JUDGMENT OF THE COURT
19 JULY 1955[1]

Antoine Kergall
v Common Assembly of the European Coal and Steel Community

Case 1/55

1. *Servants of the Community — Disputes with the institutions — Jurisdiction of the Court*
The jurisdiction of the Court in disputes involving servants of the Community is based on Article 42 of the Treaty, together with the arbitration clause contained in the contract of employment and the provisions of the Staff Rules applicable
(Treaty, Article 42).

2. *Servants of the Community — Period prior to the adoption of the Staff Regulations — Contract of employment — Precursor of the Staff Regulations — Interpretation*
Contracts of employment concluded with servants under the third paragraph of Article 7 of the Convention on the Transitional Provisions are contracts governed by public law which are the precursors of the Staff Regulations and render servants eligible for stability of employment. Those contracts must be interpreted with regard to what was contemplated by the parties and to the intentions of the Community in respect of its servants
(Convention on the Transitional Provisions, third paragraph of Article 7).

3. *Servants of the Community — Professional ability — Assessment by the Administration — Review by the Court*
It is normally the administration which assesses the professional competence of servants. A finding as to the professional inadequacy of a servant must be reached by means of a regular procedure such as must be followed by any administration.

4. *Servants of the Community — Abolition of a post — Powers of the Administration — Reassignment of the servant*
The administration has the power to organize its services as it wishes and in the interests of the service. It acts in the full exercise of its powers when it abolishes a post which it considers unnecessary.
The abolition of a given post cannot, on that count alone, result in the dismissal of the servant who occupied it. Rather, it renders that servant free to occupy another post
(Treaty, Article 31).

5. *Liability of the Community — Wrongful act on the part of the Administration — Injury — Obligation to make good*
Where, in circumstances which are irregular, a contract of employment is not renewed, this may constitute a wrongful act on the part of the administration in the performance of its duties entailing liability which involves the obligation to make good the injury caused
(Treaty, Article 40).

In Case 1/55

ANTOINE KERGALL, represented by Pierre Chareyre, Advocate at the Conseil

1 — Language of the Case: French.

d'État and at the Cour de Cassation, Paris, with an address for service in Luxembourg at the Chambers of G. Margue, 6 Rue Alphonse München,

applicant,

v

COMMON ASSEMBLY OF THE EUROPEAN COAL AND STEEL COMMUNITY, represented by its Secretary General, M. F. F. A. de Nerée tot Babberich, acting as Agent, assisted by Jean Coutard, Advocate at the Conseil d'État and at the Cour de Cassation, Paris, with an address for service in Luxembourg at its offices, 19a Rue Beaumont,

defendant,

APPLICATION for damages following failure to renew the applicant's contract of employment,

THE COURT

composed of: M. Pilotti, President, L. Delvaux and A. van Kleffens (Presidents of Chambers), P. J. S. Serrarens and O. Riese, Judges,

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

gives the following

JUDGMENT

Facts

1. On 14 January 1955 Antoine Kergall, a former servant of the Common Assembly, lodged an application at the Registry of the Court claiming that the Court should:

'Declare the application to be admissible;

Declare that it is well founded and rule that the decision of the Bureau of the Common Assembly, dated 15 June 1953, was adopted in irregular circumstances;

Accordingly, rule that the said measure has caused injury to the applicant and that this must be made good;

Therefore, order the Common Assembly to pay the applicant:

1. A sum equal to two years' remuneration;
2. A sum equal to 3 000 000 Belgian francs or the corresponding annuity;
3. Four-twelfths of his annual remuneration, in accordance with the obligation entered into by the Bureau;
4. A sum of 82 500 Belgian francs, representing the quarterly fixed allowance of 15 000 Belgian francs, the so-called car allowance, unpaid since 15 July 1953;

Order the Common Assembly to pay the whole costs'.

In its statement of defence the Common Assembly contends that the Court should:

'Reject Mr Kergall's application lodged on 14 January 1955, with all consequences at law, in particular as regards payment of fees, costs and any other expenses'.

The appointing of the agent and of counsel took place in accordance with the prescribed formalities.
The parties lodged a reply and a rejoinder respectively in which they persist in their conclusions.
The President of the Court designated Judge P. J. S. Serrarens to act as Judge-Rapporteur.
In accordance with the conclusions of the Judge-Rapporteur in his preliminary report, the First Chamber, by order read in open court on 14 June 1955, required the parties to appear in person in order to supply full information and to produce any relevant documents concerning the facts mentioned in the said order.
The preliminary inquiry took place *in camera* before the First Chamber on 14 June 1955.
The defendant lodged definitive written conclusions in which it persists in its previous conclusions.
At the hearing in open court on 27 June 1955, the parties submitted their oral arguments.
At the hearing on 28 June 1955 Mr Advocate General Roemer stated as his opinion that:

1. The applicant's claim for payment of a car allowance should be rejected;
2. His claim for payment of four month's additional remuneration should be accepted;
3. His claim for additional damages of such amount as the Court shall consider fair should be accepted;
4. The defendant should be ordered to pay the whole or the greater part of the costs.

All the formalities required by the Rules of Procedure of the Court concerning contentious cases were observed during the procedure in the present case.

2. From the documents submitted by the parties, it appears that the facts are as follows:

The applicant held a contract of employment dated 10 January 1953 (with effect from 6 December 1952) valid for two years (annual salary: 7800 European Payments Union units of account), under which he entered the service of the Common Assembly.
The applicant's contract of employment refers to the Internal Rules in force. The first Internal Staff Rules date from 12 January 1953. They were replaced on 1 July 1953 by the Provisional Staff Rules.
By letter of 16 June 1953, the Secretary General of the Common Assembly informed the applicant that the Bureau 'at its meeting on 15 June decided to abolish the post which you occupy within the Secretariat of the Common Assembly. Accordingly, it will not be possible for me to renew your contract...'.
On 3 November 1954, Vice-President Fohrmann informed the applicant that in view of the practical difficulties which the latter would have to face as head of a large family after leaving the service of the Assembly, the Bureau had decided to grant him, in addition to the allowances to which he was entitled under the staff rules and under his contract, the sum of four twelfths of his remuneration.
By letter of 24 November 1954, addressed to the President of the Common Assembly, the applicant made it known that he considered himself to have been injured by the decision of 15 June 1953, and by the decision which confirmed it, and that he therefore protested against those decisions.
On 18 December 1954, Mr Fohrman informed the applicant that the Bureau had been constrained to find that the applicant was not disposed to withdraw his letter of 24 November, as the Bureau had asked him to do, and that in those circumstances the benefit of an additional allowance which had been granted and which he had not accepted was withdrawn.

3. The arguments which the parties put forward in support of their claims during the procedure before the Court may be summarized as follows:

1. *On the regularity of the decision not to renew*

The applicant claims that he entered the service of the Common Assembly only because the latter strongly urged him to do so. The defendant replies that the applicant entered the service of Assembly at his own request and after having personally submitted an application.

According to the applicant, his engagement, although temporary, rendered him eligible for a stable post. As against this argument, the defendant states that it does not appear either from the circumstances of his engagement or from the individual clauses of his contract that the applicant was eligible for such treatment, since he did not receive any promise, whether oral or in writing, that his contract would be renewed.

According to the applicant, the decision not to renew was taken at a time when it was impossible to ascertain whether the duties in question were or were not to be continued in 1955. The applicant mentions a judgment of the French Conseil d'État which annulled a decision not to renew because it was adopted too long in advance of the end of the contract. The defendant states that the first few months had quickly shown the defects of the organization.

