JUDGMENT OF THE COURT (SECOND CHAMBER)
8 FEBRUARY 1973 [1]

Godelieve Goeth-Van der Schueren v Commission of the European Communities

Case 56/72

Summary

Officials — Disputes with the administration — Act adversely affecting an official — Meaning
(Staff Regulations, Article 91)

An official memorandum addressed to an official stating that the provisions applicable do not permit the maintenance of an allowance which he has hitherto received, and notifying him of the withdrawal of that allowance, constitutes an act adversely affecting him within the meaning of Article 91 of the Staff Regulations.

In Case 56/72

GODELIEVE GOETH-VAN DER SCHUEREN, official of the Commission of the European Communities, represented by Victor Biel, advocate at the Cour Supérieure de Justice at Luxembourg, having chosen her address for service at Luxembourg in the chambers of the said advocate, 71 rue des Glacis,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser Pierre Lamoureux, acting as agent, having chosen its address for service at the offices of its legal adviser Emile Reuter, 4 Boulevard Royal,

defendant,

In the matter (at the present stage of the proceedings) of the admissibility of the application for annulment of the decision by the Commission impliedly rejecting the applicant's complaint of 5 April 1972 seeking to retain the expatriation allowance and of the measure withdrawing that allowance,

1 — Language of the Case: French.

THE COURT (Second Chamber)

composed of: P. Pescatore, President of the Chamber, R. Monaco and H. Kutscher (Rapporteur), Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. The applicant, of Belgian nationality, is an official of the Commission and carries out her duties in Luxembourg. On 1 October 1971, she married the Austrian national Mr Goeth who is in private employment and resident in Luxembourg.

2. On 28 October 1971, the Head of the Personnel Division of the Directorate-General for Personnel and Administration of the Commission addressed a memorandum to the applicant in the following terms:

'Following your marriage on 1 October 1971, your right to the expatriation allowance has been re-examined. According to the certificate of residence which you submitted to us it appears that your husband has lived in Luxembourg since 25 September 1964. The conditions laid down in Article 4 (3) of Annex VII of the Regulations accordingly do not allow you to retain the expatriation allowance after your marriage and steps will be taken to withdraw it as from 1 October 1971.

The amount which you have continued to receive on account of this allowance in October and November will be recovered in four instalments from your next payments of salary.'

The applicant, by letter dated 22 December 1971, requested the Head of Division to re-examine her case, bearing in mind that her husband, being obliged every year to renew the work permit to be granted by the Grand Ducal authorities, was only provisionally settled in Luxembourg; therefore the conditions envisaged by Article 4 (3) of Annex VII of the Staff Regulations for the withdrawal of the allowance in question were not fulfilled.

By memorandum dated 14 January 1972 the Head of Division rejected this argument and confirmed his previous position.

By memorandum dated 5 April 1972, addressed to the President of the Commission and lodged with the Commission's General Secretariat on 6 April, the applicant submitted a formal complaint seeking to retain the expatriation allowance. The Commission did not reply to this memorandum.

3. By judgments dated 7 June 1972 (Cases 20/71 Mrs Bertoni-Sabbatini v

European Parliament; 32/71 Mrs Bauduin-Chollet v Commission), the Court (Second Chamber) held that in making the continuance of the said allowance dependent, in case of an official marrying a person not complying with the conditions for the grant of this allowance, upon acquiring the status of 'head of household' as defined by Article 1 (3) of Annex VII of the Regulations, the latter had created an arbitrary difference in treatment between officials. In consequence, the Court annulled the decisions withdrawing the allowance.

On 13 June 1972 the applicant, relying on the abovementioned judgment in Case 20/71, requested the Head of Division to re-examine her case.

By memorandum dated 15 June the Head of Division replied 'that steps will be taken to examine your request with a view to restoring the expatriation allowance, when the Council and the Commission have informed the administration of the practical implications to be drawn from the judgment of the Court of Justice on which you rely'.

By 'Communication to the Staff' No 118 dated 29 June 1972, the Directorate-General of Personnel and Administration of the Commission informed its officials that as a result of the judgment in Case 20/71, 'the administrative heads of the European Institutions decided on the 16th of this month to apply the implications of this judgment to all women officials in a position similar to that of Mrs Bertoni regarding the provisions of Article 4 (3) of Annex VII of the Staff Regulations. This measure will have effect from 1 July 1972'. The officials 'who might be affected' were requested to make themselves known.

The Head of Division, by memorandum dated 5 July 1972, replying to the memorandum of 13 June, informed the applicant that 'as a result of the judgment which you cite in your abovementioned note' the administrative heads had taken the decision set out above; he added as follows: 'The examination of your file makes it appear that your situation is comparable to that on which the Court of Justice pronounced; as a result your expatriation allowance is restored as from 1 July next. This regularization does not, however, in any way prejudge the answer that will be given to your complaint under Article 90 of the Regulations'.

4. On 3 August 1972, the applicant submitted the present application.

By a pleading submitted on 22 September 1972, the Commission, without entering a defence on the merits, raised the objection of inadmissibility, in accordance with Article 91 of the Rules of Procedure. By a pleading submitted on 23 October 1972, the applicant joined issue on the question of admissibility.

