In Joined Cases 79 and 82/63

JEAN REYNIER AND PIERO ERBA, officials of the Commission of the European Economic Community, represented by Marcel Slusny, Advocate of the Cour d'Appel, Brussels, and Head of Department at the University of Brussels, with an address for service in Luxembourg at the Chambers of E. Arendt, avocat-avoué 6 rue Willy-Goergen,

applicants,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, with an address for service in Luxembourg at the offices of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

1. Application for:

— annulment of the establishment of the applicants in Grade A 4 and the refusal by the Commission of 21 May 1963 to grant their request to be reclassified in Grade A 3;

— an order that the Commission must classify the applicants in Grade A 3;

— an order that the European Economic Community pay the costs of the application;

2. Subsidiary application for an order against the European Economic Community for the repayment of damages to the applicants,

THE COURT (Second Chamber)

composed of: Ch. L. Hammes, President, R. Rossi and R. Lecourt (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

Mr Jean Reynier was engaged by the Commission of the European Economic Community by a letter of 18 March 1959 and commenced duties under a so-called 'Brussels contract' on 1 April 1959, attached to the Joint Statistical Office of the European Communities. He was at the time placed in Grade A 6, Step 1. He was appointed to Grade A 5, Step 2 on 1 March 1960, and to Step 3 of the same grade on 1 April 1961. Then, with effect from 1 December 1961, he was reclassified in Grade A 4, Step 2, and appointed Head of the Associated Overseas Countries Statistics Division by a Decision of the Commission of 22 December 1961. On 21 January 1963 he was established as an official in Grade A 4, Step 2. On 2 April 1963 he wrote to the Commission through the official channels requesting, in accordance with Article 90 of the Staff Regulations, that his position within the administration be regularized by appointing him to Grade A 3 with effect from 1 January 1962.

Mr Piero Erba was engaged by the Commission of the European Economic Community by a letter of 9 December 1959 and commenced duties under a so called 'Brussels contract' on 1 February 1960, attached to the Joint Statistical Office of the European Communities. He was at the time placed in Grade A 5, Step 2.

A letter of 14 December 1960 informed him that the Commission had appointed him to Grade A 4, Step 1. He was made Head of Division for 'Banking and Financial Accounts' within the department of General Statistics by a Decision of 3 May 1961 without altering his grade, and was informed of this in a letter dated 26 May 1961.

He was established as an official on 21 January 1963 in Grade A 4, Step 2. On 15 February 1963 he formally acknowledged receipt of the communication appointing him and resigned from his 'Brussels contract', reserving to himself, however, the benefit of 'all rights vested or continuing to exist after the entry into force of the new contract'. On 4 April 1963 he wrote to the Commission through the official channels requesting, in accordance with Article 90 of the Staff Regulations, that his position within the administration be regularized by appointing him to Grade A 3 with effect from 1 January 1962, and his letter was supported by a note dated 24 May 1963 from Mr R. Dumas, signed on behalf of the Director-General of the Statistical Office, drawing attention to the table of basic posts and corresponding career brackets which appears in Annex I to the Staff Regulations.

By letter of 21 May 1963 the President of the Commission informed Messrs Reynier and Erba that the Commission was as yet not in a position to give a decision on their request since 'the problems arising from Article 102 and the table of basic posts and corresponding career brackets have yet to be studied in full'.

Messrs Reynier and Erba then commenced legal proceedings in the Court of Justice of the European Communities in Cases 79 and 82/63, lodged at the Registry on 29 July 1963.

II — Conclusions of the parties

The *applicants* claim that the Court should:

'1. Declare their appointments null and void in so far as these establish them in Grade A 4;

2. Declare null and void the refusal

of the Commission of 21 May 1963 to grant their request for reclassification;

3. Rule that the Commission must place the applicants in Grade A 3;
4. As a subsidiary point:
   Order the European Economic Community and if necessary the Commission to pay the applicants damages of 1 franc, to be made up to the proper sum during the course of the proceedings;
5. Hold that the European Economic Community and if necessary the Commission must bear the costs of the action in full;
6. Place on record the fact that the applicants:
   (a) reserve the right to raise any fresh issues of fact or of law which may be necessary following the statement by the other party of its defence, and the right to produce documents, if need be;
   (b) offer to prove by any means open to them in law, including evidence by witnesses, the facts alleged by them but not yet proved in writing, should those facts be contested by the other party.'

