JUDGMENT OF THE COURT (SECOND CHAMBER)
20 FEBRUARY 1975 [1]

Maurits Willem Geerlings
v Commission of the European Communities

Case 38/74

Summary

Officials — Retirement in the interest of the service — Application to officials on leave on personal grounds — Refusal by the Administration — Admissibility (Regulation No 1543/73 of the Council)

Regulation No 1543/73, which is partly designed to resolve the problems created by the reduction in the number of posts, cannot apply to individuals not actually occupying a post. In these circumstances, the Commission rightly interpreted Regulation No 1543/73 as not applying to officials who are on leave on personal grounds.

In Case 38/74

MAURITS WILLEM GEERLINGS, an official of the Commission of the European Communities on leave on personal grounds, represented by F. Salomonson, advocate at Dordrecht, with an address for service in Luxembourg at the chambers of E. Arendt, 34 b rue Phillippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. H. J. Bourgeois, acting as agent, with an address for service in Luxembourg at the office of its Legal Adviser, P. Lamoureux, 4 boulevard Royal,

defendant,

Application for annulment of the refusal by the Commission to grant the

1 — Language of the Case: Dutch.

applicant a measure terminating his service as provided for under Regulation No 1543/73.

THE COURT (Second Chamber)

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

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

gives the following

JUDGMENT

Facts

The facts and arguments developed by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

1. Mr M. W. Geerlings, of Dutch nationality, belongs to the scientific service of the European Communities. His last post was that of Head of the Radio-Chemical Division at the European Institute for Transuranium Elements at Karlsruhe.

Since 1 July 1969, he has been on leave on personal grounds within the meaning of Article 40 of the Staff Regulations of Officials.

2. By a letter of 10 September 1973, Mr Geerlings requested the application to him of a measure terminating his service pursuant to Regulation of the Council No 1543/73 of 4 June 1973 introducing special measures temporarily applicable to officials of the European Communities paid from research and investment funds (OJ L 155/1 of 11. 4. 1973).[1]

1 — Article 2 of the Regulation provides as follows:

1. In order to deal with exceptional problems arising from the adoption of research programmes involving a reduction in the number of posts provided in the plan of staff paid from European Atomic Energy Community research and investment funds, and problems arising from the accession of new Member States to the European Communities, the Commission is hereby authorized until 31 December 1973 and within the limit of the number of posts affected, to take measures to terminate the service, within the meaning of Article 47 of the Staff Regulations, of those of its officials who are paid from research and investment funds, under the conditions laid down below.

. . . . . .

2. The Commission shall determine which posts are to be affected by the measures provided for in paragraph 1.

The Commission shall draw up a list of officials according to grade, affected by these measures after consulting the Joint Committee, which shall accord a hearing to the official when he so requests. It shall take into account the interests of the service and take into consideration the official's age, ability, efficiency, conduct in the service, family circumstances and seniority.

. . . . . .

The Commission shall, where the interest of the service so permits, accord priority treatment to applications from officials who request termination of service under paragraph 1. When such an application is rejected, the rejection must indicate the reasons and be communicated in writing to the person concerned.

. . . . . .

This request was rejected by the Commission in a decision communicated to Mr Geerlings by letter of 10 December 1973 on the ground that it had, on 7 November 1973, decided that the regulation did not apply to officials who were on leave on personal grounds.

3. As there no reply to the complaint submitted on 24 December 1973 by Mr Geerlings against this decision, the present appeal was lodged on 30 May 1974.

The procedure followed the normal course.

On the report of the Judge-Rapporteur, after hearing the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preliminary inquiry.

II — Submissions of the parties

The *applicant* claims that the Court should annul the decision of the Commission which was the subject of its letter of 10 December 1973; declare that the Commission is under a duty to adopt the measure to terminate the applicant's service provided for under Article 2 of Regulation No 1543/73 of the Council; and order the Commission to pay the costs of the action.

The *Commission* contends that the Court should:

(i) dismiss the application as inadmissible in so far as it seeks a declaration that the Commission is under a duty to adopt a measure terminating the service of the applicant within the meaning of Regulation No 1543/73;

(ii) in any case dismiss the application as unfounded;

(iii) order the other party to pay the costs, in accordance with the relevant provisions.

III — Submissions and arguments of the parties

In his *application*, the *applicant* points out that he asked for leave on personal grounds on the advice of the Director-General of Personnel and Administration. The funds provided for the scientific research programme had been withdrawn or at least so reduced that he would no longer have had any work and his functions would have had to be regarded as redundant.

Contrary to his clearly expressed wish, his leave was twice extended by the Commission. On two occassions, in June 1970 and September 1971, he asked to be reinstated but his requests were rejected on the ground that the Commission had insufficient funds available to enable the post to be filled.

The applicant believes that his old post has always remained vacant.

The applicant considers that the Commission's refusal to reinstate him is unjustified. It is clear from the various provisions of the Staff Regulations that an official on leave on personal grounds has the right to be reinstated in his post if it is still vacant. If this were not so, Article 40 (4) (d) of the Staff Regulations would have no real meaning.

The applicant contends that, in view of the restricted research programme in operation and of the position created by the accession of the new Member States, the Council, in promulgating Regulation No 1543/73, conferred on redundant officials the right to a special allowance which was to enable them, in the words of the recitals in the regulation, 'to overcome the serious financial difficulties resulting from loss of employment . . .'

The repeated refusal of the Commission to reinstate the applicant and its unqualified refusal to apply to him the provisions of Regulation No 1543/73 show that, in fact, the Commission wanted unlawfully to bring his employment to an end without enabling

him to take advantage of the rights and privileges provided for under Regulation No 1543/73, despite the fact that the regulation was promulgated specifically to deal with cases such as his.

The applicant also maintains that the Commission was wrong to decide that Regulation No 1543/73 does not apply to officials on leave on personal grounds. In taking this decision the Commission changed the regulation. The applicant draws attention to Article 2 and particularly to the provision that the Commission shall, where the interest of the service so permits, accord priority treatment to applications from officials who request termination of service. As the applicant has been on leave for more than four and a half years it is difficult to accept that the interest of the service does not allow the Commission to accord priority treatment to his application.

In the applicant's view, it is unreasonable that, because he took the initiative, to avoid being idle, of seeking temporary employment elsewhere, he should, in contrast to officials who are content to twiddle their thumbs, be penalized through being unable to take advantage of the provisions governing termination.

In its *statement of defence,* the *Commission* points out that one of the applicant's claims is that the Court should declare 'that the Commission has a duty to adopt a measure terminating his service', and contends that, without prejudice to the question whether it is still possible to take such a measure without further formality, the application is inadmissible on this point. Under Article 91 (1) of the Staff Regulations of Officials, the Court has jurisdiction in any dispute regarding the legality of an act and has unlimited jurisdiction only in disputes of a financial character, but the settled case-law of the Court has established that, even in the latter case, the Court cannot enjoin the administration to take a course of action.

The Commission emphasizes that the action is concerned with the question whether the Commission was right in deciding that it was not possible to consider enabling the applicant to take advantage of a measure terminating his service and not the question whether the Commission unlawfully failed to reinstate the applicant pursuant to Article 40 (4) (d) of the Staff Regulations. What matters is that the applicant is in that administrative position and not why and how he got there. In the Commission's view, therefore, it is unnecessary to go into the facts set out by the applicant on these two questions.

As regards the substance of the case, the Commission first of all contends that its decision of 7 November 1973 that Regulation No 1543/73 does not apply to officials on leave on personal grounds represents nothing more than confirmation of the practice followed by its departments in drafting decisions implementing the regulation. The decision cannot alter Regulation No 1543/73 and was not intended to do so. The Commission has never been in any doubt that Regulation No 1543/73, in common with Regulation No 2530/72, which are identical on this point, is not applicable to officials on leave on personal grounds.

This conclusion emerges both from the wording of the regulation and from the object of the release system. The release measure in comparable with 'retirement in the interests of the service' under Article 50 of the Staff Regulations and, moreover, attention is expressly drawn to this comparison by the draftmen's use, in this connexion, of the phrase 'within the meaning of Article 47 of the Staff Regulations'. Thus, like the latter measure, release was intended to free a post.

In both cases, the authority which takes the initiative in the matter is the administration, which decides whether a post should be freed. In both cases provision is made to 'enable officials

affected by such measures to overcome the serious financial difficulties resulting from loss of employment' (second recital of Regulation No 1543/73).

The situation of an official on leave on personal grounds has, so to speak, nothing to do with these measures. In the first place, the official is not occupying any post, and this fact is the result of a process which he himself set in motion. Secondly, the official concerned is drawing no pay. It is doubtful whether he faces the same financial difficulties as the official who loses his employment.

The Commission also states that, given the purpose of the regulation, namely, to create vacancies, it is difficult to see how it can apply to an official taking advantage of leave on personal grounds. In this administration situation the official is not occupying any post; a measure terminating his services would in no way release a post which has an incumbent.

As the applicant cannot, while on leave on personal grounds, be the subject of a measure implementing Regulation No 1543/73, his allegations of misuse of powers, based on a combination of the defendant's refusal to apply the termination arrangements to him and of the fact that he has not yet been reinstated, are wholly unfounded. Furthermore, the Commission vigorously denies that it intended to bring the applicant's employment to an end.

In his *reply*, the *applicant* states that he always believed that, in asking for leave on personal grounds, all he was doing was set the termination procedure in motion.

In his view, Regulation No 1543/73 provided for an autonomous method of terminating a servant's service. The only significance of the reference in the regulation to Article 47 of the Staff Regulations was to make clear to the reader that its sole purpose was to provide for a method of termination *sui generis*.

The Commission (he says) creates the impression that it is of cardinal importance that in the case of leave on personal grounds the official must take the initiative and that, in the case of Regulation No 1543/73, the Commission must take it.

The first question which this raises is why this difference should be decisive.

The applicant states that the upshot of the Commission's arguments is that the decisive factor is that the purpose of Regulation No 1543/73 is to create vacancies and that it is for the Commission and the Commission alone to decide which posts should in this way be released. However, this has no application whatever in the present case. The applicant had in fact been sent on leave because there were no funds to enable him to continue carrying out his duties. If he had continued to 'twiddle his thumbs' he would, without further ado, have been directly covered by Regulation No 1543/73. The only difference is that the Commission secured in 1969 what it would otherwise have obtained only in 1973. The extremely theoretical argument of the Commission would only make sense if in fact it had been able to add that 'if it depended upon us, the applicant's post would have still been occupied'.

Secondly, the applicant considers the question whether, in practice, there is any substantial difference between the situation in which the official is the 'prime mover' and that in which it is the Commission. The fourth paragraph of Article 2 (2) makes it clear that the difference is less than the Commission thinks. In practice, there is in both cases agreement, for all intents and purposes, between the official and the Commission or, at least, the two parties try to reach one.

Finally, the applicant emphasizes that he is seeking no more than application of the regulation in his case in accordance with the purpose which the Commission states to be that of the regulation, namely, to create vacancies. Owing to

the curtailment of the research programme, his post became redundant. Nevertheless, the competent authorities refused to apply Article 41 of the Staff Regulations. Regulations enabling the applicant's position and the irregular actions taken in respect of his post to be legalized were finally put into operation in 1973. The applicant emphasizes that he has suffered substantial financial loss.

In its *rejoinder,* the *Commission* maintains that the reason for the administrative position in which the applicant finds himself and the way in which he reached it are not relevant. However, to prevent any misunderstanding on the subject the Commission offers the following clarification. In 1969 the applicant decided to terminate his service with Euratom. The Commission could have compelled him to choose between the two normal and obvious alternatives, remaining in his post or resigning, but it showed a sympathetic attitude to his desire to do other work outside Euratom without resigning.

The Commission emphasizes, moreover, that it took steps to find other employment for officials assigned to a post under programmes for which insufficient funds were available. It endeavoured to reserve posts which had become vacant for officials whose posts had become redundant. This circumstance gives the lie to the applicant's assertion that it was necessary for him to take the initiative in 1969 in order to avoid being idle. It also partly explains why it has not to this day been possible to offer a vacancy to the applicant or, because of the budgetary repercussions, to add a post to another unit.

