JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 15 APRIL 1975 [1]

Michelina Santopietro
v Commission of the European Communities

Case 61/74

In Case 61/74

MICHELINA PITRONE (née Santopietro), a former member of the temporary staff of the Commission of the EEC, residing at 45 boulevard Charlemagne, Brussels, represented by Victor Biel, Advocate of the Cour Supérieure de Justice of the Grand Duchy of Luxembourg, with an address for service in Luxembourg at the Chambers of Mr Biel, 71 rue des Glacis,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Thomas F. Cusack, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, P. Lamoureux, 4 boulevard Royal,

defendant,

Application for a declaration that the applicant had a contract as a member of the temporary staff expiring on 31 July 1974 and that the Commission was not entitled to terminate that contract otherwise than in accordance with the conditions laid down by Article 47 et seq. of the Conditions of Employment of Other Servants of the European Communities and, consequently, for an order for the Commission to pay to the applicant her salary from 1 November 1973 to 31 July 1974,

THE COURT (Second Chamber)

composed of: A.T. Mackenzie Stuart, President of Chamber, H. Kutscher and M. Sørensen (Rapporteur), Judges,

Advocate-General: A. Trabucchi,
Registrar: A. Van Houtte

gives the following

1 — Language of the Case: French.

JUDGMENT

Facts

The facts and the arguments put forward by the parties during the written procedure may be summarized as follows:

I — Facts and procedure

1. Mrs Pitrone (née Santopietro) entered the service of the Commission as a shorthand-typist on 16 March 1972 as a member of the auxiliary staff. On 26 July 1972 she entered into a contract with the Commission as a member of the temporary staff. The contract was for a period of one year from 1 August 1972 to 31 July 1973.

After leave for confinement and her annual leave, the applicant returned to work in mid-July 1973 for a period of three weeks. After 6 August 1973 her state of health prevented her from working.

The applicant received the duplicate of a computer card showing her administrative position. This individual card is prepared by the Commission's departments on the basis of the data in the personal file and contains personal information on each official and servant. The applicant's card was headed 'Expiration of Contract' on 31 July 1974. According to the way in which it was worded, the card took effect on 1 August 1973. It was dated 24 August 1973, that being the date on which it came out of the computer in Luxembourg. The Commission states that the card was not sent to the applicant until 4 September 1973.

On 24 August 1973, the competent authority at the Commission sent the applicant a letter in French worded as follows:

'I regret to have to inform you that your conduct at work is judged not to have appreciably improved. In fact, my departments have been informed that you are continually absent and that you do not carry out your duties satisfactorily.

Enclosed herewith you will find an extension* of your contract as a member of the temporary staff for three months. If during that period you do not show evidence of regular attendance at work and an appreciable improvement in your work, I shall be obliged to terminate your contract.'

* 'The extension has already been sent.'

On 28 August 1973 an identical letter, this time in Italian, was sent to the applicant. This letter contained no reference at the foot of the page to the dispatch of the extension of the contract. The computer card and the two letters were sent by internal messenger service to the applicant's administrative address. She states that because of her illness she did not know of the existence of these documents until mid-September 1973, when her husband was informed that there was post for his wife at her office and went to collect it.

The applicant states in addition that she never received the extension of the contract, referred to in the two letters. The Commission states that it was sent [1].

On 12 October 1973, the competent authority at the Commission sent the

1 — According to the copy in the applicant's personal file, this document was worded as follows:
'I would ask you to take note that the appointing authority has decided to extend your contract of employment as a member of the temporary staff until 31. 10. 1973. The conditions of work and the other provisions contained in your original contract will remain unchanged. I would therefore ask you to return to me a copy of this letter duly signed.'

applicant a note containing the following:

'You have a contract of employment as a member of the temporary staff expiring on 31 October 1973.

I regret to have to inform you that it is not possible to renew your contract beyond that date.'

2. After asking by letter of 26 October 1973 for an explanation from the Directorate of Personnel of the Commission and, on 27 November 1973, meeting some officials of that Directorate, the applicant submitted a complaint within the meaning of Article 90 of the Staff Regulations of Officials against the decision of 12 October 1973.

As no reply was received to that complaint, the present application was made on 7 August 1974.

The written procedure followed the normal course.

After 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.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— rule that the applicant had a temporary contract expiring on 31 July 1974;

— rule that the Commission was not able unilaterally and under fabricated pretexts to terminate that contract otherwise than in accordance with the conditions laid down in Article 47 et seq. of the Conditions of Employment of Other Servants;

— consequently order the Commission to pay to the applicant her salary together with all appropriate allowances from 1 November 1973 to 31 July 1974;

— order the Commission to pay the costs.

The *Commission* contends that the Court should:

— declare the applicant's application to be unfounded and consequently dismiss it;

— order the applicant to pay the costs.

III — Submissions and arguments of the parties

In *her application,* the *applicant* maintains that, according to the computer card, the position between the parties at 24 August 1973 is clear. The applicant accepted that position by going to work, and the Commission by continuing to pay her salary. In addition, she continued to consult the medical department of the Commission which was therefore informed of her absence for reasons of health.

A contract therefore existed, expiring at the end of July 1974. That contract went through the administrative processes. The financial department accepted the extension of a year. The administration itself, by sending that contract which was by implication contained in the computer card, confirmed it at the time of the dispatch of the card. The extension was tacitly agreed to by the applicant.

On the other hand, there is not contract expiring on 31 October 1973. For such a contract to exist, there must at least be agreement between the parties. There cannot have been agreement by the applicant who never saw such a contract and, all the more so, could not have agreed to it. In the applicant's opinion, such a contract never even existed, because it would then be inexplicable that it was not enclosed with the Commission's letter of 24 August 1973.

The applicant claims that the decision to terminate her employment on 31 October 1973 was taken after the extension of her contract to 31 July 1974.

She maintains that the administration, wishing to terminate her contract but lacking the necessary conditions for dismissal, fabricated the story of the expiration of a temporary contract on 31 October 1973.

The Commission may not take a decision creating a temporary contract for three months after itself extending the duration of the contract to a year. If necessary, it could have had recourse to a decision terminating the appointment in accordance with Articles 47 to 50 of the Conditions of Employment of Other Servants. In that case, it would have had to give reasons for the decision, but the letter of 12 October 1973 gives no reasons except a reference to a contract which never existed. In addition, the terms of notice were not observed. The administration did not even give a minimum notice as it informed the applicant on 12 October 1973 of the termination of her contract on 31 October 1973.

The applicant finds support for her arguments in the last sentence of the administration's letter of 24 August 1973, which states: '... I shall be obliged to terminate your contract'. If there had been a contract for three months mentioned in that letter, the administration would have indicated that the contract would not be renewed. But it was well aware that in order to get rid of the applicant, a person under contract who was unwell, it would have to terminate that contract.

In *its statement of defence,* the *Commission* emphasizes that the concept of a contract is that of agreement between at least two parties. In the absence of any evidence of a common will on the part of the parties in question, there can be no contract.

According to the Commission, this essential element is lacking as regards the alleged extension of the applicant's contract to 31 July 1974. Legally, there was no extension of the contract expiring on 31 July 1973. Although the computer card contained false information, this was because the administration had previously envisaged an extension for a year. At that stage of handling of the applicant's file, the data on the position were fed into the information system and came out on 24 August 1973 in the form of the card in question. That card was not sent to the applicant until 4 September 1973. In the meantime the Commission took a definitive decision and communicated it to the applicant on 24 and 28 August 1973. Faced with this contradiction between two documents, the applicant wishes the Court to accept that a computer card must prevail over a letter signed by the Director of Personnel, clearly showing his intention to renew the contract for a period of three months.

The Commission considers that the applicant's contract of employment expired on 31 July 1973 and that it was not renewed in due form. As to the legal nature of the relationship between the applicant and the Commission during the period between 1 August 1973 and the dispatch either of the contract of three months' extension or of the letters of 24 and 28 August 1973, it is difficult to be certain on this point. There was perhaps an implied extension of uncertain duration while waiting for the position to be regularized definitively. In any event, before the end of August the Commission did what it could to regularize the applicant's position. Although she did not receive the extension of her contract duly signed by the competent authority she was at least adequately informed of the decision taken with regard to her by the said letters of 24 and 28 August 1973.

In *her reply,* the *applicant* points out that the Conditions of Employment of Other Servants refer to a contract for temporary staff but without specifying that it must be in writing. The renewal of a contract may therefore take place by way of implied extension. This argument is confirmed by a decision of the Commission of 26 February 1971 which, in Article 9 thereof, designates the

authority competent to decide upon the engagement of other servants of the Communities.

In the applicant's case, this implied extension took place as far as the administration is concerned when it fed the data from the file into the computer. It took place as far as the applicant is concerned when she returned to work on 1 August 1973. The applicant does not claim that the card constitutes a contract but evidence of the intention of the administration to offer an extension, which offer the applicant accepted.

The applicant contends that there was no contract for a period limited to three months, which moreover is admitted by the Commission. The essential element is lacking, namely the consent of both parties. On the other hand, the implied renewal of the contract of one year cannot be disputed, as all the legal conditions are fulfilled in this instance: on the one hand, an offer by the administration, evidenced by date or documents from the file fed into the computer, and, on the other hand, acceptance by the servant, as evidenced by her return to work.

This is the reason why the letter of 12 October constitutes a decision of dismissal disguised for the needs of the case as an administrative measure in the form of a simple statement. This letter therefore amounts to a misuse of powers.

Finally, the applicant calls upon the Commission to give reasons for the discrimination exercised against her as compared with the case of another member of the temporary staff. In that case, which is identical to that of the applicant, the person concerned remained in service until the end of the tacitly extended contract.

In *its rejoinder, the Commission* looks at the problem on the basis of two hypotheses: hypothesis A that the applicant received the text of the extension of her contract but did not sign and return it to the administration, and hypothesis B that, as a result of an error in its departments, the Commission did not send it to the applicant.

In hypothesis A the applicant received a document which, if she had signed it herself and returned it, would have constituted employment legally perfect both as to substance and to form. Although she did not carry out that formality, she did nevertheless comply with the obligations laid down in that document, either by presenting herself at work or by supplying medical certificates indicating her willingness to work.

In hypothesis B, the applicant was unable to carry out the formality, on her part, of accepting the offer but clearly indicated her willingness to accept employment the legal existence of which she was aware of from the moment she received the letters of 24 and 28 August 1973, namely some time in mid-September 1973.

The Commission might just possibly accept the applicant's argument that there may be an implied acceptance of a contractual offer of employment. But such implied acceptance can only concern a measure adopted by the authority having the power to conclude contracts of employment.

If it were considered possible to envisage the conclusion of contracts otherwise than in writing — which is not the case as these contracts contain terms which must of necessity be specified in writing — it would nevertheless be true that an oral contract should, in respect of the institution concerned, be concluded by the competent authority.

The defendant therefore strongly disputes that the mere 'intention of the administration', whether express or implied, may be accepted. Only the person who has the power to conclude a contract also has the power legally to make an offer. The computer card was prepared (by feeding certain data into the computer) in mid-July, at a time when the Director of Personnel, the sole competent authority in the matter, had not yet reached a decision. Certainly at

that time there was an intention to grant an extension of a year and it was only subsequently that the competent authority came to a different decision.

The Commission also disputes that the letter of 12 October 1973 is one of disguised dismissal. Either the applicant was granted an extension of her contract to 31 October 1973, in which case the administration did not have to terminate the contract with effect from that date as it was in any event to expire on the said date; or the applicant was granted an extension to 31 July 1974, in which case the letter of 12 October 1973 must be considered as having no effect, as it was written from a point of view which subsequently appeared as incorrect.

With regard to the alleged discrimination against the applicant as compared with the case of another servant, the Commission maintains that the raising of a fresh issue in the course of proceedings is prohibited by Article 42 (2) of the Rules of Procedure of the Court and that the issue is therefore inadmissible. The Commission shows, in addition, that the two cases are not identical. In the case of the other servant, it was simply a question of a contract having expired, without having been renewed or extended.

The applicant, represented by V. Biel, and the Commission, represented by its Agent, T. Cusack, presented oral argument at the hearing on 20 February 1975.

The applicant refers to a document, entitled 'Extension of contract', annexed to the Commission's rejoinder. According to her, a note made on that document to the effect that 'this extension of contract rescinds and replaces that of 10 July 1973 — ref. 5328 — to 31 July 1974' settles the dispute since it constitutes proof that the Commission had drawn up a contract of a year's extension before the expiration of the prior contract. The applicant points out that this note appears on a document which bears the signature of the appointing authority.

The Commission replies in particular that the document in question is an internal measure and that the note does not prove the existence of an actual contract of a year's extension. In any event, the competent authority sent only one contract of extension to the applicant, namely the contract of three month's extension.

The Advocate-General delivered his opinion at the hearing on 19 March 1975.

Law

1 The applicant asks the Court to declare that she held a contract as a member of the temporary staff expiring on 31 July 1974 and that the Commission was not entitled to terminate that contract otherwise than in accordance with the conditions laid down by Articles 47 et seq. of the Conditions of Employment of Other Servants of the European Communities.

2 In addition, and as a consequence of such declarations, she asks that the Commission be ordered to pay to her her slary for the period from 1 November 1973 to 31 July 1974.

3 It is appropriate, first of all, to establish whether the competent authority of the Commission offered the applicant a renewal of her contract of emplyoment for a period of one year.

4 Although the Commission's departments appear to have had the intention of renewing the applicant's contract for a period of one year, such intention was not crystallized in a express offer to the applicant by the appointing authority.

5 The only express offer of a renewal of the contract coming from that authority and addressed to the applicant was the offer in the two letters of 24 and 28 August 1973 to extend the contract for a period of three months.

6 Even if it were assumed that the computer card of 24 August 1973 concerning personal information on the applicant could be interpreted as containing an offer for the extension of her contract for a period of one year, that offer would in any event have been revoked by the express offer of an extension of three months contained in the two letters of 24 and 28 August 1973.

7 Moreover it is established that the applicant received the computer card and the two letters at the same time.

8 She therefore never had an offer of the extension of her contract for a period of one year, which she could have accepted.

9 The applicant's remaining conclusions presuppose that the existence of a contract for one year is established.

10 The application must therefore be dismissed.

Costs

11 Under the terms of Articles 69 (2) and 70 of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs, but in proceedings

commenced by servants of the Communities against institutions, institutions shall bear their own costs.

12 However, under the terms of Article 69 (3) the Court may in exceptional circumstances order that the parties bear their own costs in whole or in part.

13 Because of the lack of clarity in the conduct of the Commission, both by reason of the delay with which it indicated its intentions with regard to the applicant's administrative position and by reason of the contradictory particulars with which it supplied her, it is appropriate to apply this provision and to require the Commission to pay the applicant's costs.

On those grounds

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Commission of the European Communities to pay the costs.**

Mackenzie Stuart Kutscher Sørensen

Delivered in open court in Luxembourg on 15 April 1975.

A. Van Houtte
Registrar

Mackenzie Stuart
President of the Second Chamber