In their reply, the applicants supplemented their initial conclusions by further subsidiary conclusions requesting that the Court should:

'Order the Council of Ministers to furnish such explanations and to produce such documents as the Court considers desirable in order that it may be fully informed of the difficulties alleged by the defendant;

Order the Commission to produce all the necessary documents relating to the difficulties alleged by it.'

The *defendant* contends that the Court should:

'Declare the applications unfounded and make an order as to costs in accordance with the relevant provisions.'

III — Submissions and arguments of the parties

A — *The Commission named as defendant*

The *applicants* have named as defendant in the application both the European Economic Community or, alternatively, the Commission of the Community, on the basis of Article 91 of the Staff Regulations. Since these Regulations were drawn up by the Councils it would be useful to know the contents of the unpublished minutes of the Council relating to their adoption. Secondly, since the Commission has argued in its defence the Council's refusal to grant its budgetary requests it would be desirable for the Council, if it does not intervene, at least to produce all the necessary explanations and documents at the request of the Court under Article 21 of its Statute.

They believe that it is necessary for them to name the Community as a party by virtue of Article 210 of the Treaty and because of their subsidiary claim, the more so since the Commission claims in its defence *force majeure* as a result of the Council's attitude.

The *defendant* replies that naming the European Economic Community as a defendant is an unnecessary precaution in view of the case-law of the Court, and emphasizes the fact that the Council of Ministers is neither a party to the proceedings, nor has it intervened in them.

B — *Principal request*

The *applicants* plead the four grounds provided for in Article 173 and the principle that vested rights must be respected, and ask that their appointment to Grade A 4, Step 2, be annulled. They consider that according to Article 102 of the Staff Regulations, they should have been established in the grade and step expressly or impliedly accorded them before they became subject to

the Regulations.

They claim that their duties were those of Heads of Division and support this by quoting a number of documents in which the Commission recognized this.

The *defendant* replies that these grounds are not pleaded with sufficient clarity. It points out that the applicants, having been expressly accorded Grade A 4, cannot claim that a higher grade was accorded them by implication, irrespective of the duties exercised by them during the period prior to the Staff Regulations or after their entry into force.

It is of the opinion that the performance of duties recognized as those of Head of Division during the period prior to the Staff Regulations could lead to the applicants being given a different grade, if two conditions were fulfilled, namely that the Commission recognizes the administrative units controlled by them as being divisions within the meaning of and subject to the Regulations, and that it has a Grade A 3 post at its disposal under the budget. But the Council of Ministers, it goes on to explain, has refused its request for the supplement to be made to the budget for the financial year 1962 which would have allowed some A 4 posts occupied by officials known as 'Heads of Division' during the period prior to the Staff Regulations to be converted into A 3 posts. It also explains that it did request within the terms of the 1964 budget that two A 4 posts in the Statistical Office be converted into A 3 posts, thus enabling the applicants' position to be regularized.

It is therefore compelled to ask the Court to dismiss the principal application.

The *applicants* reply that their arguments are sufficiently precise for the defendant to have grasped them, and they invoke in this connexion Articles 38 (1) and 42 (2) of the Rules of Procedure.

They stress that, in their view, Article 102 and Annex I of the Regulations have been infringed. They recall that in arguing on the basis of their position prior to the Staff Regulations (no breach of continuity) they were not thereby claiming any right except to the extent that Article 102 takes such a position into account.

They reject the distinction to which the defendant has recourse between grades assigned expressly and by implication, a distinction which can be disputed both on the facts (position of officials established under a Brussels contract) and on the law (the correct interpretation of Article 102).