The applicant also argues that the abolition of his post was a matter for the Committee of Presidents provided for under Article 78 of the Treaty and not for the Bureau. According to the defendant, the application of Article 78 of the Treaty has been provisionally suspended by the last paragraph of Article 7 of the Convention on the Transitional Provisions. The defendant also argues that the applicant is confusing the power to organize departments, which belongs to the Assembly, and the power to fix the number of servants, which is exercised by the Committee of Presidents.

Furthermore, the applicant is of the opinion that since the post was not mentioned in the contract, the abolition of that post cannot result in the applicant's dismissal. The measure is vitiated by misuse of powers, because the abolition of the post was only a pretext.

According to the defendant, the applicant has not proved that the abolition took place for the purpose suggested. Therefore there cannot be any question of misuse of powers.

Finally, the applicant argues that the decision not to renew appears to be a disguised penalty. The defendant replies that the applicant is confusing the legal concepts of a penalty and the genuine abolition of a post. In its statement of defence, the defendant puts forward for the first time the inadequacy of the applicant in the service. The applicant points out that the observations concerning his professional competence are based on his activity subsequent to the decision to dismiss him.

2. *On the grant for which Article 15 of the contract makes provision*

The applicant argues that by letter of 3 November 1954 the Bureau of the Common Assembly granted him an additional payment of four-twelfths of his annual remuneration, and that the said grant was withdrawn because he persisted in making an application to the Court. He has never protested against that grant. The defendant argues that the offer, made *ex gratia,* was never accepted by the applicant, who preferred to take legal action rather than accept that benefit.

3. *On the so-called car allowance*

According to the applicant, the Internal Staff Rules of 12 January 1953 annexed to his contract of employment gave him the right to a quarterly car allowance. Payment of that allowance was unlawfully suspended on 15 July 1953. The defendant points out that under the Provisional Staff Rules a special decision is necessary in order to obtain the allowance. No such measure was adopted in respect of the applicant.

Law

1. *Jurisdiction*

The Court has jurisdiction to hear the present case.

The jurisdiction of the Court is based on Article 42 of the Treaty, relied on by the applicant in his application, together with Article 17 of the contract of employment and Article 27 of the Internal Staff Rules of the Common Assembly of 12 January 1953. Article 17 of the contract of employment provides that all the clauses of the Internal Rules in force are applicable to the relationship between the servant and the Common Assembly in so far as they are not contrary to the provisions of the contract of employment. Article 27 of the Internal Staff Rules provides that any dispute of an individual character to which the application of the Rules or the performance of contracts of employment may give rise shall be brought before the Court of Justice. Article 50 of the Provisional Staff Rules of 1 July 1953 contains an analogous provision.
The Court also finds that the argument with which the Advocate General supported his opinion, based on the general principle of liability laid down by Article 40 of the Treaty, is well founded. That article was also relied on by counsel for the applicant during the oral procedure.
The Court notes that the defendant has not raised any objection of inadmissibility. The Court rules that the present application is admissible.

2. *Substance*

At its meeting on 15 June 1953, the Bureau of the Common Assembly decided 'to abolish the post of Head of Administrative Services upon the expiry of the contract of the present incumbent, Mr Kergall (5 December 1954)' (see the minutes of the meeting).
That decision to abolish the said post did not, at that moment, expressly involve the non-renewal of the applicant's contract of employment. On 16 June 1953, the Secretary General of the Common Assembly wrote to the applicant: 'I regret to inform you that the Bureau, at its meeting on 15 June, decided to abolish the post which you occupy within the Secretariat of the Common Assembly. Accordingly, it will not be possible for me to renew your contract'. At a number of meetings held by the Bureau of the Common Assembly on 3 and 27 October and 29 November 1954, the latter confirmed the decision not to renew taken by the Secretary General, and refused to grant the applicant an extension of his contract as requested by him.
Without claiming that the decision not to renew his contract should be annulled, the applicant claims that the Court should rule that the said decision was adopted in irregular circumstances and that it should therefore rule that the said measure has caused him injury, and that this should be made good.

A — On the regularity of the decisions of the defendant not to renew the applicant's contract of employment

(a) The Court is of the opinion that although the contract of employment entered into on 10 January 1953 between the Common Assembly and the applicant is on the face of it merely a contract of employment for a limited period, it nevertheless constitutes a contract *sui generis*.
That contract must be interpreted not only in the light of the provisions of the Treaty and of the Internal Rules in force to which it refers, but also with regard to what was contemplated by the parties and to the intentions of the Community is respect of its servants.

1. The preamble to the said contract of employment refers to the third paragraph of Article 7 of the Convention on the Transitional Provisions, which provides: 'Until the Committee provided for in Article 78 of the Treaty has decided upon the size of the staff of the Community and has laid down staff regulations, the personnel required shall be engaged on a contractual basis'. The reference to that provision clearly establishes the fact that the contract of employment was the precursor of the Staff Regulations.

2. Articles 1 and 2 of the contract of employment provide that 'Mr Kergall shall enter the service of the Common Assembly. This contract shall take effect on 6 December 1952 and is valid for two years'.
The words 'enter the service' and the fact that the applicant was engaged as a servant in the first grade—which included the Secretary General, the Assistant Secretary General, the Heads of Service and persons holding similar posts—indicate, or in any event, constitute reasonable grounds for taking the view that what was involved here can only have been the applicant's engagement as an official who was eligible, subject to certain conditions, for stability of employment, that is to say for establishment under the Staff Regulations.

3. Furthermore, the limitation of the duration of the said contract to a period of two years does not necessarily mean that the parties intended that the engagement under the contract should be of limited duration.
Rather, it means that they shared the general opinion of the institutions of the Community which, at that time, considered that two years would suffice in order to prepare and adopt the Staff Regulations of Officials. Accordingly, the Court takes the view that the engagement of the applicant created a legal relationship which is wider than that arising under a contract of employment governed by private law.

4. Moreover, Article 15 of the applicant's contract of employment provides that servants shall receive a grant upon the expiry of the contract if they are not established under the definitive Staff Regulations of Officials, and Article 51 of the

Provisional Staff Rules of 1 July 1953 provides that the said Rules shall be 'automatically' replaced by the Staff Regulations upon the adoption of the latter. Thus the contract of employment and the Provisional Staff Rules make provision for and anticipate the application of Staff Regulations, and therefore render the applicant's expectations reasonable.
Finally, the applicant's contract of employment is a contract governed by public law. It is a contract concerning entry into the service of a public authority, in which service the applicant was called upon to perform duties appertaining to public law, and the contract refers to Internal Rules established by that authority. It follows that the legal position of the applicant is that of a public official engaged on a temporary basis.

5. There is nothing to suggest that the duties which the applicant was to perform implied a temporary assignment likely to be terminated in two years. Moreover, the engagement did not involve a probationary period, and the applicant was not required to serve any such period. Furthermore, the Staff Rules of 1 July 1953, which were the first to introduce the system of a probationary period of 3 months, do not provide that after the probationary period has been completed the institution may still proceed to a dismissal otherwise than as a disciplinary measure.

6. As regards the professional inadequacy alleged by the defendant, the Court is of the opinion that it is normally the administration which assesses professional competence, but it notes that no decision of the Bureau of the Common Assembly mentions any professional inadequacy on the part of the applicant. Furthermore, the applicant was not given the opportunity of proving his professional competence, since he occupied the post in question only for a very limited period. Moreover, no complaints were ever made to the applicant. The first comment concerning the quality of his work was addressed to him on 11 June 1953. A further point is that his personal file does not contain any comments either on his professional ability, or on his conduct from the disciplinary point of view. Professional incompetence has not been put forward in respect of the applicant as a reason for the decisions not to renew his contract of employment. No finding as to professional inadequacy has been reached by means of a regular procedure such as must be followed by any administration. In these circumstances, the allegation as to professional incompetence made for the first time by the defendant in its statement of defence in order to justify its decision not to renew the contract cannot be taken into consideration.