On the report of the Judge-Rapporteur, after hearing the Advocate-General, the Court (Second Chamber) decided to open the oral proceedings on the issue of admissibility.

Under Article 26 (3) of the Rules of Procedure, President of the Chamber R. Monaco was appointed to replace Judge A. Trabucchi, prevented from attending.

The oral arguments of the parties were heard on 22 November 1972. The Advocate-General presented his opinion at the hearing on 13 December 1972.

II — Submissions of the parties

The *applicant* submits that the Court should:

(a) say that the implied refusal to accept the complaint of 5 April is illegal and must therefore be annulled;

(b) in any case, and on the same grounds as in the Bertoni case 20/71, say that the withdrawal of the expatriation allowance is illegal and must therefore be annulled;

that consequently the allowances wrongly withheld must be paid

retrospectively from the date when the illegal measure was first applied, that is 1 October 1971;

(c) order the defendant to bear all the costs and expenses of the proceedings;'

The Commission submits that the application be dismissed as inadmissible and that the applicant be ordered to bear the costs;

III — Pleas and arguments of the parties

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

The *Commission* considers that the application is inadmissible as being out of time. To contest the decision of 28 October 1971 in good time, consistently with the constant decisions of the Court, the applicant would have had to submit, within a period of three months counting from the notification, either a direct application or a complaint followed by an application formulated within the set period. The time for taking action, then, had expired long before the date on which the applicant submitted her complaint, that is 5 April 1972. As for the memorandum of 14 January 1972, this merely confirmed the previous decision; the Court has consistently held that a confirmatory decision does not make time start to run afresh.

The *applicant* replies that the memorandum of 28 October 1971 did not constitute a decision but merely imparted information. To hold otherwise would mean that the staff were bound to consider even a preparatory measure as an act adversely affecting them, against which the interested party must submit an administrative complaint or a legal application within time limits excluding all possibility of amicable discussion. Such a situation could not fail to create a climate of distrust.

The memorandum of 28 October was limited to stating that the expatriation allowance could not be continued and that the overpayment would be recovered; 'very vague graunds' were cited which were subsequently recognized as illegal by the abovementioned judgments of the Court. It did not contain any element likely to draw the applicant's attention to its possibly decisive character; in particular, it did not use the expressions 'decide' or 'decision'. In the States of the Community, the smallest decisions include a mention of their decisive character.

The term 'decision' was only used for the first time by the memorandum of 14 January 1972. Subsequently to this note, the applicant presented in due time, first her complaint of 5 April and then the present application.

In the case of the Court finding that the memorandum of 28 October 1971 constituted a decision, the question would arise whether the Head of Division was competent to take it. Article 2 of the Regulations, it is true, provides that 'each institution shall determine who within it shall exercise the powers conferred by these Staff Regulations on the appointing authority'. If the delegation of powers is thus admitted in principle, it is nevertheless necessary in the present case to know:

— whether the Head of Division had been effectively delegated;

— if so, whether the delegation was regular, and in particular whether there exist provisions laid down by the Commission and determining the method of exercise of the delegated powers;

— if appropriate, whether the delegation was renewed by an appointing authority *ex hypothesi* different from that which made the first delegation;

— whether, having regard to the regulations in force at the Commission, the Head of Division

was not bound to sign *per procuratorem.*

The Commission ought to produce all the documents necessary to establish an answer to these questions.

Besides, even supposing that there was a regular delegation, the Head of Division was not competent to take an illegal decision. It follows from the judgment in Case 20/71 cited above, that the alleged decision of 28 October 1971 rested on a provision of the Regulations recognized as illegal.

In the case of the Court not accepting the applicant's arguments, the Commission ought nevertheless to bear the costs of the case because it encouraged the applicant's mistake. If the memorandum of 28 October 1971 constituted a decision, the Head of Division ought logically to have considered the applicant's letter of 22 December 1971 as a complaint and to have passed it to the competent authority; the applicant would thus have understood the situation and acted accordingly.

At the hearing the *Commission* produced a copy of its 'Internal Information Bulletin — Staff Courier' No 156 bis, dated 31 March 1971, containing its decision of 26 February 1971 'relating to the exercise of powers granted by the Staff Regulations to the appointing authority, etc.'. It cites Article 7 of this decision, under the terms of which 'the Heads of Division of the Directorate-General of Personnel and Administration shall exercise within their respective spheres of competence the powers granted to the appointing authority concerning staff in categories A, B, C and D and in the Language Service by Articles... 4 of Annex VII (of the Regulations) — expatriation allowance (special cases) . . .' As a result the Head of Division was in this case acting within his powers in taking the decision of 28 October 1971. This decision, from the fact of its having ordered the withdrawal of part of the applicant's emoluments, constituted an act adversely affecting the applicant. The applicant's salary slips, similarly produced, make it clear that the expatriation allowance has not been paid since 15 November 1971. On pain of being ruled out of time, the applicant ought to have presented a complaint or an application by mid-February 1972 at the latest. The letter of 22 December 1971 did not constitute a complaint; it was addressed to the Head of Division, whereas by the terms of Article 2 of the general decision of 26 February 1971 mentioned above, 'the Commission shall exercise the powers conferred on the appointing authority by the Regulations, concerning staff in categories A, B, C and D and the Language Service by Articles . . . 90 — decision on request or complaint'. The application is, in any case, inadmissible even if this letter must be considered as a complaint, since in this case, having regard to the time limits set by Article 91 of the Regulations, the application ought to have been presented in April 1972 at the latest.