As to the two conditions which the defendant claims must be satisfied before the applicants can be accorded Grade A 3, the applicants stress that the first condition, that of recognition of the administrative units directed by them as being divisions, has never been applied and is contradicted by a number of events and documents, particularly the request for A 3 posts to be allowed for in the 1962 budget.

The second condition — that a vacant A 3 post should be available — is, according to the applicants, wrong in fact and in law. In law, if the Council has not intervened in the present proceedings its refusal cannot be taken into consideration when there is a question of the observance of the Regulations. If the Court were to give judgment against the Commission, the inevitable result would be that the Council would be compelled to grant the budgetary credits necessary for effect to be given to the Court's decision.

As to the facts, there is at least one A 3 post available in the Statistical Office, and several similar posts in the joint services, as shown by the vacancy notices.

The applicants also state that the budgets allowed to the Commission are expressed in aggregate figures, and credits are not allocated by reference to administrative units. This is in keeping with the fact that officials are

established in a grade, and not in a particular post.
The applicants draw attention to the vagueness and the hypothetical nature of the difficulties referred to by the Commission.
Lastly, they state that even if the Council decides to agree to the creation of two new A 3 posts which would be given to the applicants, the latter would still suffer financial damage and their careers would be retarded since the new budget only comes into effect on 1 January 1964.
The *defendant* replies that the applicants' argument assumes that a contractual servant can be accorded by implication a grade other than his expressly recognized grade, and that in the event of a conflict between the two it is the latter which must prevail. This is clearly contrary to the wording and spirit of Article 102 of the Regulations. In any event, exercise of particular functions cannot be the determining factor in deciding which grade has been by implication attained, since the contract does not provide for any legally determined table of correspondence between grades. The table of correspondence in Annex I cannot create rights for contractual servants.
The defendant is of the opinion that, if the Court rejects the applicants' claim to be made officials in Grade A 3 with effect from 1 January 1962 by virtue of Article 102 of the Regulations, the related problem of possibly reclassifying the applicants is raised by reason of the fact that they continued to perform the same duties after becoming subject to the Staff Regulations. This would entail a second appointment which could only be made subject to the above-mentioned conditions.
As regards the vacant posts, the defendant draws attention to the fact that the only vacant A 3 post in the Statistical Office provided for by the budget was transferred in the interests of the service to a post in the second 'Third countries and publications', the subject of a vacancy notice challenged by the applicants in Cases 98 and 99/63.
It also emphasizes that the staff of the Statistical Office authorized for 1963 by the budget has been precisely established and that the number of A 3 posts in it cannot be increased.

C — *Subsidiary application*

The applicants seek compensation for material and non-material damage caused by the Commission's delay, constituting a wrongful omission ('faute'), in defining the duties and powers attaching to each post, despite the completion of the work of the Staff Regulations Committee and the prompting of the Assembly; this is an inexcusable and wrongful failure to act.
The defendant points out that if the Court allows the principal request, the subsidiary request made by the applicants loses its point; if the Court does not allow the request, there will be no ground for awarding damages since a wrongful omission will not have been established.

IV — Procedure

The written procedure followed the normal course. By Order of the Second Chamber of the Court of 12 March 1964 a decision as to costs in the proceedings in Cases 98 and 99/63 (main action and application for the adoption of an interim measure) between the same parties, which the applicants discontinued, was reversed, on the ground of identity of subject-matter with the present action, to the judgment in the present proceedings. The present two cases were joined on the ground of their identical subject-matter for the purposes of the oral procedure and of the judgment.
On 13 May 1964 Mr Advocate-General Roemer delivered his oral and reasoned opinion to the effect that the decisions

of the Commission refusing to reclassify the applicants with effect from 1 January 1962 in Grade A 3 should be annulled, and that the Commission should be ordered to pay the costs of the present applications and of those in Cases 98 and 99/63 (main action and application for the adoption of an interim measure).

Grounds of judgment

Admissibility

The applicants have named as defendants in their applications the European Economic Community or, alternatively, the Commission.

Article 179 of the EEC Treaty provides that: 'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations of the Conditions of Employment'. The phrase 'the conditions laid down in the Staff Regulations' applicable to officials and other servants necessarily implies that the appointing authority, which exercises in fact the powers of an employer with regard to officials, has the capacity to be a party to legal proceedings. In this instance the appointing authority is the Commission itself. The wording of the Regulations confirms this reasoning.

Under Title VIII, headed 'Appeals', Article 91 of the Staff Regulations of officials of the European Economic Community is a continuation of Article 90 which describes the procedure through official channels, which it is both logical and desirable to follow before proceedings are instituted before the Court. Any official may submit his case to the appointing authority of his institution by means of this procedure. Consequently the appeal to the Court provided for in Article 91 ought, in the absence of any provision to the contrary, to obey similar rules and thus be directed against that same authority.

The applicants further claim that it is necessary to compel the Community to appear because it comprises several institutions and because of the distribution of budgetary and financial powers among these institutions.

The Regulations were adopted in accordance with the procedure laid down by Article 212 of the Treaty by the authorities designated for the purpose, and the institutions are bound by their provisions; therefore the Court's interpretation of the Regulations applies equally to all the institutions of the Community.

Moreover, the force of *res judicata* prevents rights confirmed by a judgment of the Court from being disputed anew. Since the Community is a single entity, it is inconceivable that judgment of the Court which has the force of *res judicata* with regard to an institution — in this case the Commission — should not have the same force with regard to the Community as a whole.

For these reasons the applications must be regarded as being made against the Commission and there is, moreover, no reason to hold them to be inadmissible.

The Substance

The applicants seek, first, the annulment of their establishment in Grade A 4.

Article 102, paragraphs 1 to 4 of which were incorporated in full in Annex X to the new Staff Regulations of officials of the ECSC, was designed to fix uniform standards not merely in relation to servants engaged under the so-called 'Brussels contracts' but, in certain respects, also for established officials and other servants engaged under the old ECSC provisions.

One of these common standards secures for all servants of the European Communities established under this scheme recognition of the position accorded them prior to the entry into force of the Regulations (except in the particular case mentioned by the second paragraph of that Article); this will be accomplished by more or less automatically transposing the grade and step previously accorded to them, whether expressly or by implication, into the table referred to in Article 66 of the Regulations.

Before the present Regulations entered into force, servants engaged under the so-called 'Brussels contracts' could not, in the absence of any regulations governing their position, be allocated a grade and step except by analogy with the system prevailing in the ECSC.

Consequently it is quite correct to maintain that the position of such servants is covered by the provision in Article 102 which refers to grades and steps 'impliedly' accorded, that is to say, the grade and step accorded by implication by analogy with the ECSC rules. In fact, this provision refers only to the previous grade and step, as far as establishment of officials is concerned.

When carrying out the process of establishment of officials provided for by Article 102, the administration is not bound to take into account, in this first stage of integrating servants into the scheme set up by the Staff Regulations, any possible differences between the grade attributed by this means to

each servant and the grade which properly corresponds to his duties according to Annex I to the Regulations and the definitions referred to in Article 5 (4).

The decision giving effect to the integration is therefore not to be criticized on the ground that it established the applicants in the same grade and at the same step which had been accorded to them by implication before the Regulations entered into force.

In those circumstances the applications must be dismissed in so far as they seek, on the ground above-mentioned, the annulment of the decisions giving effect to the integration.

However, any servant who, after he has been brought under the Staff Regulations, has been kept in his previous post when that post ought under the new Regulations to carry a grade higher than that accorded under the Article 102 procedure is entitled to have his position regularized in compliance with the principle of correspondence between grade and duties prescribed in Annex I.

The applicants requested, by letters dated 2 and 4 April 1963, that they be reclassified in Grade A 3 with effect from 1 January 1962.

It is not disputed in the present proceedings that the applicants exercised the duties of, and were regarded as, Heads of Division. In the new Staff Regulations of officials of the three Communities these duties correspond only to the actual career bracket for Heads of Division, which is covered exclusively by Grade A 3. Moreover the administrative units controlled by the applicants were described as 'Divisions' by the Commission itself.

The fact that the Commission failed to draw up within a reasonable time the description of posts provided for in Article 5 of the Regulations is not an obstacle to placing the applicants in Grade A 3. In fact, Annex I, where the Council laid down guidelines for the drawing up of this description, provided from the very date on which the Regulations entered into force that Heads of Division should be classified in Grade A 3.

Consequently, the Regulations under which the applicants have been integrated confer on them the right to be classified in Grade A 3 in accordance with their posts, as from the date of entry into force of the Regulations.

While the applicants' principal conclusions are well-founded, their request for damages is not.

The applications should be referred back to the Commission for the purpose of giving effect to this judgment.

Costs

The defendant has been unsuccessful in its principal submissions, and should therefore be ordered to bear the costs of these applications by virtue of Article 69 (2) of the Rules of Procedure.

The Court has been asked to give a decision as to costs in Cases 98 and 99/63, and in the interlocutory proceedings for the adoption of an interim measure in those cases between the same parties, by Orders of the Second Chamber of 12 March 1964. Jean Reynier and Piero Erba discontinued their applications in those cases. The discontinuance was justified by the conduct of the defendant which stated at the hearing on 11 November 1963, in which the parties to the application for the suspension of certain measures were heard, that it would reclassify the applicants with effect from 1 January 1962 in Grade A 3 if they were successful in their applications 79 and 82/63. Had this declaration been made earlier it would have made the proceedings in Cases 98 and 99/63 unnecessary. The costs in Cases 98/63 and 99/63, and Cases 98/63 R and 99/63 R, must accordingly be borne by the defendant pursuant to Article 69 (4) of the Rules of Procedure.

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 Treaty establishing the European Economic Community, especially Article 179;
Having regard to the Staff Regulations of officials of the European Economic Community, especially Articles 5, 66, 90, 91, 102 and Annex I;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69,

THE COURT (Second Chamber)

hereby:

1. **Annuls the Decision of 21 May 1963 whereby the Commission refused to reclassify the applicants Reynier (Case 79/63) and Erba (Case 82/63);**

2. Refers the cases back to the Commission;

3. Orders that the costs of these applications and those of Cases 98 and 99/63, including the costs of the applications for the adoption of an interim measure, be borne by the Commission.

Hammes Rossi Lecourt

Delivered in open court in Luxembourg on 9 June 1964.

A. Van Houtte
Registrar

Ch. L. Hammes
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 13 MAY 1964[1]

Mr President,
Members of the Court,

The problems raised in the two cases which concern us today (joined by an order of 23 April 1964 for the purposes of the oral procedure and therefore also for the opinion) relate to the classification of servants following their integration under the new Staff Regulations; these problems were considered in detail by my colleague Advocate-General Lagrange and the Court in *Maudet v Commission of the European Economic Community*.

The facts appear on the whole to be indisputable.

The first applicant (Case 79/63) and the second applicant (Case 82/63) commenced employment with the Commission of the EEC on the basis of 'Brussels contracts' (contracts dated 18 March 1959 in the case of the second applicant). They were assigned to the Statistical Office and at first received salaries corresponding to Grade A 6/1 (in the case of the first applicant) and Grade A 5/2 (in the case of the second) under the scale of salaries in the ECSC Staff Regulations. After a number of salary increases (by letter of the Commission of 14 December 1960 the first applicant was promoted to Grade A 5/2, and the second applicant was promoted to Grade A 4/1 by a letter from the Commission of the same date), the two applicants were appointed, during 1961, Heads of Division in the Statistical Office, in the case of the first applicant by Decision of 22 December 1961 classifying him in Grade A 4/2 as from 1 December 1961; and in the case of the second, by Decision of 3 May 1961, with classification unchanged.

In the integration procedure, which was introduced after the entry into force of the new Staff Regulations for Community officials in order to canvass the possibilities of confirming the appointments of individual employees, the duties of the applicants were described in the integration reports as those of

1 — Translated from the German.