If the competent authorities, alerted by the use made of the aforementioned reports to the fact that their assessments were capable of giving rise to premature hopes on the part of the applicant, became more careful in formulating their assessments of officials, that is not in itself a misuse of powers, but rather a very understandable amendment of their conduct in the light of experience.

17 Since moreover the defendant had found that in the past assessments of 'Excellent' had become too frequent for them to retain the desired cogency, it agreed no longer to make this entry for 1973-1974 save in exceptional cases and to assess the best efficiency as 'Very good'.

18 This attitude does not deserve censure.

19 The applicant himself admits that the periodic report in question is very eulogistic.

20 In these circumstances the existence of a misuse of powers has not been established.

21 In the second place the applicant claims that the report in question is worse than his previous report and as such is an act adversely affecting him for which reasons should have been given under the second paragraph of Article 25 of the Staff Regulations.

22 No such reasons have been given in the present case.

23 Article 25 provides that any decision relating to a specific individual shall at once be communicated in writing to the official concerned and the last paragraph of the article stipulates the categories of decisions referred to.

24 Periodic reports, the drawing up of which is governed by Article 43 of the Staff Regulations, do not come within these categories of decisions but are governed by the special provisions laid down by or by virtue of that article.

25 The provisions adopted in this matter by the Parliament in accordance with Article 43 do not require reasons to be given for assessments save in extreme cases of which the present is not one.

26 Accordingly the submission is unfounded.

27 The application must therefore be dismissed.

Costs

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

29 The applicant has failed in his submissions.

30 However, under the terms of Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions brought by servants of the Communities are to be borne by such institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the action;**

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

Donner O'Keeffe Bosco

Delivered in open court in Luxembourg on 25 November 1976.

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

The case on which I have to give my opinion today is concerned with a report made on the applicant under Article 43 of the Staff Regulations.

This report on 'ability, efficiency and conduct in the service' relates to the years 1973 and 1974. As provided in Article 43 of the Staff Regulations, it was communicated to the applicant. Since the applicant did not agree with its contents he made observations thereon on 5 March 1975. In them the applicant expresses his astonishment at the fact that he received only 'Very good' for 'Ability' and 'Efficiency' whereas in two previous reports he had received 'Excellent' for these.

Further, in the general observations the applicant notes that there is no mention of his suitability for promotion as was the case in the two previous reports. In his view this is all the more astonishing since for some eight months during the period covered by the report he acted as temporary Head of Division.

The Director-General to whom the applicant was responsible made

1 — Translated from the German.