JUDGMENT OF THE COURT (FIRST CHAMBER)
15 DECEMBER 1966[1]

Heinrich Schreckenberg
v Commission of the EAEC

Case 59/65

Summary

1. Measures adopted by an institution — Definitive nature — Criteria

2. Procedure — Claim for compensation distinct from an application for annulment — Limits of this distinction

1. A measure adopted by an institution without conditions or reservations must be regarded as final in the absence of material factors which clearly and consistently indicate its provisional nature. Cf. para. 1, summary, Case 34/65.
2. A party may take action by means of a claim for compensation without being obliged to seek the annulment of the illegal measure which causes him damage. He may not, however, by this means attempt to obtain a result similar to that of the annulment of the measure in question, if the application for its annulment is inadmissible.

In Case 59/65

HEINRICH SCHRECKENBERG, an official of the Commission of the European Atomic Energy Community, represented and assisted by Marcel Slusny, Advocate of the Cour d'appel, Brussels, Lecturer at the University of Brussels, with an address for service in Luxembourg at the Chambers of Bernard Schmitz, 6, rue J.-B. Esch,

applicant,

v

COMMISSION OF THE EUROPEAN ATOMIC ENERGY COMMUNITY, represented by its Legal Adviser, Maurice Prelle, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Department of the European Executives,

defendant,

Application for the annulment of the Commission's refusal of 22 September 1965 to comply with the applicant's request of 8 July 1965; for classification in Grade

1 — Language of the Case: French.

A 3, Step 2, as from 1 January 1962, with additional biennial advancement of step as from that date; and, in the alternative, for the payment of damages;

THE COURT (First Chamber)

composed of: A. Trabucchi, President of Chamber, L. Delvaux and R. Lecourt (Rapporteur), Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and Procedure

Heinrich Schreckenberg was engaged by the EAEC on 25 November 1960 at a salary of 21 000 Belgian francs. He has since performed the duties of Head of the Internal Services Department. On 5 March 1963 he was integrated in Grade A 5, Step 2, with effect from 1 January 1962. On 13 October 1964, Mr Schreckenberg was promoted to Grade A 4, Step 1, with effect from 1 January 1964.

On 8 July 1965 he addressed to the President of the Commission a 'complaint concerning [his] classification submitted in accordance with Article 90 of the Staff Regulations'. He asked to be reclassified retroactively in Grade A 3. His request was chiefly based on a comparison of his position with that of Mr Maudet at the Commission of the EEC and on the precedent constituted by the judgment given by the Court in the *Maudet* Case. On 22 September 1965, the Commission rejected this complaint and confirmed the decisions which classified the applicant and integrated him in the post of Principal Administrator in Grade A 5 with effect from 1 January 1962 (decision of 5 March 1962) and promoted him to Grade A 4 with effect from 1 January 1964 (decision of 13 October 1964).

On 13 December 1965 Mr Schreckenberg brought an appeal against the decision of the Commission reïecting his request. In an application on procedural issue the Commission contended that the application was out of time and therefore inadmissible.

By order of 3 March 1966 the Court (First Chamber) reserved its decision on the procedural issue for the final judgment.

At the request of both parties, at the hearing on 21 October 1966 the remainder of the oral procedure was adjourned until 10 November to allow for the consideration of further documents placed on the file.

Mr Advocate-General Roemer delivered his reasoned oral opinion at the hearing on 24 November 1966.

II — Conclusions of the parties

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

'1. declare that the refusal of the Commission on 22 September 1965 to comply with his request and complaint submitted by letter of 8 July 1965 is void and of no effect;
2. declare and adjudge that the Commission shall be bound to classify the applicant as from 1 January 1962 in Grade A 3, Step 2, with an additional biennial advancement in step in accordance with Article 44 of the Staff Regulations;

3. *in the alternative*, declare and adjudge that the Commission shall pay the applicant by way of damages a sum corresponding to the differential allowance provided for in Article 7(2) of the Staff Regulations, which he should have received as from 1 January 1962 and which is assessed at 100 000 Belgian francs, subject always to the right of the applicant to claim an increased sum in the course of the proceedings;
4. in any event, declare and adjudge that the Commission must bear the entire costs of the proceedings.'

The *defendant* contends that the Court should:

— declare that M. Schreckenberg's application is out of time and therefore inadmissible;
— dismiss the request and order the applicant to pay the costs in accordance with Article 70 of the Rules of Procedure of the Court.'

In his reply to the application on a procedural issue, the *applicant* claims that the Court should:

'— dismiss the objection of inadmissibility raised by the defendant;

In the alternative:

— reserve its decision on the procedural issue for the final judgment;
— make an appropriate order as to costs.'

In its statement of defence the *defendant* contends that the Court should:

'— declare that the applications for annulment and damages are out of time and therefore inadmissible;
— uphold the defendant's preliminary objection on a procedural issue;
— in the alternative, declare the said applications to be unfounded and dismiss them;
— order the applicant to pay the costs to the extent provided for by Article 70 of the Rules of Procedure of the Court.'

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

'— take notice that the applicant repeats the conclusions set out in his application;

In the alternative:

1. order the Commission to produce the documents and in particular the reports on which were based the decisions taken at the 282nd and 283rd meetings (item XI of the 282nd meeting and item XV of the 283rd meeting);
2. order the Commission to produce document EUR/C/1651/63 f and the letter of 8 March 1965 from the Commission to Dieter Mosthaf;

In the further alternative:

as the applicant offers to make Mr Funck, the Director-General for Administration and Personnel, available for examination as a witness, order the following facts to be proved by witnesses:

"that Mr Funck informed the applicant that this his position could not be settled as long as the duties performed by him and by certain other officials at the Directorate of Administration had not been assessed".'

In its rejoinder, the *defendant* contends that the Court should:

'— accept the conclusions set out in its statement of defence;
— dismiss the alternative requests submitted by the applicant in his reply as both inadmissible, in the absence of the explanation required by Article 42(1) of the Rules of Procedure, and irrelevant.'

III — Submissions and arguments of the parties

A — *Admissibility*

The *defendant* emphasizes that as the applicant only submitted his complaint through official channels on 8 July 1965, 28 months after the integration decision of 5 March 1963 was taken, neither that complaint nor his appeal to the Court against the classification resulting expressly from that decision were submitted within the periods provided for in Article 91 of the Staff Regulations. The decision of the President dismissing this belated complaint merely confirmed the decision of 5 March 1963. The defendant refers to the established case-law of the Court according to which an appeal against the classification resulting from an integration decision can only be presented within three months after notification of the decision. This case-law provides an answer to any arguments based on possible new factors.

Furthermore, the partial reorganization of

certain departments and the organization of certain of these departments into divisions, as well as the promotion of certain servants on the grounds of their personal merits, could not constitute the new factors which the applicant claims that a general reorganization of the departments followed by a reclassification of the servants in question represents.

The *applicant* replies that the objection of inadmissibility put forward by the defendant did not refer to the admissibility of the second request and emphasizes that it was impossible to come to a decision on this second request without having considered the substance of the first. By way of a subsidiary point, the applicant sets out the grounds on which his first request is admissible. The case-law applicable in this instance is not, says the applicant, that which refuses to regard an earlier judgment given by the Court between other parties as a new factor but, on the contrary, that which takes into account an important new factor influencing the administrative position of the parties concerned, such as in the cases of *Müller* (Joined Cases 109/63 and 13/64, Rec. 1964, p. 1316) and *Jullien* (Case 10/64, Rec. 1965, p. 1).

The measures taken on 8 April 1965 concerning certain officials were not merely promotions but reclassifications (and were, moreover, irregular in that they were not retroactive). Everything goes to show that the measures in question concerned a new organization of all the departments (the lack of preliminary publication of these measures, the minutes of the 282nd and 283rd meetings of the Commission, the memorandum of 4 April 1963 from Mr Funck to the Commission, the inclusion in the 1963 budget of certain posts filled in 1965, the statements made by Mr Funck and the manner in which Euratom set out its departments in the 'Guide de la Communauté').

