OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 10 JUNE 1964[1]

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Mr President,
Members of the Court,

The third in a series of cases concerning integration puts to us the question whether it is proper for the Commission of the EEC to refuse to integrate a contractual official.

We are concerned here with a servant taken into the service of the EEC by a decision of the Commission of 4 September 1958, who was assigned to the Directorate-General of the Internal Market, as Head of the Services Division. His salary corresponded at the beginning to that of Grade A 3, Step 2, in the salary scale of the Staff Regulations of the ECSC. Later it was increased by his classification in Grade A 3, Step 5, as from 1 March 1960.

As in the two Cases 78 and 80/63, the integration procedure of Article 102 of the Staff Regulations ended in a result unfavourable to the applicant. This result was notified to him by a letter from the Directorate-General of Administration of 14 March 1963.

At the same time he was offered integration in Grade A 4, Step 6, with seniority from 1 June 1961, in the Directorate-

1—Translated from the French version.

General of Administration in the Library and Documentation Department. The applicant was given eight days from such notification in which to accept this offer.

Subsequently, attempts were made to obtain an extension of time. They led to refusals by the Director-General of Administration by letter of 22 March 1963 and, following a new request on 25 March 1963, by the Head of the Directorate of Budget and Finance by letter of 11 April 1963.

Finally, the Directorate-General of Administration informed the applicant on 6 May 1963 that his employment with the Commission was being terminated on three months' notice.

Those are the facts.

The application made to the Court on the basis of all these events claims that the Court should:

1. Annul the integration procedure and the opinion of the Establishment Board of 19 July 1963;
2. Annul the decision of dismissal of 6 May 1963;
3. Declare that the Commission is obliged to resubmit the applicant to the integration procedure;
4. Declare that the applicant continues to be in the service of the Commission;
5. Declare that the Commission of the EEC is obliged to continue to pay to the applicant, after the expiration of the period of notice of dismissal, the monthly salary which he was receiving previously and to state that the applicant is entitled to the other benefits of the legal status which he had before his dismissal.

Alternatively:

1. Declare that the decision of dismissal is improper and defective;
2. Order the EEC or the Commission of the EEC to pay damages.

Legal consideration

The fact that the conclusions and the submissions overlap at least in part those of Cases 78/63 and 80/63 will help us to consider these facts.

That is why, for the moment, I am going to deal particularly only with the points which have not yet been dealt with in those cases or which appear in another light in the present case, taking into account its particular facts; for the rest I shall content myself with a simple repetition.

I — The principal conclusions 1 to 5

1. In repect of the admissibility of the principal conclusions which the Commission disputes with the exception of head 2, I can already take advantage of the possibility of referring back. In my opinion, as explained in Cases 78/63 and 80/63, there is no reason to dismiss a part of the conclusions as inadmissible in the operative part of the judgment.

2. Similarly, so far as the merits are concerned, Case 78/63 already gives the answer to a series of problems.

(a) It is so first of all in respect of the ground of complaint of infringement of Article 110 of the Staff Regulations.

The additional arguments which counsel for the applicant developed at the hearing in support of his proposition gives me no reason to change my view. Thus, in my opinion, the use of the word 'staff' in Article 110 does not allow the conclusion to be drawn that this rule is equally valid in respect of the single application of the transitional provisions to officials who are not yet established. If there is a question of 'staff', and not just of officials, that would mean to say that the general provisions for giving effect to the Staff Regulations must always be brought to the knowledge of all the staff, even if they apply only to established officials, for example so that the contractual staff may protect themselves against unjustified advantages accorded to established officials. Similarly, the reference to Article 102 of the Conditions of Employment of Other

