JUDGMENT OF THE COURT (SECOND CHAMBER)
12 JULY 1973 [1]

Leandro Tontodonati
v Commission of the European Communities

Case 28/72

Summary

Officials — Tasks — Level higher than grade — Reclassification — Acceptance — Right — Absence
(Staff Regulations, Art. 5)

Fulfilment by an official of tasks on a level higher than his grade can be a factor to be borne in mind in connection with promotion but does not give him the right to be reclassified.

In Case 28/72

LEANDRO TONTODONATI, an official of the Euratom Joint Research Centre at Ispra, resident at 18 Via Bligny, Varese, represented by Giuseppe Pellicini, of the Varese Bar, and by Victor Biehl, of the Luxembourg Bar, having chosen his address for service in Luxembourg in the chambers of Me Biel at 71, rue des Glacis,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser Giorgio Pincherle, acting as agent having chosen its address for service c/o its legal adviser, Emile Reuter, 4 boulevard Royal,

defendant,

Application for annulment of the defendant's implied rejection of the applicant's claim to be re-graded in Category B,

1 — Language of the Case: Italian.

THE COURT (Second Chamber)

composed of: P. Pescatore (President), M. Sørensen and A. J. Mackenzie Stuart (Rapporteur), Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Statement of facts

The facts on which this dispute is based can be summarized as follows:

On 20 February 1963 Mr Leandro Tontodonati was, with effect from 1 January 1962, appointed Principal Clerical Officer of the EAEC at the Joint Research Centre at Ispra in grade C 1, incremental step 1.

In its judgment of 15 December 1971, in Case 17/71, the Court of Justice rejected as inadmissible as being out of time an application submitted by Mr Tontodonati against the Commission on 13 April 1971 for failure to change his designation and re-grade him retrospectively in Category B.

In a claim based on Article 90 of the Staff Regulations, dated 31 January 1972, Mr Tontodonati asked the President of the Commission to place him in Category B with effect from February 1971. In support of this claim, the applicant stated that, since January 1971, he had been responsible for the inventory section at the Ispra research centre and that therefore the principle of equal treatment, the importance of the establishment at Ispra, the regulations of the Joint Research Centre, as well as his qualifications and record justified his classification in grade B.

As there was no reply to the claim, Mr Tontodonati brought an application against the Commission of the European Communities on 18 May 1972.

The Inventory Section at Ispra forms part of the Centre's Supply and Finance Division. Although there was no post of 'Head of Inventory Section', the Section operated under a grade B 1 official, Mr Rousseau, who was assisted by Mr Scaramucci, an official in grade B 4, and the applicant. Between June 1969 and October 1971, Mr Scaramucci was ill and shortly after his return to work, he was transferred from the Supply and Finance Division to the Personnel and Administration Division.

The duties previously carried out by Mr Rousseau and Mr Scaramucci have for the most part been taken over by the applicant.

II — Submissions of the parties

The *applicant* submits that the Court should grant him a classification in

Category B, effective from February 1971;

The *defendant* submits that the Court should declare the application inadmissible or unfounded and should order the applicant to pay the costs of the application.

III — Pleas and arguments of the parties

The pleas and arguments advanced by the parties can be summarized as follows:

A — On admissibility

The *applicant* contends that the fact that he has carried responsibility for the inventory section at the Ispra establishment since February 1971 constitutes a new development which is of a nature sufficient to justify his claim for re-classification from that date.

The *defendant* contends in reply that the development alleged by the applicant to be new amounts to nothing more than, as a result of illness on the part of the head of the inventory section at the Ispra establishment, the temporary discharge (from February to May 1971) of functions normally carried out by the latter. It is a case of a temporary extension of functions set out in the job-description as 'main duties allocated and discharged'.

The defendant denies that the applicant was in charge of inventory at Ispra. In this connection, the defendant points out that instructions relating to the maintenance of the inventory were communicated to various members of staff, including the applicant, to ensure that he was aware of decisions affecting the sector in which he carried out his duties.

Keeping the inventory up to date fell within the responsibilities of another official who, because of absence due to illness, was temporarily replaced by the applicant from October 1970 until September 1971. The defendant maintains that developments purporting to be new must consist of precise expressions of the management's intentions.

In the light of these considerations the defendant denies the existence of any new development in February 1971, and submits that, because of this the application is inadmissible as the management's silence merely confirmed the decision taken in 1963.

In reply, the *applicant* states that the former head of the Inventory Section at the Ispra establishment has not returned to work in the section because he now works in the Personnel and Administration Division. The same applies to the other official who was responsible for keeping the inventory up to date. Consequently the applicant is at the moment substantive head of the inventory section.

In reply, the *defendant* concedes that the head of the section was transferred on 1 August 1971 and that there was consequently a partial extension of the applicant's duties.

B — Merits

The applicant contends that the requirements of equal treatment should mean his classification in Category B from 1 February 1971, as officials responsible for the inventory in other departments have all been placed in Category B in accordance with a specific regulation of the Joint Research Centre. The classification of the applicant in this category is all the more necessary in view of the importance of the establishment at Ispra when compared with the others. Besides, the report on the applicant's work show that his duties are appropriate to his training and abilities. The Commission itself regards him as head of inventory at Ispra.

The *defendant* comments that when the exigencies of the service require an official temporarily to assume the functions of a colleague this in no way entails an obligation on the employer's

part to place him in the same grade as the latter. Promotion to a higher category is governed by Article 45 (2) of the Staff Regulations, and no exceptions can be allowed. Replacement by the applicant *de facto* of a colleague in a higher grade does not entitle the administration to classify him in a higher grade.

The defendant relies on the judgment of the Court in case 77/70 according to which the fact that an official carries out duties appropriate to a higher-graded post is insufficient to justify regrading. Replacement must not be confused with re-assessment of the value of an existing job as a result of which its responsibilities are given a different and enhanced rating. In this connection the defendant cites the judgments of the Court in Cases 70/63 and 26/67.

As regards parity of treatment with officials employed in other departments of the Joint Research Centre the defendant points out that if, at Karlsuhe, an official in Category B 4 discharges responsibilities corresponding to those of the applicant, he has, in addition, the duty to make analytical returns on the stores and to deal with purchases. In other departments, the applicant's functions are carried out by employees in Category C. Moreover, the defendant denies that there are any relevant provisions in Regulations.

The *applicant* states in return that he is now occupying a post whose previous occupant was Mr Rousseau, an official in grade B, but who is no longer in the inventory section.

The *defendant's* reply to this is that it was only after the statement of defence had been lodged that it was informed of the transfer and appointment of Mr Rousseau to a job in the Personnel and Administration Division on 1 August 1971, which was shortly after his return to work after a long illness. The defendant maintains that this transfer has no effect on the applicant's classification.

According to the applicant's report in the Commission's files, his duties consisted in indexing material ordered by the establishment at Ispra for inventory purposes, in deciding whether it was capable of being inventoried, and in checking that it was what had been ordered. When he acted for Mr. Rousseau, the applicant was also responsible for following the procedures laid down for bringing the inventory up to date and for distribution of supplies, he was responsible for coordination of his inventory with the general inventory and for mechanical duplication of stock records. The applicant works within the framwork of the Finance and Supply Division under the supervision and direct instructions of the Head of Division, M. Metger.

The level of classification is fully justified; in this connection, it is sufficient to compare his functions with those in the table showing basic posts. From this it is clear that the applicant has not been given duties on a level of reponsibility higher than that of his grade.

The functions laid down for a 'Principal Clerical Officer' and the different functions which have been quoted as examples of work at this level correspond exactly with the functions carried out by the applicant, who on the basis of these comparisons could be described as a 'stores manager' (to keep within the titles used in the table) or as a 'Principle Filing Clerk'. It is relevant to bear in mind that duties similar to those carried out by the applicant (stores accounts clerk, accounts clerk, machine operator etc) are rated at grade C 2/3, and therefore clearly within the compass of the higher grade.

However, even if the extension of the applicant's functions was in fact maintained without alteration after Mr Rousseau had been transferred, it was not of such a nature as to raise the functions discharged by Mr Tontodonati out of the group normally allocated to category C 1 officials in the table of basic posts.

At the public hearing, the defendant added that, in assessing the value of a post, particular account is taken of the number of people working under the official concerned. As the applicant had no one working under him, no re-evaluation of his job was called for.

The applicant adds the following argument: Though the Staff Regulations do not provide for job re-evaluation and he himself cannot be promoted without competition, the Regulations provide the possibility of holding a competition. In its judgment, the Court can lay down the steps to be taken to resolve the dispute, particularly those which would make up for the management's failure to act. In support of this view, the applicant quotes the decisions of the Court in the following cases:

— Lassalle v Parliament (15/63) Recueil 1964, p. 57,

— Bourgaux v Parliament (1/56) Recueil 1955-56, p. 421,

— Krawczynski v Commission (83/63) Recueil 1956, p. 773.

C — Discovery

The applicant formally requests the Court to order the documents which establish Mr Rousseau's position in the administration to be placed on the file and to require the Commission to produce them.

The applicant also requests the Court to give instructions for inclusion in the file of documents relating to the grade of officials appointed to the Inventory Sections and to require their production by the departments concerned.

The defendant points out that it has never disputed that Mr Rousseau is in grade B 1. As an annex to the statement of defence, the defendant is supplying the personal files of three officials employed respectively by the establishments at Petten, Geel and Karlsruhe.

IV — Procedure

After the Advocate-General had been heard, and as a result of the Judge-Rapporteur's report, the Court (Second Chamber) decided to open oral proceedings by inviting the Commission to reply during the hearing to questions designed to clarify the present position of the applicant. The oral arguments of the parties were heard during on 5 April 1973.

The Advocate-General presented his opinion at the hearing on 30 May 1973.

Grounds of judgment

1 By letter of 31 January 1972, addressed to the President of the Commission, the applicant, an official at the Joint Research Centre at Ispra, submitted a claim to be classified in Category B, with retrospective effect from February 1971;

Not having received any reply to the claim, he brought the present action before the Court, under the second paragraph of Article 91 (2) of the version of Staff Regulations applicable at that time.

On admissibility

2 The Commission maintains that the action is inadmissible on the ground that the implied refusal, arising from the President of the Commission's silence, was no more than confirmation of a previous decision which was no longer open to challenge.

3 The applicant states that a new development, which substantially changed the circumstances in which his grade was fixed when he was first established, took place in January 1971.

In this connection he points out that the official in charge of the Inventory Section fell ill in January 1971 and did not resume his previous duties on recovery, having been transferred to another department in August 1971. The latter's assistant has also definitely ceased to belong to the Inventory Section; as a consequence, the applicant is carrying out all the tasks of the Section by himself.

4 During the oral proceedings, the defendant admitted that these statements were correct. The service has, in fact, been re-organized, resulting in an extension of the scope of the applicant's duties. It was, therefore, in order for the latter to ask the Commission to review his position in the administration in view of the changes which had taken place in the structure of the department to which he belonged.

5 The implied rejection of his claim constitutes, therefore, an act adversely affecting the applicant.

His application is, accordingly, admissible.

Merits

6 The stock inventory section at Ispra consisted of three members of staff, one classified in grade B 1, another, his assistant, in grade B 4, and the third, the applicant, in Category C 1.

When the first two ceased to be employed in the inventory section, the applicant took sole charge of the section.

7 The applicant contends that, as he has continued to discharge the responsibilities previously borne by these two officials, he is now head of the section and should be re-classified in the career-bracket B 2/B 3.

8 Though the administration cannot compel an official to fulfil tasks on a level higher than his grade, the fact that he agrees to fulfil them can be a factor to be borne in mind in connection with promotion, but does not give him the right to be re-classified.

In any case, according to Article 45 of the Staff Regulations, promotion to a higher category can only arise from an appointment as a result of competition.

9 It is clear from explanations supplied by the Commission that it was not only category B posts of the inventory section which were transferred to another department; the corresponding budgetary entries had been transferred as well.

There were, therefore, in the section no posts vacant in category B which could have been filled by competition.

10 The action is therefore unfounded.

On costs

11 The applicant has failed in his action.

Under Article 69 (2) of the Rules of Procedure, the unsuccessful party must bear the costs.

Nevertheless, under Article 70 of the Rules, costs incurred by the institutions in connection with actions by staff of the Community remain the responsibility of the Community.

On those grounds,

Upon reading the pleadings;
Upon reading the report of the Judge-Rapporteur;
Upon hearing the oral arguments of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaties establishing the European Communities;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations of the European Communities, expecially Articles 45 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders each party to bear its own costs.**

Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 12 July 1973.

A. Van Houtte — Registrar

P. Pescatore — President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 30 MAY 1973 [1]

Mr President,
Members of the Court,

If perseverance were proof of right, you would no doubt have to give favourable reception to the submissions in the application in which Mr Leandro Tontodonati asks you to declare in his favour against the Commission of the European Communities.

The applicant is for the second time appealing to the Court in order to obtain

1 — Translated from the French.