JUDGMENT OF THE COURT (SECOND CHAMBER)
16 DECEMBER 1970[1]

Maurice Prelle
v Commission of the European Communities

Case 5/70

Summary

1. *Officials — System of temporary posting — Application — Conditions (Staff Regulations of Officials of the EC, Article 7)*

2. *Commission — Internal organization of departments*

1. The system of temporary posting may only be applied to an official who temporarily occupies a post of a grade higher than his own and thereby carries out duties which are substantially different from those involved in his own post.
2. It is for the Commission to determine the internal organization of its departments.

In Case 5/70

MAURICE PRELLE, an official of the Commission of the European Communities, residing in Brussels, represented by Ernest Arendt, Advocate of the Cour Supérieure de Justice of the Grand Duchy of Luxembourg, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34/B/IV Centre Louvigny, rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Emile Reuter, 4, boulevard Royal,

defendant,

1 — Language of the Case: French.

Application for annulment of the decision whereby the Commission refused to grant to the applicant, as from 24 July 1969, the differential allowance set out in Article 7 (2) of the Staff Regulations of Officials, and for the award of damages,

THE COURT (Second Chamber)

composed of: A. Trabucchi, President of Chamber, P. Pescatore (Rapporteur) and H. Kutcher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

When the departments of the Commission were recognized, following the merger of the executives in 1967, Mr Maurice Prelle, a Principal Administrator in Grade A4 in the Commission, was employed, within the Legal Department, in a branch which covered in particular matters relating to the application of the EAEC Treaty and to technological research and the research agreements of the ECSC.
When the work was divided up between the four members of the branch, Mr Prelle was given responsibility, jointly with a colleague, for matters concerning nuclear research, the circulation of the knowledge acquired, of the patents and of the research agreements of the ECSC.
After being promoted to Grade A3, Mr Prelle's colleague obtained leave on personal grounds, starting on 25 April 1969.
Mr Prelle believed himself to be deputizing for his colleague, having taken over all his duties, and in a memorandum of 3 October 1969 requested from the Commission the differential allowance provided for in Article 7 (2) of the Staff Regulations.
As he had been given no express decision on this, on 6 January 1970 he submitted a complaint through official channels.
On 26 January 1970 he made an application against the implied decision rejecting his complaint through official channels.
In the course of these proceedings the Commission expressly rejected Mr Prelle's request in a reasoned decision of 18 February 1970, which he received on 24 February.

II — Procedure

The application directed against the Commission's implied decision of rejection was lodged at the Court Registry on 26 January 1970.
Apart from the issue of an express decision by the Commission, the written procedure followed the normal course.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.
The parties presented oral argument at the hearing on 12 November 1970.
The Advocate-General delivered his opinion at the hearing on 19 November 1970.

III — Conclusions of the parties

The *applicant* claims that the Court should:

(a) rule that the Commission is obliged to pay to him the differential allowance provided for in Article 7 (2) of the Staff Regulations for the period from 24 July 1969 to 24 April 1970;

(b) order it to do so, if necessary;

(c) alternatively, rule that the Commission is liable for a wrongful act or omission on its part giving rise to damage equal to the amount of the allowance set out in the Regulations or to any other amount which the Court may determine *ex aequo et bono* for failing to take an express decision appointing him to a temporary posting and thus to regularize the existing situation whereby irrespective of his wishes the applicant daily had to carry out the duties of his colleague;

(d) order the Commission to pay this, if necessary;

(e) order the Commission in either case to pay the costs of the proceedings.

The *defendant* contends that the Court should:

(a) dismiss the application as unfounded in respect of both the principal and the alternative claim;

(b) order the applicant to pay the costs.

IV — Submissions and arguments of the parties

The *applicant's* arguments may be summarized as follows:

(a) In the absence of his colleague in Grade A3 he is carrying out his duties and therefore temporarily occupies his post. The Commission was under an obligation to make the necessary arrangements under the Staff Regulations and to effect financial adjustments in accordance with Article 7 (2) of those Regulations.

(b) The Staff Regulations lay down certain fundamental rules which are applicable to all officials, irrespective of their posting:

— the appointing authority is under an obligation to place each official in a post corresponding to his grade; this means, on the one hand, that there must necessarily be a post corresponding to each official and, on the other hand, that the duties are in accordance with the level of each grade without there being any possible confusion between the levels of two different grades belonging to different career brackets;

— the appointing authority is obliged to give a description of the posts; even if there is no express measure there are some posts which are at least 'predetermined' by internal departmental measures;

— all officials are subject to the same legal system and any discrimination is prohibited.

(c) Article 7 (2) is a derogation from the rule whereby in principle an official cannot be given duties of a level other than that of his grade as each official holds a post and is placed in a post in his grade; it therefore follows that the duties of an office-holder who is absent may only be carried out, at least for a period of some length, by an official of the same grade. If this were not the case, the whole system of seniority in the

levels of duties on which the Staff Regulations are based would be prejudiced. Temporary posting is limited in time and subject to financial compensation as it is an exception to the rules protecting this system of seniority. The appointing authority cannot, therefore, without committing an unlawful act or omission, give to an official of a lower rank duties attaching to a higher position while not giving him financial compensation or observing the maximum period of one year; the interpretation whereby the appointing authority is able to escape its obligations merely by refraining from making an express decision in accordance with Article 7 (2) of the Staff Regulations is also quite unacceptable.

(d) Moreover, it is by no means certain that the differential allowance is dependent on the existence of an express decision by the appointing authority. Article 7 (2) of the Staff Regulations merely provides that the official 'may be called upon'—that is to say, therefore, also by circumstances or as the need arises—to occupy temporarily a higher post, not that he must be 'designated' or 'appointed'. The event giving rise to the allowance is the actual performance of certain duties by an official of a lower grade, except of course in the hypothetical case of 'usurpation'. Formal regularization of the situation by an express decision of a temporary posting is no doubt desirable; however the substance of the right to the differential allowance lies solely in the actual and *bona fide* performance of duties by a person of a lower grade.
The intention to create a temporary posting is to be deduced by implication, but necessarily, from the decision to allow the holder of the higher post leave on personal grounds, and not to replace him in his post or to abolish it.

(e) The view of the Commission that the members of its legal department do not hold any defined post is completely contrary to the general terms of the Staff Regulations. The difference in treatment to which these officials are thus subject is a sign of arbitrariness which is incompatible both with the Staff Regulations and with good staff administration.
It is incorrect, moreover, that the system of seniority of grades within the legal department is not observed.

(f) The argument relating to an 'administrative practice' is still less relevant to its legality.

(g) There can be no doubt as to the wrongful act or omission on the part of the Commission with regard to the general principles of the Staff Regulations. The irregularity of the position in which the applicant was placed against his clearly expressed wishes is made more serious by the rule of equality amongst officials. The damage suffered by the applicant is partly non-material and partly the denial of a financial benefit to which he is entitled.
The *defendant*, for its part, makes the following points in particular:

(a) In regard to the facts, it is relevant to note that if, after the departure of his colleague on leave, the applicant did in fact take over the former's duties, this assumption of additional duties led, of necessity, to some redistribution of work in the branch in question.

(b) From a legal point of view it is clear from the wording of Article 7 (2) of the Staff Regulations and from their spirit that a right to payment can only arise where the official has been called upon to occupy a post temporarily by a decision of the appointing authority in the circumstances set out in Article 7 (2) of the Staff Regulations. This is clearly not the case here.
A decision to have a post occupied temporarily has not insignificant consequences, in particular on departmental organization, and cannot be taken away from the supreme authority in the hierarchy. To link the granting of the allowance for a temporary posting to the mere 'actual performance of the duties which had been relinquished' would be to impose the wishes of the officials on the authority or to leave matters to chance.

(c) Even supposing that an implied decision might be considered sufficient, it must be noted that in this case, there cannot be in-

ferred from the behaviour of the Commission the intention, with a wide range of administrative measures open to it, to have the post in question occupied on a temporary basis, and even less to give the applicant the temporary posting.

(d) The applicant cannot rely on any right to be called upon to occupy temporarily the post in question and therefore can have no right to the temporary differential allowance.
Article 7 (2) of the Staff Regulations leaves to the discretion of the appointing authority the decision whether an official is to be appointed to a higher post on a temporary basis.
Doubtless the appointing authority is not entirely free in the exercise of this discretion; however in this case it can in no way be held at fault: the applicant is not able to claim that there is a usual practice, which in his case has not been followed; the factual situation is not such as to meet the requirements of Article 7 (2) of the Staff Regulations which the authority has refused to rectify by means of a decision.

(e) Further, the applicant cannot claim to be confirmed in a higher post on a temporary basis as such higher post does not in fact exist here.
The structure of the legal department differs from that of the other departments of the Commission in that it is not subdivided by seniority in clearly defined directorates, departments and administrative units. Assignment of duties within the legal department is variable and adaptable at all times to the needs arising, as regards both advisory work and litigation, irrespective of the grade of the official. The description of posts in the legal department does not refer to duties defined *ratione materiae* but is based on other criteria: the nature of the work and the degree of responsibility of lawyers with a general background. Nowhere do the Staff Regulations provide that all posts should be so defined and determined that they should be clearly distinguishable from one another by the description of their duties alone; in any case such a requirement would be incompatible with the needs of a live administration and, in respect of the legal department in particular, would result in total atrophy and prevent it from accomplishing its duties the nature of which is continually changing.
In particular the difference between a lawyer in Grade A3 and one in Grade A4 cannot be established by a comparison of the different work done by those officials; as is confirmed by the wording of the vacancy notices for each post, the difference lies in the greater measure of responsibility which a Grade 3 adviser must in general be able to assume, as well as the requirement of a longer professional experience, in comparison with a principal administrator of the A5–A4 career bracket.

(f) The decision taken in respect of the applicant is merely part of a standard administrative practice and is in no way discriminatory.

(g) As to the applicant's alternative request, the Commission observes that as there is no obligation to give the applicant the temporary posting to what he considers to be a post there can be no question of its 'regularizing an existing situation'; there is in this case, therefore, no wrongful act or omission and in consequence nothing giving rise to a right to compensation.

Grounds of judgment

1 The applicant seeks the annulment of the decision whereby the Commission refused to grant him as from 24 July 1969 the differential allowance provided for cases of temporary posting by Article 7 (2) of the Staff Regulations; in addition he seeks

damages for the liability incurred by the Commission for its failure to regularize by express decision the existing situation whereby, irrespective of his own wishes, the applicant was led to assume daily the duties of a colleague who had obtained leave on personal grounds.

The application for annulment

2 By the terms of Article 7 (2) of the Staff Regulations 'An official may be called upon to occupy temporarily a post in a career bracket ... which is higher than his substantive career bracket'.

3 It is not denied that the applicant, a principal administrator in Grade A4, in the legal department of the Commission, assumed at the least a substantial part of the duties of a colleague in Grade A3 who had obtained leave on personal grounds.

4 Having been called upon to occupy temporarily a post in a higher career bracket within his category, the applicant believes he is entitled to payment of the differential allowance as set out in the abovementioned provision.

5 In addition to the other conditions for its application, the first sentence of Article 7 (2) makes the payment of the differential allowance conditional on the occupation of a post in a career bracket higher than that of the official who is called upon to occupy it.

6 This provision is intended to ensure that an official who is called upon temporarily to assume duties which entail responsibilities greater than those which he normally bears receives payment corresponding to those greater responsibilities.

7 To grant the same allowance to an official who temporarily occupies a post in a career bracket higher than his own, but who nevertheless does not carry out duties which are substantially different from those involved in his own post, would go beyond the scope of this provision.

8 It is clear from the submissions where the parties are in agreement that, taking into account the organization of the legal department of the Commission and the assignment of duties within that service, there is no substantial difference between the post normally occupied by the applicant and the post temporarily occupied by him.

9 The applicant may not therefore claim the differential allowance provided for by Article 7 (2) of the Staff Regulations.

The claim for damages

10 Alternatively, the applicant maintains that in the organization of the legal department the Commission has not given a sufficiently precise description of the posts and has not placed each official in a specific post corresponding to his grade.

11 He claims that in consequence of this lack of organization an official called upon to occupy temporarily, within that department, a post in a career bracket higher than his own is unable to claim the differential allowance to which he would normally be entitled.

12 The applicant believes that by virtue of this omission the Commission is liable to him for compensation.

13 It is for the Commission to determine the internal organization of its departments.

14 In view of the lack of any noticeable differences between the applicant's post and the post temporarily occupied by him, by virtue of the way in which the legal department was organized, the Commission was not required to give the applicant a new posting as a result of his temporary occupation of the post in question.

15 For these reasons the alternative request must also be rejected.

Costs

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

17 The applicant has failed in his submissions.

18 However, by virtue of Article 70 of the Rules of Procedure institutions shall bear their own costs in actions by servants of the Communities.

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 Staff Regulations of Officials, especially Article 7;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application both as regards the principal and the alternative claim.**

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

Trabucchi Pescatore Kutscher

Delivered in open court in Luxembourg on 16 December 1970

A. Van Houtte — A. Trabucchi

Registrar — President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 19 NOVEMBER 1970[1]

Mr President,
Members of the Court,

In spite of nearly 25 years' experience in litigation in public office there is always a certain sadness for me when I give an opinion in a case between a senior official and the administration which he serves.
This is all the more so where the official is one of the legal advisers of that administration.
Indeed the very existence of such cases shows that something is wrong or has gone wrong in the relations between the administration and its principal servants, where relations should be ones of mutual confidence.
Mr Prelle is an official in Grade A4 who

1 — Translated from the French.