JUDGMENT OF THE COURT (SECOND CHAMBER)
25 JUNE 1970[1]

Raymond Elz
v Commission of the European Communities

Case 58/69

In Case 58/69

RAYMOND ELZ, an official of the Commission of the European Communities, residing at 24, rue Belle-Vue, Luxembourg-Howald, represented by Paul Beghin, Advocate at the Luxembourg Bar, with an address for service in Luxembourg at the offices of Paul Beghin, 9, avenue de la Gare,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Pierre Lamoureux, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Emile Reuter, 4, boulevard Royal,

defendant,

Application for the partial annulment and the rectification of the periodic report of 31 May 1968 concerning the applicant,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, A. Trabucchi (Rapporteur) and W. Strauß, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

1 — Language of the Case: French.

JUDGMENT

Issues of fact and of law

I — Summary of the facts and procedure

The facts which form the basis of this case and the procedure may be summarized as follows:

On 14 March 1969 Mr Raymond Elz, an official of the Commission of the European Communities, submitted a complaint under Article 90 of the Staff Regulations against the periodic report of 22 May 1968 concerning him.

By a memorandum of 8 July 1968 signed by Jean Rey, the President, and addressed to the applicant, the Commission confirmed this report and stated that the Court of Justice had decided in its judgment of 25 February 1969 in Case 15/68 between the same parties that it was clear that this report had been communicated to the applicant in its final form on 13 May 1968.

By an application lodged at the Registry of the Court on 8 October 1969 the applicant appealed against the periodic report of 31 May 1968.

The written procedure followed the normal course.

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

The parties presented oral argument at the hearing on 22 April 1970.

The Advocate-General delivered his opinion at the hearing on 14 May 1970.

II — Conclusions of the parties

In his application, the *applicant* claims that the Court should:

— annul the periodic report of 31 May 1968 concerning the applicant as it is contrary to Article 43 of the Staff Regulations and all other relevant implementing provisions;

— annul the said report as it may adversely affect the applicant owing to the differences between the analytical assessment on the one hand and the assessment of the reporting officers on the other;

— annul the report because it reveals contradictions and contains assessments which are not laid down by the regulations in force;

— order the rectification of the report on the points with which this application is concerned, or else annul them, and order the Commission to bear all the costs of the action.

The *defendant* claims in its statement of defence that the Court should:

— dismiss the applicant's application completely as inadmissible or unfounded;

— order the applicant to pay the costs.

The *applicant* claims in his reply that the Court should:

— take note that the introductory application is directed against the decision of the Commission signed by President Rey on 9 July 1969;

— grant him the benefit of the conclusions previously submitted in the case.

The *defendant* contends in its rejoinder that the Court should:

— dismiss the applicant's application completely as inadmissible or unfounded;

— order the applicant to pay the costs.

III — Submissions and arguments of the parties

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

1 — *Admissibility of the application*

The *applicant* maintains that the period for lodging an appeal began to run, in this case, on the day after the Court gave judgment in Case 15/68, that is on 26 February 1969, since that judgment decided that the periodic report of 15 January 1968 was replaced retroactively by the report of 31 May 1968. He claims that this finding is by implication confirmed by the Commission's decision of 8 July 1969 which did not mention formal inadmissibility but confirmed the contested report as regards the substance of the case.

On the other hand, the *defendant* maintains that the period started to run with the communication, on 31 May 1968, of the periodic report in its final form.

Hence it claims that this application is inadmissible because it was lodged out of time.

It alleges that its reply of 8 July 1969 was purely by way of confirmation and could not restore time-limits which had expired and states, in the alternative, that the application is not directed against the Commission's memorandum of 8 July 1969.

The *applicant* replies that the judgment of the Court of 25 February 1969 constitutes a new factor with regard to him as it decided that the report had been communicated in accordance with Article 26 of the Staff Regulations. He claims that this follows *a contrario* from the case-law of the Court whereby a judgment which annuls an administrative measure constitutes a new factor with regard to the parties to the action.

The *defendant* asserts that, as opposed to a judgment which annuls an administrative measure, a judgment which dismisses an application in no way alters the existing legal situation and cannot therefore constitute a new factor except perhaps in certain exceptional circumstances.

The *applicant* maintains that the situation which arises in this case is 'quite different' from that in Case 28/64 (*Richard Müller* v *Council of the EEC and Council of the EAEC*) since his application is not directed against an implied decision of the Commission to reject the request but against an express decision rejecting the request which was made within the period laid down for the lodging of an application to the Court against the absence of a reply from the administration which is deemed to be an implied decision to reject a request.

Moreover the *applicant* states that it follows clearly from the context that this application is against the decision taken by the Commission on 8 July 1969 and signed by Mr Rey, the President.

The *defendant* asserts that the memorandum of 8 July 1969 only confirmed the contested periodic report and that therefore it could not start time running afresh since it was only in reply to a complaint through official channels which had been lodged out of time.

2 — *The substance of the case*

The *applicant* states that the report reveals certain differences on the following points:

> 'In the analytical assessment of efficiency, the applicant was given the mark "Good" for the standard of work and was also given the mark "Good" for the speed with which the work was performed. This assessment, however, differs from the assessment of the reporting officers in which the first reporting officer assesses his efficiency as "Fair" and the second as "Normal".'

The *defendant* replies that this criticism on the part of the applicant does not correspond to the facts. It says that the mark 'Good' is the average of the assessment made by the first reporting officer, 'Fair, but excellent in matters relating solely to bookkeeping'.

The *applicant* rejoins that the average of two assessments cannot be an assessment within the meaning of the Staff Regulations because an average can never be taken from subjective value-judgments.

The *defendant* asserts that the aim of a periodic report is to reproduce as exactly as possible the assessment made of an official

in a very limited number of words. In these circumstances the mark 'Good' is the one which reflects most faithfully an assessment which is expressed in certain areas by the mark 'Fair' and in others by the mark 'Excellent'.

The *applicant* claims that by adding comments to their assessment the reporting officers seem to have exceeded their duty, since comments are only obligatory for the marks 'Very Good' and 'Unsatisfactory'. Moreover, he says that the mark 'Normal' which was given by the second reporting officer is not laid down as a criterion of assessment.

The *applicant* asserts that in the analytical assessment of sense of responsibility the mark is 'Good', whilst in the comprehensive assessment both reporting officers call for a keener sense of responsibility, and he claims that these comments should be removed from the periodic report because they are superfluous.

The *defendant* replies that the report form does not expressly prohibit comments. It adds that in this case comments might be useful to order to define more clearly the mark 'Good' which appears rather bald on its own, and says that the adjective 'Normal' is plainly shown on the form as being equivalent to 'Good'.

The *applicant* maintains that the criticism made of him that his requests for leave were ill-timed must also be removed on the ground that he adhered strictly to the provisions of the Staff Regulations on this point by obtaining the prior consent of his superiors. Moreover, he asserts that these criteria of assessment are irrelevant and maintans that these comments are therefore *ultra vires*.

The *defendant* asserts that the absence of an official has a serious effect on the running of a department and that it seemed necessary to ask the applicant to have a keener sense of responsibility with regard to the way in which he chose his leave.

The *applicant* replies by emphasizing the contradiction which he says exists 'between the comprehensive assessment on the choice of leave contained in the report of 15 January 1968 which was withdrawn *post festum* and the less favourable assessment on the same point in the report of 31 May 1968'.

The *defendant* states that it does not understand this argument put forward by the applicant.

Grounds of judgment

Admissibility of the application

1 The defendant maintains that the application, which was lodged at the Court Registry on 8 October 1969, was filed out of time because the period started to run with the communication to the applicant on 31 May 1968 of the periodic report of 22 May 1968.

2 The applicant replies that the period for lodging the application began to run on the date of the judgment given by the Court (First Chamber) on 25 February 1969 in Case 15/68, as that judgment constituted a fresh factor with regard to him.

3 That judgment dismissed as inadmissible an application brought by the same applicant on 25 July 1968 against a periodic report of 15 January 1968, on the ground that the Commission had replaced that measure by an amended report on 22 May 1968.

4 That judgment merely stated the situation which existed when the first application was lodged, by declaring that the amended report could be used against the applicant.

5 Therefore the judgment of 25 February 1969 cannot constitute a factor which could start running in the applicant's favour a new period for lodging an application against the report of 22 May 1968.

6 As this report had been communicated to the applicant on 31 May 1968, the period of three months available to him under Article 91 of the Staff Regulations of Officials had already expired before this appeal was lodged.

7 The memorandum of 8 July 1969 whereby the President of the Commission simply confirmed the periodic report in question following a complaint by the applicant through official channels cannot constitute a measure against which an application can be made.

8 Therefore this application must be dismissed as inadmissible.

Costs

9 The applicant's application has been unsuccessful.

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

11 However, under Article 70 of those Rules institutions shall bear their own costs in proceedings brought against them by servants of the Communities.

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 Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 26 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT (Second Chamber)

hereby:

1. **Dismisses Application 58/69 as inadmissible;**

2. **Orders the parties to bear their own costs.**

Pescatore Trabucchi Strauß

Delivered in open court in Luxembourg on 25 June 1970.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 14 MAY 1970[1]

Mr President,
Members of the Court,

1. A periodic report dated 15 January 1968 was made on Mr Elz, who is at present a principal assistant in the Directorate-General for Financial Control in Brussels. Although at the time he had been first in the service of the High Authority and then of the Commission for almost 14 years and although it was contrary to Article 37 of the former Staff Regulations of the ECSC and Article 43 of the new Staff Regulations of the ECSC and the Staff Regulations of the EEC, this was the first time a report had been made on him.
This is no doubt the reason why he attached special importance to it and, as he did not feel satisfied with certain assessments which it contained, he submitted a complaint under Article 90 on 27 March 1968, following which a new amended report was made on 22 May 1968. However, in spite of this Mr Elz requested in an application lodged on 25 July 1968 that the first report of 15 January be annulled.
The objection raised by the Commission was sustained and the application was dis-

1 — Translated from the French.