The *applicant* replies that a complaint can equally be introduced through the official's immediate superior, that is addressed directly to the author of the act to which it relates. She denies that there was delegation of the power of decision on the question of withdrawal of the expatriation allowance.

Grounds of judgment

1 The application, filed in the Court Registry on 3 August 1972, seeks first the annulment of the implied decision of rejection which the applicant considers

to have arisen from the silence observed by the Commission on the complaint of 5 April 1972.

2 It further seeks that the Court should declare illegal the withdrawal of the applicant's expatriation allowance and declare the Commission bound to pay to her the amounts alleged to have been wrongly withheld.

3 The Commission, by interlocutory pleading, in reliance on Article 91 of the Rules of Procedure, has raised an objection of inadmissibility based on the delay in filing the application.

4 It asserts that the memorandum of the Head of the Personnel Division dated 28 October 1971 stating that the applicant no longer fulfils the conditions for the grant of the expatriation allowance, as well as the actual withdrawal of this allowance, shown for the first time in the salary slip of 15 November 1971, constituted acts adversely affecting the applicant within the meaning of Article 91 of the Staff Regulations, so that the applicant, under pain of being ruled out of time, ought to have presented a complaint or an application in February 1972 at the latest.

5 However, she failed to do this, the letter of 22 December 1971, addressed to the Head of Division and not to the appointing authority, not being susceptible of constituting a complaint.

6 On the other hand, supposing it to have constituted a complaint, the applicant would have had to file, in April 1972 at the latest, an application contesting the implied decision of refusal which would then have resulted from the two months' silence on this letter observed by the Commission.

7 The preliminary objection must be judged in the light of Articles 90 and 91 of the Staff Regulations as they appeared at the time of the measures in dispute — hereinafter called 'former Article 90' and 'former Article 91' — that is without taking account of the modifications introduced by Articles 38 and 39 of Council Regulation No 1473/72 (Euratom, ECSC, EEC) of 30 June 1972 (OJ L 160, p. 1) and taking effect only on 1 July 1972, under the terms of Article 90 of this Regulation.

8 The memorandum of 28 October 1971 constituted an act adversely affecting the applicant within the meaning of former Article 91 (1) of the Regulations.

9 The applicant is wrong in objecting that since the memorandum did not anywhere employ the expression 'decision' or the term 'decide', it did not contain any element likely to draw her attention to the decisive character of the measure in question.

10 In stating in the memorandum that 'the conditions envisaged in Article 4 (3) of Annex VII of the Regulations do not allow you to retain the expatriation allowance' and that 'steps will be taken to withdraw it from 1 October 1971' the Head of Division in clear and unconditional terms took a measure adversely affecting the applicant.

11 The applicant did not take all the steps in her power with regard to the memorandum of 28 October 1971, that is to say she did nothing either to present an application directly within the time limit provided by the first sentence of former Article 91 (2) of the Regulations, or to preserve her right to an application by filing a complaint with the appointing authority under former Article 90 of the Regulations.

12 The letter of 22 December 1971 did not constitute a complaint, the applicant herself not having intended to give it this character; this conclusion is chiefly supported by the fact she did not address it to the appointing authority and that she did file a complaint with this authority, within the meaning of former Article 90 of the Regulations, by her letter of 5 April 1972 addressed to the President of the Commission.

13 Accordingly, the applicant's right to impugn the decision of 28 October 1971 before the Court had expired at the end of the month of January 1972.

14 Whilst it was open to her, by virtue of former Article 90 of the Regulations, to file a complaint at any time with the appointing authority, as she did by her letter of 5 April 1972, such a complaint could not confer on her a new right of action.

15 Finally, the memorandum of the Head of Division of 14 January 1972, being simply a confirmation of the decision of 28 October 1971, cannot be taken into consideration when calculating the relevant time limits.

16 The action, being out of time, must therefore be dismissed as inadmissible.

Costs

17 The applicant has failed in her action.

18 By Article 69 (2) of the Rules of Procedure the losing party must bear the costs.

19 However, by Article 70 of the Rules of Procedure, costs incurred by the institutions, in actions by the staff of the Communities, remain the liability of the institutions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral arguments of 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 Regulation of the European Communities, especially Articles 90 and 91 as they appeared prior to 1 July 1972;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69, 70 and 91;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action as inadmissible;**
2. **Orders each party to bear its own costs.**

Pescatore Monaco Kutscher

Delivered in open court in Luxembourg on 8 February 1973.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber