JUDGMENT OF THE COURT (FIRST CHAMBER)
15 DECEMBER 1971[1]

Leandro Tontodonati
v Commission of the European Communities

Case 17/71

Summary

Officials — Disputes with the administration — Act confirming a previous act — Complaint against such a measure — Period prescribed for appeal against the previous act — No re-opening
(Staff Regulations of Officials, Article 91)

A complaint brought against even an implied decision which constitutes confirmation of a previous decision cannot re-open the period prescribed under the Staff Regulations for an appeal against the previous decision.

In Case 17/71

LEANDRO TONTODONATI, an official at the Euratom Joint Research Centre at Ispra, residing at 18 Via Bligny, Varese, represented by Giuseppe Pellicini, of the Varese Bar, with an address for service in Luxembourg at the Chambers of Victor Biel, 71 rue des Glacis,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, assisted by Giorgio Pincherle of the Commission's Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, Emile Reuter, 4 boulevard Royal,

defendant,

Application for annulment of the implied rejection by the defendant of the applicant's request to be reclassified in Category B, career bracket B 3/B 2, with retroactive effect from 1 January 1963, and payment of the salary corresponding to this classification,

1 — Language of the Case: Italian.

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of Chamber, A. M. Donner (Rapporteur) and R. Monaco, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

The applicant was appointed as Chief Clerk in Grade C 1 (in which he has remained), first step, on 20 February 1963.

On 28 February 1963 the applicant lodged a complaint under Article 90 of the Staff Regulations of Officials of the European Communities against the classification given in the act of appointment.

After a reminder sent by letter dated 5 July 1963 to the President of the EAEC Commission, the latter rejected the complaint by letter of 19 September 1963.

On 28 April 1966 the applicant sent the Director of the Ispra Centre a complaint under Article 90 of the Staff Regulations concerning the difficulties which had allegedly been placed in the way of the normal progress of his career. The Director of the Centre rejected the complaint by letter of 25 May 1966.

On 28 January 1969 the applicant requested the latter to revise his designation and grade. This request was rejected by the Director of the Centre by letter of 25 March 1969.

Finally, on 15 December 1970, the applicant submitted a complaint under Article 90 of the Staff Regulations to the Commission of the Communities requesting that his designation be changed and that he be re-classified with retroactive effect in Category B (career bracket B 3/B 2).

In the belief that the two months prescribed in the second paragraph of Article 91 (2) of the Staff Regulations commenced to run from 15 February 1971, he initiated proceedings before the Court of Justice by application lodged at the Registry on 13 April 1971.

In a supplementary statement lodged on 11 June 1971, the Commission, pursuant to Article 91 of the Rules of Procedure, asked the Court to rule on the admissibility of the appeal without going into its substance and to declare it inadmissible.

The applicant submitted his observations on the objection of inadmissibility by statement lodged on 17 August 1971.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court (First Chamber) decided to open the oral procedure on the objection without preparatory inquiry.

The oral observations of the parties were heard on 10 November 1971.

The Advocate-General delivered his opinion on 2 December 1971.

II — Conclusions of the parties

The *defendant* (the applicant on the issue of admissibility) claimed that the Court should:

1. Declare the application to be inadmissible and reject it without going into the substance of the case;
2. order the applicant to pay the costs.

The *applicant* (the defendant on the issue of admissibility) contended that the court should dismiss the objection as to admissibility raised by the defendant.

III — Submissions and arguments of the parties on admissibility of the action

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

1. The *defendant* Commission (applicant as to admissibility) contends that the action is inadmissible because it has been brought against a non-existent implied decision rejecting a request (silence constituting rejection). For the following reasons, the alleged implied decision at most constitutes no more than confirmation of the previous decision of the administrative authority:

(a) After addressing, on 28 February 1963, a complaint against his appointment, dated 20 February 1963, to the Commission of the EAEC, the applicant should have commenced proceedings before the Court within a period of two months from the date of the implied rejection, namely, on 28 June 1963 at the latest. For reasons which the Commission sets out in its statement, if the period must be regarded as having commenced to run only from the second half of July 1963, it follows that the reply of 19 September was given within the period prescribed and constitutes a measure capable of being contested.

(b) The complaint which, on 28 February 1963, the applicant addressed to the highest administrative authority in his institution relied on the same grounds which were later adduced in support of the complaint of 15 December 1970, especially the fact that his classification and related duties did not correspond either to those which he was actually carrying out or to his qualifications.
From the replies given to his complaint by the Director of the Ispra Centre on 25 May 1966 and 25 March 1969, it is clear that he could be promoted only in accordance with the procedures laid down by the Staff Regulations of Officials, in particular Article 45 (2) concerning transfer from one category to another.

(c) Consequently, in relation to the first decision in 1963, all subsequent replies given to the applicant were mere confirmations of that decision. As there can be no question of an implied rejection in this matter, because a definite decision had already been taken, and no appeal was lodged against it within the period prescribed in Article 91 (2) of the Staff Regulations, it is clear that the application is inadmissible.

(d) The argument set out above is confirmed by the decisions of the Court of Justice in its judgments of 14 April 1970 (*Nebe* v *Commission,* Case 24/69, [1970] ECR 145) and of 17 March 1971 (*Kschwendt* v *Commission,* Rec. 1971, p. 251).

2. The arguments of the *applicant* (defendant as to admissibility) may be summarized as follows:

(a) Over the years, the applicant has assumed duties of increasing responsibility and, consequently, the subject-matter of the complaint of 15 December 1970 was different from that of the complaints in 1963, 1966 and 1969. The implied rejection by the Commission of the complaint of 15 December 1970 cannot, therefore, be regarded as an act of

confirmation because it was concerned with a request based on new circumstances.

(b) The fact that the request of 28 January 1969 to the Director of the Ispra Centre was supported by Mr Metzger, Head of the Supply Department at the Ispra Centre, and by Professor Levi-Sandri represented a new factor. In view of the fact that the letter of 28 January 1969 to the Director of the Ispra Centre is not a complaint within the meaning of Article 90 of the Staff Regulations and of the fact that the Director's reply does not constitute a decision, the absence of an answer from the Commission to the complaint of 15 December 1970 may be regarded as an implied decision rejecting it and not as an act of confirmation.

(c) The Commission's view would lead to the absurd conclusion that an illegal situation still subsisting after the rejection, ten years previously, of a complaint cannot be the subject of an appeal because it was not contested at the time.

Grounds of judgment

1 By letter of 8 December 1970, addressed to the President of the Commission, the applicant lodged a complaint with the object of securing his classification in Category B, career bracket B 3/B 2, with retroactive effect from 1 January 1963. Since he did not receive any reply to the complaint, he brought the present action before the Court in pursuance of the second subparagraph of Article 91 (2) of the Staff Regulations of Officials.

2 In a statement on a procedural issue, the defendant Commission raised an objection of admissibility on the ground that the implied rejection, which was a consequence of the silence of the President of the Commission, was merely confirmation of previous decisions which could no longer be contested.

3 Under Article 91 of the Staff Regulations, appeals against the acts referred to in that article must be lodged within a period of three months. The official concerned cannot revive a limitation period which he has allowed to lapse by lodging a complaint through official channels on the same subject-matter as an act which can no longer be contested and by initiating proceedings before the Court on an alleged implied rejection of that complaint.

4 It is clear from the wording of the complaint of 8 December 1970 that its object was to obtain the applicant's re-classification with effect from 1 January 1963. By decision of 20 February 1963 of the EAEC Commission, communicated on 16 July 1963, the applicant, a servant of the Community since 1959, was 'integrated' as Chief Clerk and classified in Grade C 1, first step, with effect from 1 January 1962. By complaint of 28 February, 1963, addressed to the President of the EAEC Commission, he asked to be classified in a higher grade. He received a reply by letter of 19 September

1963 stating that as the Commission did not find that there was any inconsistency between his grade and the level of his duties, it could not accept this complaint.

5 Neither the decision to integrate him nor the Commission's rejection was challenged within the period prescribed.

6 It is true that, in the course of the written and oral procedure, the applicant contended that at the beginning of 1969 new circumstances arose, which changed his position and justified a re-classification. Nevertheless, the complaint through official channels, the implied rejection of which is the subject of the present proceedings, sought his re-classification with retroactive effect from 1 January 1963 and relied solely on circumstances which existed prior to 1968. No reference to the new circumstances which are alleged to have arisen in 1969 was made in that complaint and such reference would, moreover, be incompatible with its subject-matter inasmuch as it was concerned with re-classification with effect from 1 January 1963.

7 Grounds which have nothing to do with the subject-matter of the complaint of 8 December 1970 cannot be relied upon to support or establish the admissibility of an appeal against the implied rejection of the complaint.

8 The application is, in consequence, inadmissible.

Costs

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

The applicant has failed in his submissions.

Nevertheless under Article 70 of the Rules of Procedure, costs incurred by the institutions in actions brought by servants of the Communities are to be borne by the institutions.

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 Atomic Energy Community;

Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 90 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 91;

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

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

Mertens de Wilmars Donner Monaco

Delivered in open court in Luxembourg on 15 December 1971.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 DECEMBER 1971[1]

Mr President
Members of the Court,

Mr Tontodonati, the applicant in the case on which I have to give my opinion today, entered the service of the Euratom Commission on 11 September 1958. He was first employed on the basis of a contract concluded in accordance with the provisions of Belgian Labour Law, but, with effect from 1 March 1959 he was, with the rank of clerk, subject to the conditions of employment of other servants of Euratom. At his request and with effect from 31 July 1961, he was transferred to the Ispra Nuclear Research Centre, where he is still at present working.

After the entry into force of the Staff Regulations of Officials of the Community, he was appointed an official with the designation of Chief Clerk in Grade C 1, step 1, with effect from 1 January 1962. Mr Tontodonati had been aware since 28 February 1963 of the decision to appoint him, which seems to have been taken on 20 February 1963. But the official dispatch of the act of appointment is dated 16 July 1963, which is the date on which he was notified of it.
As regards the applicant's duties it should be said that he works in the 'Supplies and Stores' Department at the Research Centre. In his 1962 periodic report his duties were indicated by the title 'adjoint responsable pour la section

1 — Translated from the German.