The *defendant* replies that the Court was entitled to declare the first request inadmissible regardless of the fate of the second. It would, however, be ridiculous if by means of an alternative application one could obtain the result sought by the main application when the latter had been dismissed by the Court.

As regards the argument based on the appearance of a new factor, the definition of basic posts (in the cases of *Müller* and *Jullien*) could not be compared with the decision to promote thirteen servants (out of 2 500) to Grade A 3. Furthermore, the factors referred to, in particular the statements made by Mr Funck, are either difficult to accept or do not apply to this case.

As regards the distinction between the two requests the *applicant* refers to Belgian case-law and as regards the new factor emphasizes that in his view so far the Court has only given it a negative definition in the judgments in which it refused to regard the earlier judgment in the *Collotti* Case to be such a new factor. Without defining it, the Court had applied a more positive concept in the judgments in *Jullien* and *Müller*. The applicant suggests the following definition:

'1. a fact or provision which concerns a number of people and not a purely individual decision;
2. a fact or decision which is capable of affecting the administrative position of the applicant.'

This criterion enables the conclusion to be drawn that in the light of the content of the file, 'we are dealing with an important new factor'.

In particular, as Article 4 of the Staff Regulations provides that no promotion shall be made for any purpose other than that of filling a vacant post, and that such vacant posts shall be notified to the staff, the fact that the Commission issued no such notification was evidence that no vacant post existed and therefore no promotion was possible; the measures in question therefore concerned a re-assessment of the posts and the corresponding classifications. Thus, for a colleague of the applicant 'to have been promoted to Grade A 3 the administrative unit directed by him must first have been organized as a division; it is precisely this organization in the form of divisions of a number of administrative units which were previously all known as departments which constitutes the important new factor.'

The *defendant* asserts that in the light of the differences between the situations in question, the Belgian case-law referred to

cannot be regarded as establishing precedents in the field of Community law.
It is not enough for the proposed definition of the new factor merely to refer to 'a number of people'. It should rather refer only to a measure of general application marking a new stage in 'staff policy'. Furthermore, the series of individual measures taken in 1965 merely repeated similar measures taken in 1963 and 1964. It is impossible to see why the new factor was only constituted by the measures taken in 1965. Finally, there was no failure to bring the vacant posts in question to the prior knowledge of the staff, but merely a delay of some hours in the translation and duplication of documents. This factor could have been relevant to a direct application for annulment but in the present instance it is sufficient to note that the fact that the vacancy notice was published 'tempore non suspecto' was evidence that the administration was not pursuing the aim alleged by the applicant, which could have been achieved without any publication.

B — *Substance*

(a) On the application for annulment

The *applicant* states that he was maintained in a pre-existing post which, having regard to the duties performed, must correspond under the new Staff Regulations to a higher grade than that obtained under the integration procedure. As Mr Schreckenberg directs an administrative unit in the capacity of Head of Division, his position must be regularized in accordance with the definition of basic posts. This is shown by the internal detailed lists of posts of the Directorate for Administration and by the structure of the Directorate-General for Administration and Personnel.
The applicant's statement on this point in the schedule to his complaint of 8 July has not been denied, either as regards the definition of his duties or the comparison between these duties and those of Mr Maudet, the applicant's counterpart in the EEC Commission.
The *defendant* replies that, to the extent that it refers to the post of Head of Division, the definition of basic posts cannot be applied to the applicant's post, since the use of the term 'administrative unit' does not automatically involve classification in Grade A 3. This finding is the more justified in this instance as the applicant is working under the authority of an appointed Head of Division. The detailed list of posts referred to has no value as an official document and as the Guide des Communautés Européennes is simply an information directory it has no probative value. Finally, Mr Maudet was recruited in 1958 to perform duties at a level corresponding in the new Staff Regulations to those of the post of Head of Division, while Mr Schreckenberg was engaged in 1960 to perform duties at a lower level, as a result of which the case-law in Joined Cases 20 and 21/63 *(Maudet* v *Commission of the EEC)* could not be applied by analogy in this instance. Moreover, the responsibilities assumed by Mr Maudet in the departments of the EEC were often performed by Mr Schreckenberg's immediate superior in the departments of Euratom. Furthermore, the comparative table of the respective duties of these two servants, which appears as a schedule to the application, is not entirely accurate.
The *applicant* recalls that the report on his abilities, drawn up in 1962 with a view to his integration, several times described the administrative unit directed by him as a 'Division' and that his arguments concerning the analogy between his own case and that of Mr Maudet was not denied during the administrative stage which followed his complaint through official channels. The classification of the applicant's immediate superior in Grade A 3 was the result of an unusual situation, since Mr Snoeren, who was answerable to the same superior, was himself classified in Grade A 3. The detailed list of posts applying internally to the Directorate for Administration had been drawn up 'tempore non suspecto', for the sole purpose of indicating the distribution of tasks within that Directorate. Moreover, in a letter addressed to a colleague of the applicant the Commission acknowledged that the classification of a post 'is determined by the duties and powers attaching thereto and not by the grade of the immediate superior in question'. Finally, a comparison between the duties of

the applicant and those of Mr Snoeren shows that the administrative unit directed by the former is at least as important as that directed by the latter. As regards his own duties and those of Mr Maudet, the applicant maintains that all the duties assigned to him for which he only holds Grade A 4 in spite of being assisted by an official in Grade A 5, correspond to those of three officials in Grade A 3 of the EEC Commission (and to those of two officials in Grade A 3 and one in Grade A 4 of the High Authority). The applicant puts forward various factors in order to demonstrate the scope of his duties and powers.

As regards the report on the applicant's abilities drawn up before the Staff Regulations were applied to the applicant, the *defendant* replies that the terms employed therein are not sufficient to challenge the classification of the applicant, as the only determining factor was the decision taken by the appointing authority. In addition, the refusal to accept the complaint submitted on 8 July 1965 was a necessary result of the fact that it had been rejected, which implies the rejection of the reasons and submissions put forward in its support. The fact that the superior of both Mr Schreckenberg and Mr Snoeren, was in the same grade as Mr Snoeren himself in no way effects the applicant's case. The Commission had awarded the grade in question to these three officials in the exercise of its power to organize the departments and after consideration of the level of their respective duties, as is shown by a letter from the Commission to a colleague of the applicant on which he is attempting to base his argument. In classifying an official the administration could only act on the basis of the level of the duties performed and not on quantitative factors such as the numbers of his subordinates. The defendant dismisses comparisons with the departments of the EEC and puts forward specific factors to show that the scope of the applicant's duties and powers cannot be compared with those of certain officials established in Grade A 3.

(b) The alternative claim for damages

The *applicant* claims in the alternative that the discriminatory action which he suffered should be regarded as a wrongful act which must be made good by the payment of damages calculated on the basis of the differential allowance provided for by Article 7 (2) of the Staff Regulations.

The *defendant* claims to have shown that no wrongful act exists which can be imputed to the Commission and considers therefore that the claim for damages is unfounded.

Grounds of judgment

Mr Schreckenberg was engaged by the Commission of the EAEC on 25 November 1960 to perform the duties of Head of the Internal Services Department. On 5 March 1963 he was integrated as a Principal Administrator in Grade A 5 and on 13 October 1964 promoted to Grade A 4. He has brought an appeal against the decision of the Commission of 22 September 1965 rejecting his request for reclassification in Grade A 3.

The applicant maintains that he is entitled to reclassification in accordance with the principle of the correspondence between duties and grades under Article 102 and Annex I to the Staff Regulations of Officials and requests that he be recognized as Head of Division. In the alternative, he claims damages corresponding to the differential allowance provided for in Article 7 (2) of these Regulations.

The Commission maintains that this appeal is inadmissible on the ground that

after being classified in Grade A 5 by the integration decision of 5 March 1963 Mr Schreckenberg did not appeal against this decision within the period provided for in Article 91 of the Staff Regulations and only submitted his complaint through official channels on 8 July 1965.

The principal claim for classification in Grade A 3

It is common ground that no appeal was made within the period provided for in Article 91 of the Staff Regulations against the decision of 5 March 1963 classifying the applicant in Grade A 5 and notified to him on the same day.

The applicant maintains, however, that at the time of his integration it was well known that the Commission was to carry out a subsequent reclassification of its officials after organizing its departments into directorates and divisions. Not only was the unit entrusted to the applicant designated a 'division' in a report from his superiors, but on 4 April 1963 Mr Funck, the Director-General for Administration and Personnel, informed the Commission that appointments or promotions to Grade A 3 were being postponed to allow the posts at this level to be considered later on the basis of the structure of each directorate. When the Commission on 31 March and 8 April 1965 made certain promotions to Grade A 3 without having published the vacant posts beforehand it in fact reclassified the servants concerned after organizing the administrative units into divisions. Since the Commission had thus organized its departments, as is also shown by the manner in which they are set out in the Guide des Communautés Européennes for 1965, the decision of 8 April 1965 constituted an important new factor capable of causing the period for bringing appeals to start to run afresh.

As, however, the classification decision of 5 March 1963 was made without conditions or reservations it must be regarded as final in the absence of material factors which clearly and consistently indicate its provisional nature. The communication from the Director-General for Administration and Personnel to the Commission cannot alone constitute evidence that the Commission has accepted his recommendations since the Commission is in no way bound by proposals made by its departments and the silence of the minutes on the point cannot be interpreted as acquiescence. Evidence by witnesses taken by the Court in Case 34/65 and produced with the consent of the parties at the hearing in the present case does not show the classification decision of 5 March 1963 to have been provisional. It does not appear that when this classification was made the Commission had doubts on its assessment of the duties corresponding to the post in question. Moreover, no importance can be attached to the fact that in a report drawn up by the applicant's superiors on 13 June 1962, that is, before the classification decision of 5 March 1963 was made, the applicant's department was described as a 'division'. The factors relied on are, therefore, not sufficient to deprive this decision of its definitive character, in particular as the minutes of the

196th meeting of the Commission of 22 January 1963 refer to a 'general consideration of the classification of the posts held by servants to whom the Staff Regulations apply'.

Furthermore, the appointment of various servants to Grade A 3 on 8 April 1965 cannot be regarded as a factor capable of causing time to start to run afresh for the purposes of an appeal against the classification decision of 5 March 1963. In particular the applicant is wrong to base his objection on the appointment to Grade A 3 of one of the Heads of Department of his own Directorate who had previously held the same grade, and on the implied conversion of the corresponding administrative unit into a division. Mr Schreckenberg has not contested this appointment and has not sought to have it annulled. His appeal is solely directed to obtaining from the Court a decision that he must be classified in Grade A 3 as from 1 January 1962, that is to say, with three years' retroactive effect. The subject matter of the dispute is thus the classification decision of 5 March 1963 itself. The appointments made in 1965, which are not retroactive, in no way affect the applicant's classification. Neither the various promotions made since 1963 nor the possible omission of the formalities concerning the preliminary notification of vacant posts can have a retroactive effect on the decision classifying the applicant and the period for appealing against it cannot be made to start to run afresh. The manner in which the departments of the Commission were set out in a 'Guide des Communautés' does not justify the interpretation suggested by the applicant.

The appeal must therefore be declared inadmissible.

The alternative claim for damages

The applicant puts forward an alternative claim for damages, presented in the grounds of the appeal as reparation for a wrongful act or omission on the part of the Commission in that it failed to designate Mr Schreckenber's department as a division, and in the conclusions of the appeal as 'a sum corresponding to the differential allowance provided for in Article 7 (2) of the Staff Regulations of Officials, which should have been paid as from 1 January 1962'.

Although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not by this means circumvent the inadmissibility of an application which concerns the same illegality and has the same financial end in view.

In fact, in the alternative head of his appeal, the applicant is not claiming that damages be assessed in the light of the actual damage which he claims to have suffered by reason of the duties which he performed, but is seeking the award of a sum equal to the difference between the salary paid and that which he would have received from 1 January 1962 in Grade A 3 to which he claims to be entitled.

The principal application concerning the classification fixed by the decision of 5 March 1963 has been held to be inadmissible, since the particulars alleged to be important new factors have been found incapable of calling this decision in question, with the result that they cannot be regarded as constituting a wrongful act. This decision is final. Lastly, by basing his claim on Article 7 (2) of the Staff Regulations the applicant draws attention to the real object of his claim which is not so much to make good damage suffered as to extend the benefit of this provision concerning payment of a salary for a temporary posting, which the applicant was precluded from claiming since he was out of time.

For all these reasons, the alternative claim must be declared inadmissible.

Costs

The applicant has failed in his appeal. Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. However, under the terms of Article 70 of the Rules of Procedure, in proceedings by servants of the Communities institutions shall bear their own costs. Moreover, under the first subparagraph of Article 69 (3), where the circumstances are exceptional the Court may order that the parties pay their own costs in whole or in part. The circumstances of the case may have misled the applicant as to the final nature of the decision of 5 March 1963. For this reason it is appropriate to order the defendant to pay half the costs incurred by the applicant.

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 Atomic Energy Community;
Having regard to Article 152 of the Treaty establishing the European Atomic Energy Community;
Having regard to the Staff Regulations of Officials of the European Atomic Energy Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT (First Chamber)

hereby:

1. **Dismisses Application 59/65 as inadmissible;**

2. Orders the defendant to bear its own costs and one half of the costs incurred by the applicant.

Trabucchi Delvaux Lecourt

Delivered in open court in Luxembourg on 15 December 1966.

A. Van Houtte
Registrar

A. Trabucchi
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 24 NOVEMBER 1966[1]

Mr President,
Members of the Court,

The applicant in the case in which I am today delivering my opinion entered the service of the Commission of Euratom on 25 November 1960. His initial salary amounted to 21 000 Belgian francs, a sum which, according to the Commission, corresponded to a classification in Grade A 5 of the Staff Regulations of Officials of the European Coal and Steel Community. From the outset of his service the applicant was assigned to the Directorate-General for Administration where he performed the duties of Head of the Internal Services Department, a position which he still holds. The present action concerns the assessment of these duties according to the Staff Regulations of Officials and the definition of posts drawn up by the Commission.

I shall only make a few observations on the history of this action.

After the entry into force of the Staff Regulations a decision of the Commission of 5 March 1963 established the applicant as from 1 January 1962 in the post of Principal Administrator in Grade A 5, Step 2. On 8 July 1964 the applicant requested that in the light of the importance of his duties the President of the Commission should award him the differential allowance provided for in Article 7(2) of the Staff Regulations. This request was not complied with. However, by a decision of 13 October 1964 the Commission promoted the applicant to Grade A 4, Step 1, as from 1 January 1964. After learning from information posted in the institution on 3 May 1965 that by decision of 8 April 1965 several officials (including two from the Directorate-General for Administration and one of his colleagues) had been promoted to Grade A 3, the applicant submitted to the Commission on 8 July 1965 a complaint through official channels pursuant to Article 90 of the Staff Regulations.

In this complaint the applicant requested that, having regard to the importance of his duties, he be classified in Grade A 3 with effect from 1 January 1962. This complaint, too, failed. It was dismissed by a decision of the President of the Commission of which the applicant was informed on 22 September 1965 by a letter from the Director-General for Administration in which he expressly emphasized that the assessment of the duties made in the decision of 5 March 1963 establishing the applicant remained unchanged. This led the applicant to institute legal proceedings. His appeal was filed on 13 December 1965 and in it he claims that you should:

— annul the decision of 22 September 1965 rejecting his complaint;
— declare that the Commission shall be bound to classify him in Grade A 3, Step 2, with effect from 1 January 1962 with advancement to those steps to which he is entitled as at 1 January 1964

1 — Translated from the German.