7. Finally, the Court finds that the intentions of the Community in respect of its servants are clearly evident in the proposed definitive Staff Regulations of the Community, drafted by mutual agreement by the Committee of Presidents of the four Institutions. The text of the draft distributed in September 1954 already included provisions concerning non-active status.

Those provisions, which are analogous to those which exist in the national administrations of several countries and which have been retained in all subsequent drafts without any objections as to substance being raised on the part of the institutions, contain two points: 'absolute priority to occupy any post in his grade which may fall vacant or be created in the service to which he belongs', and payment 'of a sum equal to his total remuneration for a period of one year, and to half his remuneration for a period of two years'.

(b) As regards the power of the Bureau of the Common Assembly to abolish the post of Head of Administrative Services, the Court rejects the applicant's argument. It finds that the Bureau has the power to organize its Secretariat as it wishes and in the interests of the service, and that it acted in the full exercise of its powers in abolishing a post which it considered unnecessary.

(c) However, the Court finds that the aboliton of a given post cannot, on that count alone, result in the dismissal of the servant who occupied that post, particularly where, as in the present case, the contract of employment does not expressly appoint the servant to the post abolished. Rather, it renders that servant free to occupy another post.
It appears from the preparatory inquiry that the defendant did not take any initiative in that respect and, moreover, that the applicant would have accepted not only a post equivalent to that which had been abolished, but even a post of lesser importance.

(d) On the basis of the foregoing considerations, the Court concludes that the Bureau of the Common Assembly, having decided in the circumstances established by the procedure before the Court not to extend the applicant's contract of employment, has put forward in support of its decision a reason which cannot, of itself, justify that decision, and that the Bureau has not taken sufficient account of the legal position of the applicant.
Moreover, the Court is of the opinion that in adopting its decisions and quantifying the grant provided for by Article 15 of the applicant's contract of employment, the Bureau of the Common Assembly ought to have had regard to the provisions of the draft Staff Regulations of the Community governing the consequences of assignment to non-active status.
Accordingly, the Court finds that the circumstances in which the applicant's contract of employment was not renewed appear to be irregular, and that the Bureau of the Common Assembly has committed a wrongful act in the performance of its duties as regards the execution of the said contract. The Common Assembly is liable as the result of that wrongful act, which caused the applicant damage which must be made good.

B — On the payments claimed by the applicant

1. *The so-called car allowance*

The Court finds that it is not the applicant's contract of employment but Article 3 of Annex I to the Internal Staff Rules of 12 January 1953 which makes provision for this allowance. Those Rules were replaced on 1 July 1953 by the Provisional Staff Rules, Article 34 of which requires a special decision of the Secretary General of the Common Assembly for the grant of that allowance. No such decision was taken in respect of the applicant.
The Court rejects the applicant's argument that the supplementary advantages which existed when he entered the service of the Community must be regarded as additional remuneration forming part of what is laid down by the contract and not capable of being altered unilaterally.
The Court finds, in agreement with the Advocate General on this point, that the applicant's claim for the payment of a car allowance is unfounded.

2. *The payments in respect of damages claimed by the applicant*

The applicant claims a first payment equal to two years' remuneration for the difficulties and delays inherent in establishing himself elsewhere, and for the inconveniences of all kinds resulting therefrom.
The applicant is of the opinion that he is also entitled to a second payment in compensation for damage suffered by reason of his dismissal. He calculates that payment to be 3 000 000 Belgian francs, that is to say the loss of 200 000 Belgian francs (difference in remuneration between a new post and that which he has left) over 15 years.
The Court cannot accept these claims. It is of the opinion that the change of residence and the costs involved therein are covered by the severance grant for which Article 9 (a) of the contract of employment makes provision, and which has been paid to the applicant. In so far as the first claim for payment is in excess of those costs, the Court will take this factor into account in the remainder of its judgment.
As regards the second payment, the Court takes the view, in agreement with the opinion of the Advocate General, that the applicant had only a limited expectation of a permanent post and that other factors may have contributed to increase the uncertainty, such that the existence of quantifiable damage cannot be accepted.