Servants is not relevant. There also, to understand things properly, the general provisions for giving effect to the Staff Regulations can only be rules the effect of which is not exhausted by a single application. The fact that such employment reports are always limited in point of time does not stand in the way of this. The general provisions for giving effect to the Staff Regulations are applicable specifically to all employment reports which must be considered during the period of their validity, whilst the peculiarity of Article 102 of the Staff Regulations lies in the fact that it applies only to a specified number of officials who at the time of the entry into force of the Staff Regulations were in the service of the Commission. Lastly, the fact that Article 102 of the Staff Regulations refers to reports on the ability, efficiency and conduct in the service in a manner identical to that of Article 43, which expressly refers to the conditions of Article 170 for the procedure to be followed in making these reports, appears to me also to be without importance. The essential difference between the two rules is to be found in the fact that the reports under Article 102 are intended to be used in a single instance, whilst Article 43 refers to a permanent system.

(b) I can also refer substantially to the conclusions in Case 78/63 in respect of the ground of complaint of infringement of Article 5 of the Staff Regulations on the question whether the participation of a member of the Legal Service in the work of the Establishment Board must be criticized because he is not employed in a supervisory capacity, on the fact that a senior official who was not a member has taken part in the preparatory meetings of the Establishment Board (but not in the decisive meeting, as appears from the minutes) and lastly on the ground of complaint of absence of reasons.

At most it is convenient to make three supplementary remarks:

— The first refers to Article 5 of the Staff Regulations. According to the applicant, it is indispensable to describe the posts before the integration procedure because the Establishment Board must express a decision not only upon past work, as the superiors do in their reports, but also upon suitability, that is to say, upon the prospects of employment of a servant in the future. The definition of the posts, subsequently drawn up, shows that Grade 3 includes not only duties in an advisory capacity but also planning duties. But as the applicant is particularly qualified for the latter duties — that is not disputed — the Establishment Board could have noted his suitability for those duties and proposed that he should be integrated if it had been able to come to a decision on the basis of the definition of the posts.

I do not think that this idea is correct. The wording of Article 102 appears quite clear to me: there is only a question of the suitability to carry out the duties assigned to a servant and there is good reason for that. The introduction of the Staff Regulations should not bring with it an upheaval of the administrative organization and provide the occasion for reorganizing the departments of the commission. On the whole it was to be expected that nothing would be changed. That is why it would hardly be logical to decide in respect of each official the tasks for which he could also be used. Of course, that does not exclude that in the case of a negative outcome to the procedure the appointing authority, by virtue of a sort of duty of protection, may wonder how a servant may still be of use and that the Establishment Board may make proposals as to this on the basis of its knowledge of the capabilities of each servant. The preliminary drawing up of the definitions of posts provided for in Article 5 does not

appear to me however, to be indispensable to fulfilling this duty. The only decisive point is whether another post which can be used is available as an alternative.

— If, in respect of the participation of a member of the Legal Service, attention has been drawn to the necessity of entrusting the progress of the integration procedure only to servants having experience of the supervision of an administrative department, because it is from this special point of view that it may be necessary to examine the candidates, one may refer also to Article 102. According to that Article servants of Grades A 1 and A 2 specifically are not subject to the integration procedure: it is a question there of servants for whom the judgment of their abilities from this point of view could play a rôle. As to the examination of the abilities of servants with subordinate duties, it is enough, in my opinion, that it should be conducted by senior officials having the experience, the knowledge and the necessary authority, without their having had to acquire this particular experience in the supervision of an administrative department, particularly in the service of the Commission.

— Concerning the obligation to give reasons, it is again necessary to state in the present case that it does not require explanation on why no use has been made of the means of proof indicated by the servant in question. The only reasons which need be given are those which in the opinion of the administration in question can support its legal point of view.

3. With all that in mind, it only remains to take up a position again on the procedure of the Establishment Board and possibly on the ground of complaint that the Board based its appraisal on incorrect data.

(a) In the first case, we meet here also the assertion that the applicant's superior had prepared his report in a spirit of animosity. Clearly, says the applicant, this reason should have made it necessary to disregard this report at the time of the integration procedure.