The Commission adds that the post to which the applicant was assigned before being sent on leave on personal grounds can be regarded as supernumerary as a consequence of the restrictions placed on the research programme. It is for the same reason that this post did not remain 'vacant': the budgetary entry on which it depended was used for a post in another unit at the Karlsruhe Institute.

On the main issue the Commission again underlines the importance of the reference, in Article 2 of Regulation No 1543/73, to Article 47 of the Staff Regulations of Officials. The only point of the reference is to make the definition of the measure clearer. Its only purpose is to make clear that 'retirement in the interests of the service' may be granted only in respect of officials actually occupying a post. Thus interpreted, the wording of Article 2 (1) of Regulation No 1543/73 is perfectly consistent with the objective pursued by the regulation, namely, to render vacant posts occupied by officials in active employment.

The oral observations of the parties were made at the hearing on 12 December 1974.

The applicant was represented by F. Salomonson, advocate at Dordrecht, and the Commission of the European Communities by its Legal Adviser, J. H. J. Bourgeois, acting as agent.

The Advocate-General delivered his opinion on 22 January 1975.

Law

1 The application seeks annulment of the refusal by the Commission to grant the applicant a measure terminating his service pursuant to Regulation No 1543/73 of the Council introducing special measures temporarily applicable

to officials of the European Communities paid from research and investment funds.

2 Since 1 July 1969 the applicant, a scientific officer employed by Euratom, has been on leave on personal grounds within the meaning of Article 40 of the Staff Regulations of Officials.

3 On 10 December 1973, the Commission rejected his request for a measure terminating his service pursuant to Regulation No 1543/73 on the ground that, on 7 November 1973, it had decided that the regulation did not apply to officials who were on leave on personal grounds.

4 The applicant seeks annulment of this decision because it is based on an erroneous interpretation of the regulation by the Commission.

5 The applicant bases his case mainly on Article 40 (4) (d) of the Staff Regulations, which confers on an official on leave on personal grounds the right to be reinstated in the first post corresponding to his grade which falls vacant.

6 Under Article 2 of Regulation No 1543/73 the Commission is authorized to take measures for the termination of service of officials 'in order to deal with exceptional problems arising from the adoption of research programmes involving a reduction in the number of posts in the plan of staff paid from European Atomic Energy Community research and investment funds, and problems arising from the accession of new Member States to the European Communities'.

7 The regulation is thus partly designed to resolve the problems created by the reduction in the number of posts.

8 As this is its object, the regulation cannot apply to individuals not actually occupying a post.

9 An official on leave on personal grounds does not actually occupy a post and has no right to reinstatement unless there is a post vacant.

10 In these circumstances, the Commission has rightly interpreted Regulation No 1543/73 as not applying to officials who are on leave on personal grounds.

11 The applicant further contends that the repeated refusal of the Commission to reinstate him pursuant to Article 40 (4) of the Staff Regulations, combined with the refusal to apply to him a measure terminating his services under Regulation No 1543/73, is evidence of the Commission's unlawful intention to terminate his service while denying him the rights and privileges provided for under the Staff Regulations.

12 The Commission justified its rejections of the applicant's requests to be reinstated on the ground that the budget for research approved by the Council rules out any practical possibility of reinstating the scientific staff on the conclusion of leave on personal grounds, and on the ground that it was necessary to recognize the large number of supernumerary officials still employed as having, when appointment was made to a vacancy, priority over officials who were not in employment.

13 As support for the non-application of Article 40 (4) (d), these grounds cannot be criticized in law.

14 The applicant has not attempted to challenge the facts on which the grounds for these decisions are based.

15 It is, moreover, established that no measure for termination of service has been taken in respect of the applicant, so that he is still on leave on personal grounds, enjoying the rights which flow from that status.

16 In these circumstances, this submission cannot be upheld.

17 The application must therefore be dismissed.

Costs

18 The applicant has failed in his application.

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

20 However, under Article 70 of the said Rules, the institutions shall bear their own costs in the case of actions by officials and servants of the Communities.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as unfounded.**

2. **Orders each of the parties to pay its own costs.**

Mackenzie Stuart Kutscher Sørensen

Delivered in open court in Luxembourg on 20 February 1975.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber