JUDGMENT OF THE COURT (SECOND CHAMBER) OF 15 JUNE 1976 [1]

Heinz Günther Jänsch v Commission of the European Communities

Case 5/76

Summary

1. *Officials — Request through official channels — Implied rejection — Express rejection within the period for commencing proceedings — Date — Fresh period — Notification of rejection — Delay not to be taken into account*
(Staff Regulations of Officials, Article 91 (3), second indent)

2. *Officials — Application to the Court — Act adversely affecting an official — Belated notification — Period for commencing proceedings — Calculation*
(Staff Regulations of Officials, Articles 90 and 91)

1. An express decision rejecting a complaint, adopted within the period for commencing proceedings and after the implied decision rejecting it within the meaning of the second indent of Article 91 (3) of the Staff Regulations, must be regarded as arising at the date on which it was adopted by the competent authority and as starting a new period to begin to run without any delay in notification being taken into account.

2. In the event of the belated notification on an act adversely affecting an official the period for commencing proceedings must be calculated from the date of notification if the delay is not attributable to the person concerned.

In Case 5/76

HEINZ GÜNTHER JÄNSCH, an official of the Commission of the European Communities, residing at 23 rue des Cigales, Luxembourg, represented by Marcel Slusny, Advocate at the Cour d'appel, Brussels, 272 avenue Brugmann, 1180 Brussels, with an address for service at the home of Mr Jänsch,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Joseph Griesmar, acting as Agent, with an address for service in Luxembourg

1 — Language of the Case: French.

at the Chambers of its Legal Adviser, Mario Cervino Bâtiment CFL, place de la Gare,

defendant,

Application, at the present stage of the proceedings, regarding the admissibility of the application lodged by the applicant for the annulment of the 'Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials in the scientific and technical services', of the decisions taken in implementation of these procedures, and, so far as necessary, of Article 92 of the Staff Regulations of Officials,

THE COURT (Second Chamber)

composed of: H. Kutscher, President of Chamber, P. Pescatore and M. Sørensen, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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

I — Facts

1. Article 45 (2) of the Staff Regulations of Officials (hereinafter referred to as 'the Staff Regulations') makes promotion from one category to another conditional on a competition.

An exception is provided for in the second paragraph of Article 98 of the Staff Regulations in respect of officials covered by Article 92, that is to say officials 'who occupy posts in the field of nuclear science calling for scientific or technical qualifications and who are paid from appropriations in the research and investment budget'.

2. The applicant entered the service of the Commission of the EAEC in August 1960 as a laboratory technician. As from

September 1961 his place of employment was the Joint Nuclear Research Centre at Ispra. In January 1962 he was established as an official in Grade B 4 and in January 1966 he was promoted to Grade B 3.

During his employment at the Joint Nuclear Research Centre at Ispra the applicant was paid from appropriations in the research and investment budget.

From 1966 to 1969 the applicant was on leave on personal grounds during which time he studied at the university of Birmingham where he graduated as a doctor of philosophy (electronic and electrical engineering).

In the absence on the expiration of his leave of a vacant post corresponding to his qualifications he was reintegrated only as from August 1973 in a post as senior administrative assistant with the Directorate-General for Energy and Euratom safeguards in Luxembourg.

In this post the applicant was paid from appropriations in the operational budget.

3. On 16 December 1974 the Commission published in the Staff Courier under the second paragraph of Article 98 of the Staff Regulations 'procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials in the scientific and technical services'. These 'Procedures' stated that they related only to officials covered by Article 92 of the Staff Regulations.

The applicant while recognizing that his post was paid from appropriations in the operational budget and not in the research and investment budget, applied on 22 January 1975 for promotion to Category A using the form suggested in the annex to the above mentioned 'Procedures'.

On 12 February 1975 the applicant submitted a request under Article 90 (1) of the Staff Regulations to the effect that the benefit of the 'Procedures' be extended to him or alternatively that he be transferred to a post paid from appropriations in the research and investment budget.

By letter dated 3 March 1975, registered on 6 March 1975, the applicant submitted a complaint under Article 90 (2) of the Staff Regulations directed against the 'Procedures'.

On 18 June 1975 the applicant requested that his complaint of 3 March 1975 be re-registered.

On 30 June 1975 the Head of the Recruiting, Appointments and Promotions Division informed the applicant that it had not been possible for his application for promotion from Category B to Category A to be granted because he did not fulfil 'one of the requisite conditions, namely belonging to the scientific and technical service'. However, his case, along with that of other officials in the same position, had been brought to the notice of the administration.

By letter dated 2 October 1975 the Commission replied expressly to the applicant's complaint of 3 March 1975. The Commission informed him in particular that it could not, on obvious grounds of natural justice, extend the application of the 'Procedures' to officials other than those expressly covered by Article 92 without infringing the express provisions of Article 45 (2) of the Staff Regulations. Further the Commission said that it had organized general competitions giving access to Category A to candidates with a university degree in the field in question. In these circumstances the Commission considered that it had acted in accordance with the principle of equality of treatment.

The letter from the Commission dated 2 October 1975 addressed to the applicant's place of work was not

delivered to him until 16 October 1975 by reason of the fact that he was on leave from 29 September to 15 October 1975.

II — Procedure

1. On 16 January 1976 the applicant brought the present action in which he claims that the Court should:

(1) Declare the express refusal of 2 October 1975 to be null and void;
(2) Declare the 'Procedures' published on 16 December 1974 to be null and void;
(3) Declare the decisions taken in implementation of the 'Procedures', and in particular the refusal meted out to the applicant on 30 June 1975 to be null and void;
(4) So far as necessary, declare Article 92 of the Staff Regulations of Officials void or at least inapplicable in the case of the applicant.

2. In his application the applicant alleges in particular, as regards the substance, that the 'Procedures' should according to Article 110 of the Staff Regulations have been adopted after consulting the Staff Committee and the Staff Regulations Committee. Moreover, the 'Procedures' derogate from the provisions of Article 92 of the Staff Regulations since the latter was not confined, as were the contested 'Procedures', to officials belonging to the scientific and technical service. The condition contained in the last part of the first paragraph of Article 92 of the Staff Regulations that the officials in question must be paid from appropriations in the research and investment budget is not an additional requirement but an explanation. To consider it otherwise would lead to the introduction of discrimination contrary to the principle of equality between officials, enshrined in particular in Article 5 (3) of the Staff Regulations. If Article 92 of the Staff Regulations does discriminate there would be reason for regarding it as contrary to the principle of equality between officials.

3. On 20 February 1976 the Commission lodged an application in accordance with Article 91 of the Rules of Procedure that the Court should decide on a preliminary objection to the admissibility of the action, declare the action inadmissible and order the applicant to bear the costs.

4. In his statement dealing with the objection of inadmissibility lodged on 22 March 1976 the applicant asked the Court to order the defendant to produce his leave record sheet for 1975. When the parties have if necessary discussed this document the Court must either fix the time-limit before which the defendant may lodge its defence or order the oral procedure to be opened with regard to the objection of inadmissibility in accordance with Article 91 (3) of the Rules of Procedure of the Court and reserve the costs.

5. On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (Second Chamber), decided to open the oral procedure on the objection without any preparatory inquiry.

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

1. *The defendant, the applicant with regard to the procedural issue,* claims that in so far as the action asks for the annulment of the decision of the Commission of 2 October 1975 and of the 'Procedures', an implied decision rejecting the applicant's complaint of 3 March 1975, registered on 6 March 1975, took effect on 6 July 1975 in accordance with Article 90 (2) of the Staff Regulations. This implied decision should have been contested before 7 October 1975 in accordance with the second indent of Article 91 (3) of the Staff Regulations. The Commission's express rejection dated 2 October 1975 was not notified to its addressee until 16

October 1975 on his return from leave. It could not cause another period for bringing an action to start to run since its notification was subsequent to the expiration of the period within which the previous implied decision should have been contested (second indent of Article 91 (3) of the Staff Regulations).

The action is likewise out of time on what appears to be the applicant's own argument, namely that the express decision of rejection takes effect on the date on which it is deemed to have been given, that is to say in the present case, on 2 October 1975. That decision should in accordance with Article 91 (3) of the Staff Regulations have been contested before the Court before 3 January 1976.

These conclusions were not invalidated by the fact that on 20 June 1975 the applicant considered that he should ask that his previous complaint, which had already been registered on 6 March 1975, should be re-registered.