I have already explained in other cases that Article 102 of the Staff Regulations lays down in a mandatory manner that reports should be prepared by superiors. Thus in the case of the applicant the Establishment Board could not disregard the report of his immediate superior without infringing the Regulations. Furthermore the integration procedure was in general arranged so that possibly other means of proof might be allowed in order to correct the subjective assessment of the superior. In the Pistoj case also it is shown that the Establishment Board only gave its opinion after having taken into account many other factors (hearing witnesses and former superiors of the applicant who supported the unfavourable opinion). This opinion was, furthermore, reached unanimously.

In view of this situation the Court can, in my opinion, avoid considering the existence of the alleged animosity of the applicant's superior.

(b) On the other hand, a much more serious ground of complaint in the present case is that the applicant has not been able completely to defend himself during the integration procedure. In Case 78/63 I set out at length my position in principle on this point. It is from that basis that it is necessary again to consider whether the alleged infringements were actually committed and whether they are of such a nature as to cause the integration procedure to be recommenced.

Three grounds of complaint have been raised in particular:

— The first relates to the fact that the Establishment Board heard other servants without keeping the applicant informed of the content of their evidence and without permitting him to submit his comments.

The Commission does not dispute this. It points out only that the applicant himself named two of these witnesses, from which it may be thought that he would have been aware of their evidence.

If the criteria of the Leroy judgment and the Huber opinion are applied to this ground of complaint, the objection of the Commission does not appear to be substantiated.

For the Court, the decisive question is as follows: could the evidence of the witnesses in question have any effect upon the formation of the opinion of the Establishment Board? As long as we do not know the content of the evidence (it does not appear in any minutes), we must take it that the answer is in the affirmative. It must not be overlooked that the observations of the applicant concerning the evidence could have influenced the judgment of the Establishment Board, independently of the fact that the applicant sent numerous written statements during the course of the procedure and defended himself tenaciously before the Board. Thus, while there remains the slightest doubt on the matter, I am forced to the conclusion that the integration procedure was irregular.

It is the same in respect of the evidence of the witnesses cited by the applicant, for there is no guarantee that it was only of advantage to him and that he was in fact made aware of the content of the evidence. Furthermore the applicant rightly remarks that the fact that the Board heard evidence in secret may also have had a bearing. The witness who knows that the content of his evidence will become known to the person whom it concerns is liable in a particular case, although with shades of meaning, to give it in a manner other than that of a witness who does not fear such a confrontation. Lastly, one cannot exclude the possibility that the two witnesses cited by the applicant have in fact given evidence only of benefit to him. If that happened to be proved, the opinion of the Establishment Board might appear to be unfounded because it did not give both the positive and negative reasons for its report.

— Just as serious is the ground of complaint that the Establishment Board was not aware of or did not take into account all the statements submitted by the applicant, and in particular his first statement of 12 April 1962.

It appears from the minutes of the meetings of the Board that it received and examined a series of statements from the applicant. The statement of 12 April 1962 was not one of them. We are concerned here with the applicant's initial comments on the report of his superior, in which he carefully sets out his explanations of all the matters raised and in particular annexes to it a complete set of explanatory documents.

One clearly cannot say that the subsequent statements submitted to the Commission are merely a repetition of the first. On the contrary, they are intended to give further explanations and to adopt a position on other documents which were used in the applicant's integration procedure.

If it is therefore true that the first statement from the applicant was not brought to the attention of the Establishment Board, which I cannot doubt, taking into account the care with which the minutes of the meetings of the Board were drawn up, there would also be in that case an offence against the required principles of procedure, because the possibility cannot be excluded that the opinion of the Establishment Board would have been different in the face of the first detailed statement.

— A third ground of complaint in this respect is that the Establishment Board used a statement of the applicant's superior dated 17 February 1961, without allowing the applicant to submit his comments.

The Commission rejects this complaint saying that this statement played no part in the integration procedure. In fact, it is not possible to see any factor (taken for example from the minutes) allowing it to be thought that this allegation of the applicant is correct. On the contrary, if I understand the matter correctly, the Commission used this document of 17 February 1961 in the legal procedure only to show that the applicant's superior was not hostile to him and showed himself to be quite impartial towards him.

As the applicant simply presumes that the statement was used (reply, p. 24) without offering any proof of his allegation, the ground of complaint cannot be considered. A further examination would in any case appear superfluous, having regard to the results already obtained from this examination.

(c) For the same reason I am allowing myself merely to pass briefly over a series of other alleged procedural defects. To the extent that they relate to points of inaccuracy and not merely to minor errors, they are hardly of such a nature as to justify annulment of the procedure.

— Certainly that applies to the ground of complaint that the Establishment Board did not hear all the witnesses cited by the applicant. The Commission rightly states on this point that the Establishment Board is not obliged to do so and that, on the contrary, just like a court, it is obliged only to obtain clarification of a case to the extent to which it appears necessary. If it considers that it has sufficient material to evaluate the candidate's abilities, it can refrain from hearing other witnesses. Consequently, one may speak at most of a procedural defect, if it was certain that the witnesses who were not heard had important evidence to give, that is to say, evidence which could seriously influence the judgment of the Commission. But, according to the applicant's statements in the course of both the written and oral procedures, there is no reason to accept this.

— I would also say that the rôle which another superior of the applicant played in the course of the integration procedure does not afford grounds for annulment.

This servant was a member of the Establishment Board and, according to the applicant, for this reason he should have refrained from being present at the meetings during which questions concerning the applicant came up for discussion or in the course of which witnesses were heard concerning the applicant. In particular, says the applicant, he should have refrained in the course of the procedure from preparing another report on the applicant and submitting it to the Board.

It seems to me, on the contrary, that this would add to the requirements of a pure examination procedure. When a superior has the right and the duty to give his opinion of a servant in his report he cannot be forbidden to explain this opinion again in writing during the procedure, always on the supposition that the person concerned can submit his comments, which was the case in the present instance. The duty of impartiality of members of the Board is in my opinion fulfilled when a member refrains from voting in a case concerning the official who is under him. On the other hand, in such a case I do not consider it necessary to exclude him completely from the whole procedure.

(d) It remains lastly to consider the ground of complaint of an incorrect assessment of the facts. It consists in saying that the information on the

absence of the applicant is incorrect, that the integration file contains a contradictory opinion of his punctuality and incorrect statements on his relations with his subordinates and his ability to adapt himself to the requirements of the new department.

Certain of these complaints require real value-judgments which cannot therefore be considered in the course of judicial proceedings, for example, the question of punctuality in the sense of ability to carry out his duties in an organized and methodical manner and the question of his ability to adapt himself to his duties in the service of the EEC Commission.

But to the extent that we are concerned with matters of fact which may be checked, as in the other cases, I prefer to refrain from examining them, because there will be sufficient opportunity to do so in the course of a new procedure, if my opinion is to be followed. But that is not to say that they are totally unimportant as regards the opinion of the Establishment Board.

4. As a result, in respect of the applicant's principal conclusions I must keep to this: I find the existence in the integration procedure of a series of serious infringements of important rules of procedure. It is thus essential to annul the opinion of the Establishment Board. In the same way the Commission's decision of dismissal must be annulled, because in the absence of the unfavourable opinion of the Establishment Board the applicant would have remained in the service of the Commission. It follows that the Commission should be obliged to recommence the integration procedure. At the same time it is certain that the applicant remains in the service of the Commission with all the rights flowing from his former position.

II—Alternative conclusions

An examination of the applicant's alternative conclusions and of all the arguments concerning the way in which his situation has been terminated thus becomes unnecessary. The same goes for the application for damages, at least in so far as it was amended in the event of the disputed opinion's being annulled, in the sense that only the salary which was withheld must be paid.

III—The Final Opinion

To sum up I should state that the application appears to me to be well-founded and that in consequence the Commission must be ordered to pay the costs.