3. *The grant provided for by Article 15 of the applicant's contract of employment*

The Court finds that Article 15 of the applicant's contract of employment fixed the minimum amount of this grant, thus giving the Bureau of the Common Assembly the power to establish the amount in each case. In exercise of that power,

the said Bureau fixed the grant due to the applicant at six months' remuneration. By a decision of the Bureau of the Common Assembly of 3 December 1954, that grant was reduced to two months' remuneration. In justification of that measure it has been alleged that the applicant did not accept the additional four months' remuneration and that he had shown evidence of his intention to bring an application before the Court of Justice.

It is the Court's view, in agreement on this point with the opinion of the Advocate General, that it does not appear from the documents that the applicant refused that grant, and that the fact that he intended to bring a case before the Court is not a valid reason for altering the decision of the Bureau of the Common Assembly to the applicant's disadvantage, as has happened in the present case. The Court concludes that the applicant's claim for payment of the four additional months' remuneration which had been granted by the Bureau of the Common Assembly is well founded.

Furthermore, the Court finds that the Bureau of the Common Assembly fixed the amount of the said grant at four-twelfths of his remuneration in addition to the two-twelfths laid down by Article 15 of the contract as a minimum, by taking into account the following factors:

(a) The material difficulties which the person concerned would have to face as the head of a large family after leaving the service of the Common Assembly;

(b) The expenses that he would have to meet in looking for a new post.

Those factors are, without doubt, very important, but a fair assessment of the consequences which they involve shows that the six months' remuneration granted is not sufficient compensation for the difficulties and expenses to which the applicant is exposed. Moreover, they are not the only factors involved in the situation. There are others, which must also be taken into consideration.

The Bureau of the Common Assembly was aware of the drafts of the Staff Regulations drawn up by the Committee of Presidents. Those drafts made provision, in accordance with the principles generally accepted in administrative law, for a servant to be assigned non-active status. The Court is of the opinion that the Bureau of the Common Assembly ought to have taken all those factors into account and, having regard to those drafts, to have granted an analogous payment to the applicant.

No such payment having been granted, taking into consideration the circumstances of the present case and having regard to the irregularity of the decisions taken by the defendant, the Court rules that the applicant is entitled to payment, by the defendant, of an amount equal to one year's remuneration.

That payment is to be added to the payment of two-twelfths already paid and to the four-twelfths wrongly withheld by the Bureau, such that the order is for payment of a sum equal to sixteen months' remuneration.

C — Costs

The defendant, having failed on a number of its conclusions, is ordered, in accordance with Article 60 of the Rules of Procedure of the Court, to pay the applicant two-thirds of the costs which the latter has incurred. The defendant shall bear its own costs.

Upon reading the pleadings;
Upon hearing the parties;
Upon hearing the opinion of the Advocate General;
Having regard to Articles 40 and 42 of the Treaty and to Article 7 of the Convention on the Transitional Provisions;
Having regard to the Protocol on the Statute of the Court;
Having regard to the Rules of Procedure of the Court and to the Rules of the Court on costs,

THE COURT

hereby:

Orders the defendant to pay the applicant a sum equal to sixteen months' remuneration, calculated according to the method used by the Common Assembly in order to fix the amount of the two months paid to the applicant as compensation for the termination of his contract.

Declares that the applicant is entitled to reimbursement of two-thirds of his costs by the defendant, and orders the latter to bear its own costs.

Delivered in open court in Luxembourg on 19 July 1955.

Pilotti Delvaux van Kleffens
Serrarens Riese

M. Pilotti
President

P. J. S. Serrarens
Judge-Rapporteur

A. Van Houtte
Registrar