2. In so far as the appeal asks for the annulment of the decisions taken under the 'Procedures' other than that notified to the applicant on 30 June 1975, the defendant states that the very summary manner in which the applicant cites these decisions leads to doubt whether this head of claim complies with Article 38 (1) of the Rules of Procedure.

Further it remains to be shown how the promotion to Category A of certain officials belonging to an occupational service to which the applicant does not constitutes an act adversely affecting him.

Finally, the contesting of these decisions for the first time before the Court constitutes an inadmissible claim, since no prior complaint was made through official channels in accordance with Article 90 (2) of the Staff Regulations.

More particularly as regards the decision notified to the applicant on 30 June 1975 the claim for its annulment would also seem to be inadmissible since it has not been preceded by any prior complaint through official channels.

3. In so far as the application claims that Article 92 of the Staff Regulations should be annulled or at least declared inapplicable, the defendant submits that this claim can be considered only if the appeal itself is admissible.

Moreover the defendant cannot see what interest the applicant can have in arguing that Article 92 of the Staff Regulations is void or does not apply: if this article were found to be unlawful the result would be that Article 45 (2) of the Staff Regulations would then apply in respect of everyone including officials covered by Article 92.

4. *The applicant, the defendant as regards the procedural issue,* submits that as regards the annulment of the decision of the Commission of 2 October 1975 and the 'Procedures' he agrees that the request of 20 June 1975 has no effect on the time-limits.

With regard to the situation created by the express rejection by the administration within the three months provided for in the second indent of Article 91 (3) of the Staff Regulations and the notification after this period of this rejection, the applicant observes that the periods for taking action must in certain cases be capable of interruption or suspension.

The Court itself in its judgment in Case 44/71, *Marcato* [1972] ECR 427, caused the periods to start to run afresh having regard to the circumstances of the case and the fact that the applicant was entitled to think that he had acted properly.

The applicant then alleges that the Court in its judgment in Joined Cases 109/63 and 13/64, *Muller* [1964] ECR 663, took the view that the publication of a table defining the duties and powers attaching

to each post may be regarded as an important new fact enabling an official affected by it to request the administration to retract a decision with regard to classification which can no longer be contested.

According to the applicant only notification causes new periods to run and the effect of the reply is suspended until it is notified.

Whatever the legal construction the Court considers it must adopt, whether it be the doctrine to be deduced from the judgement in *Marcato,* the judgment in *Muller* or the argument suggested by the applicant, the solution is to make the new period run from notification of the express rejection, that is to say in the present case, 16 October 1975.

Moreover the applicant's normal leave from 29 September to 15 October 1975 was not for the purpose of relaxation. The applicant remained at home in Luxembourg to prepare for the L/A competitions. Up to 6 October 1975 at least he was at home in Luxembourg and subsequently he could easily have been reached at the administrative offices where he was at the time of these competitions. Notification of the letter of 2 October 1975 was thus unduly delayed and the defendant should in this respect produce the applicant's leave record sheet where all the details are to be found.

Moreover to the three legal constructions mentioned above may be added that which consists in recognizing that periods are suspended when the end of a period falls during absence on normal leave or mission.

5. With regard to the annulment of the decisions taken in implementation of the 'Procedures', the applicant alleges that it has always been recognized that it is possible in the course of the procedure to give more details of one's claims and even, according to the case-law of the Court, formulate arguments and submissions amplifying previous arguments.

The defendant could certainly not be mistaken as to the applicant's claims and submissions.

Further the appointments which are the ultimate result of the implementation of the 'Procedures' should be annulled by the defendant of its own accord. The question of a prior complaint through official channels does not arise in respect of the necessary consequences of an annulment.

With regard to the argument that the contested measure does not adversely affect him, the applicant says that if the A posts which he can claim were filled, he would be frustrated even if the 'Procedures' were ultimately annulled and the Court upheld him as regards the annulment of Article 92 of the Staff Regulations.

The arguments which the applicant has set out with regard to the general consequences of the annulment of the 'Procedures' apply likewise with regard more particularly to the annulment of the decision notified to the applicant on 30 June 1975.

6. With regard to the annulment of Article 92 of the Staff Regulations the applicant is in complete agreement with the defendant in regarding the admissibility of the objection to it as depending on the admissibility of the application.

If the inapplicability of Article 92 of the Staff Regulations were to result in Article 45 (2) of the Staff Regulations being left as the sole rule applicable to promotions the applicant would already obtain partial satisfaction by reason of the fact that all the officials covered by Article 92 of the Staff Regulations would thus be in the same position.

According to the applicant the inapplicability of Article 92, to the extent to which it is sought in the application, would abolish the discrimination contained in that article but would leave untouched the benefits provided for in Article 98 of the Staff Regulations in the interest of all officials of the Communities 'who occupy posts in the field of nuclear science calling for scientific or technical qualifications'.

The applicant, represented by Marcel Slusny, and the Commission, represented by its Agent, Joseph Griesmar, made oral observations at the hearing on 6 May 1976.

At this hearing the parties adduced new factors summarized below:

The *Commission* states that the first indent of Article 90 (2) shows that a prior complaint through official channels may be directed against a 'measure of a general nature'. Such a measure does not include measures having a legislative scope as for example the 'Procedures'.

As to the applicant's leave record sheet produced by the administration, the Commission points out that there is no mention on this sheet of the applicant's address during his leave from 29 September to 15 October 1975.

The *applicant* states in particular in reply to the arguments of the Commission that in appears from the case-law of the Court that in the case of a 'procedural measure', that is to say a measure which involves the carrying out of a certain number of implementing measures, it is possible to attack the original measure.

During his leave from 29 September to 15 October 1975 the applicant had gone regularly to his office to collect his post. All who had seen him come and go knew very well that he was in Luxembourg and that he was coming into the office. In addition, a friend of the applicant confirmed in a letter that during the period in question he had been all the time at home in Luxembourg save for two days which he had spent in Brussels.

Law

1 The application lodged at the Court Registry on 16 January 1976 seeks in particular the annulment of a decision of the Commission of 2 October 1975 rejecting a complaint brought by the applicant on 3 March 1975 and directed against the 'Procedures to be implemented prior to decisions on the transfer from Category B to Category A of officials in the scientific and technical services' published in the Staff Courier on 16 December 1974.

2 By an application on a procedural issue lodged on 20 February 1976 the defendant raised under Article 91 of the Rules of Procedure a preliminary objection of inadmissibility on the grounds of the alleged lateness of the application.

3 In support of this preliminary objection the defendant states in the first place that the applicant's complaint registered on 6 March 1975 was rejected by the refusal implied by the absence of a reply within the four months prescribed in the last subparagraph of Article 90 (2) of the Staff Regulations, that is in the present case before 7 July 1975, and this implied decision of refusal should therefore have been contested by an application to the Court before 7 October 1975 und the second indent of Article 91 (3) of the Staff Regulations.

4 It states that since the express decision of the Commission was not notified to the applicant until 16 October 1975, that is after the expiration of the period for bringing an appeal, it was impossible for it to have activated the last sentence of that provision, which provides that 'where a complaint is rejected by express decision after being rejected by implied decision but before the period for lodging an appeal has expired, the period for lodging the appeal shall start to run afresh'.

5 However a decision must be regarded as arising within the meaning of this provision at the date on which it is adopted by the competent authority.

6 The latter, having adopted an express decision within the period for bringing an appeal, must except a new period to begin to run in favour of the person concerned without any delay in notification being taken into account.

7 It is proper therefore to conclude that in the present case the express decision of the Commission of 2 October 1975 caused a new period for bringing an appeal to begin to run.

8 The problem then arises as to the date from which this period must be calculated.

9 In this respect the date of notification is the criterion in all cases where as in the present case the delay in notification is not attributable to the person concerned.

10 Only the notification enables him to have effective knowledge of the existence of the decision and the grounds by which the administration justifies it.

11 Since notification took effect in the present case on 16 October 1975 the application lodged on 16 January 1976 was brought within the three months laid down in Article 91 (3) of the Staff Regulations.

12 Accordingly the preliminary objection of inadmissibility must be rejected.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Declares the application to be admissible;**
2. **Orders the procedure to continue with regard to the substance;**
3. **Reserves the costs.**

Kutscher Pescatore Sørensen

Delivered in open court in Luxembourg on 15 June 1976.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber