JUDGMENT OF THE COURT (FIRST CHAMBER)
12 DECEMBER 1967[1]

Anne Muller (née Collignon) v Commission of the European Communities

Case 4/67

Summary

1. Procedure — Periods prescribed for instituting proceedings — Legal nature

2. Procedure — Application for annulment — Application for damages — Close connexion between the two — Inadmissibility of application for annulment bringing with it inadmissibility of application for damages

1. The periods prescribed for instituting proceedings are mandatory in nature and are not subject to the discretion of the parties or of the Court.

2. The inadmissibility of a request for annulment brings with it the inadmissibility of a claim for damages with which it is closely connected.

In Case 4/67

ANNE MULLER (NÉE COLLIGNON) (wife of Jean-Claude Muller), an official of the Commission of the European Communities, residing in Luxembourg, assisted by Gaston Thorn, Advocate of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of his Counsel at 78 Grand'rue,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, taking the place of the High Authority of the European Coal and Steel Community under Article 9 of the Treaty of 8 April 1965, represented by its legal adviser, Pierre Lamoureux, acting as Agent, with an address for service in Luxembourg at 2 place de Metz,

defendant,

Application for:

— annulment of the appointment made following internal competition HA/INT/15/A announced on 25 February 1966 and in which the applicant took part;

1 — Language of the Case: French.

— an order that after the annulment of the said appointment the defendant shall appoint the applicant to the said post with retroactive effect;

— an order for the payment by the defendant to the applicant, by way of damages, of a sum assessed at 30 000 FB, for the loss of income suffered by the applicant by reason of being denied the said post and for the injury suffered by her by reason of the wrongful act of the defendant arising out of the circumstances in which it was decided not to appoint her;

— an order for costs against the defendant,

THE COURT (First Chamber)

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts in the present case may be summarized as follows:

The applicant, who completed her secondary schooling (certificate in 'humanités anciennes') in Belgium, entered the service of the High Authority in which on 15 November 1965 she was promoted to Grade 2 of Category B. She took part in internal competition HA/INT/15/A instituted on 25 February 1966 for a post of administrator in Grade A7. In its report of 13 April 1966, the Selection Board, pursuant to Article 30 of the Staff Regulations of Officials of the ECSC, drew up the following list of suitable candidates:

1. Mrs Anne Muller-Collignon, 29 years (the applicant),
2. Mrs Marlies Graf, 43 years.

The Selection Board found, moreover, that Mrs Graf 'came very close to the standard achieved by the candidate who was placed first and is also worthy of a post in Category A'.

By a note of 14 April 1966, the Director General for Administration and Finance forwarded to the Administrative Committee the report of the Selection Board and recommended that it adopt the Board's conclusions. After discussions in which conflicting views were expressed the preparatory working party of the Administrative Committee proposed unanimously that the conclusions of the Selection Board be adopted.

The Directorate General of Administration and Finance, by a note of 6 July 1966 addressed to the chef de cabinet

of the President of the High Authority, informed him that the Administrative Committee, supporting the conclusions of the Selection Board and the proposal of the Administration, recommended the appointment of Mrs Muller.

By a note of 14 July 1966 the said Directorate General informed Mrs Muller that her name appeared in the list of suitable candidates but that she had not been finally accepted for appointment to the available post.

By decision of 29 July 1966 the President of the High Authority appointed to the vacant post Mrs Graf who appeared in the list of suitable candidates and who had previously been classified in Grade 1 of Category B.

On 2 September 1966 Mrs Muller addressed a request to the President of the High Authority. In it she stated, in particular, that the accusations made against her that she had prior knowledge of the questions in the written tests was prejudicial to her good name but she did not request the annulment of the appointment of Mrs Graf.

On 13 October 1966 she sent to the President the following letter:

'With reference to the request which I sent to you on 2 September 1966, I am taking the liberty of submitting to you, pursuant to Article 90 of the Staff Regulations of officials of the ECSC, the present complaint on the claims raised in the letter which accompanied that request in order to protect my rights under the said regulations. I hope you will understand my position and trust that you will not object to my using this procedure which will put me in the position of keeping open the opportunities available to officials under the Regulations.'

On 17 October 1966 the President of the High Authority sent to the applicant the following note:

'*Re*: your request of 2 September 1966.

You allege in your above-mentioned request a number of factors which, in my view, no matter what the actual truth about them may have been, had in any event no influence on the results of the competition. The Selection Board put you first on the list. It was under no duty to draw up any kind of order of merit, since its task under the Staff Regulations is to submit to me a list of suitable candidates from which I make an entirely independent choice, in which I am guided solely by the requirements of the service and by the qualifications, ability, vocational experience and merits of the candidates put forward as they appear from the Selection Board's report and from the personal files. You will observe therefore that your position is no different from that of any other candidate who, although his name is entered on a list of suitable candidates, has not been accepted by the appointing authority. I therefore fail to see how you can have suffered any harm to your career prospects or how the fact that you have not been appointed could be prejudicial to your good name.'

The applicant lodged the present application at the Court Registry on 3 February 1967.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— 'declare the application admissible;
— declare that it has jurisdiction to entertain it;
— take note that the applicant reserves the right to formulate (in the further course of the proceedings) further arguments on fact and on law which she was not in a position to put forward when lodging the present application;
— take note that she reserves the right to tender the evidence more particularly described above;

— in any event order the relevant departments of the defendant to produce all relevant administrative documents the contents of which are unknown to the applicant and in particular the following:
  — the report of the Selection Board with the result of competition HA/INT/15/A,
  — the reasons relied upon for the decision not to appoint the applicant,
  — the notes and correspondence relating to this competition,
  — all other administrative documents relating to the case in question.

As to the substance of the case:

— declare the application well-founded;
— accordingly annul the appointment made by the defendant on the basis of competition HA/INT/15/A, on the ground that there was no sufficient reason for refusing to appoint the applicant when she was classed first in the competition, since the appointment therefore constituted an abuse or misuse of powers:
— declare that the defendant's appointing authority must appoint the applicant to the post for which she had competed, and with retroactive effect;
— order the defendant to pay to the applicant by way of damages a sum assessed at 30 000 BF for loss of income which she has suffered by reason of the decision not to appoint her, in so far as the Court does not see fit to award the applicant *ex aequo et bono* further damages or a higher sum;
— reserve to the applicant any other right to which she may be entitled and order the defendant to bear the costs and in any event to grant to the applicant, so far as may be necessary, the benefits accruing under Articles 69, 70, 71, 72 and 73 of the Rules of Procedure'.

The *defendant* contends that the Court should:

—'dismiss the application in its entirety as inadmissible and unfounded;
— order the applicant to pay the costs save those incurred by the High Authority which it must bear under Article 70 of the Rules of Procedure'.

III — Submissions of the parties

The submissions of the parties may be summarized as follows:

A — *Admissibility*

The *applicant* alleges that her complaint of 13 October 1966 to the President of the High Authority received no reply until after the expiry of the limitation period of two months laid down by Article 91 (2) of the Staff Regulations, that is until 14 December 1966, and that the two months' period for bringing an appeal against the implied decision of rejection expired on 14 February 1967. Therefore, she says, the appeal lodged on 3 February 1967 was made in good time and is admissible.

She expresses surprise that the defendant on the one hand is content to leave the question of admissibility to be decided by the Court, and this, she says, amounts to saying that it does not dispute the admissibility of the appeal, and on the other hand requests the Court in its conclusions to declare the appeal inadmissible.

The *defendant* observes that the application lodged with the Court contains requests which were not expressed in the request of 2 September 1966, that is to say the annulment of the appointment of Mrs Graf, the appointment with retroactive effect to the post in dispute and damages for the harm suffered as the result of the decision not to appoint her.

As regards the letter addressed by the

applicant to the President on 13 October 1966, the defendant alleges that that new request refers solely to the request of 2 September 1966 which the applicant in no way amends or supplements.

It goes on to remark that although the applicant alleges in her appeal to the Court that her complaint of 13 October 1966 did not receive a reply she nonetheless attaches as a schedule to her application the President's note in reply dated 17 October 1966.

In any event the defendant leaves the question of admissibility of the appeal to be determined by the Court. In so doing it in no way acknowledges the admissibility of the appeal.

B — *The substance of the case*

1. Action for the annulment of the decision of 29 July 1966 to appoint Mrs Graf

(a) The *applicant* alleges in the first place that under the Staff Regulations her placing in the competition gave her the right to be chosen in preference to the other candidates and she adds that the appointing authority substantially departed from the result of the competition by appointing Mrs Graf without any good reason, as she was placed second on the list of suitable candidates; the appointing authority thereby infringed Articles 27, 29 and 30 of the Staff Regulations of Officials and in view of this the appointment should be annulled.

In support of her argument the applicant relies on the judgment delivered by the Court (First Chamber) of 15 December 1966 in the case of *Serio* v *Commission of the EAEC* (Rec. 1966, p. 824 et seq.) and in particular:

'although it [the appointing authority] is entitled in making its selections to ignore the precise order of merit in the competition for reasons which it is incumbent upon the administration to evaluate and justify before the Court, nevertheless it may not destroy the very concept of competition by departing substantially from the result of the competition without serious reasons.' (Rec. 1966, p. 826, eighth paragraph).

The *defendant* replies, first, that in the first paragraph of Article 30 of the Staff Regulations and in the penultimate paragraph of Article 5 of Annex III to the said Regulations there is no provision that the list of suitable candidates drawn up by the Selection Board, must include an order of merit. From this the defendant concludes that the appointing authority's freedom of choice cannot be restricted by an order of merit which has no legal foundation.

The defendant goes on to remark that in the judgment in the *Serio* case quoted above by the applicant the authority had chosen the twelfth person on a list which moreover was a reserve list and not a list of suitable candidates. On the other hand in the present case the choice has been made of the second person in a list of suitable candidates which only contained two names and, furthermore, the Selection Board had found in its report of 13 April 1966 that Mrs Graf was very close to the standard of the candidate who was ranked in the first position.

According to the defendant, the expression 'the result of the competition', used in the above-mentioned judgment, is not to be identified with the order of merit established by the Selection Board on the basis of a list of suitable candidates but covers the results of the tests of the candidates, the Selection Board's evaluations of those tests and any other factor which the competition might bring to light. It argues therefore that, in selecting Mrs Graf, the authority did not depart substantially from the result of the competition.

Lastly the defendant remarks that in the *Serio* case the choice was carried out on the basis of a reserve recruiting

list which itself had been drawn up on the basis of a first choice which the appointing authority had made from a list of suitable candidates prepared by a selection board following a competition. Accordingly the freedom of choice in making a selection from this reserve recruiting list had to be limited with particular severity since it had already been exercised once on the basis of the list of suitable candidates. On the other hand in the present case, according to the defendant, the applicant's criticism is directed against the first choice made by the appointing authority directly from the list of suitable candidates drawn up by the Selection Board.

(b) The defendant takes the view that in exercising the choice which is conferred upon it by Article 30 of the Staff Regulations the appointing authority has other factors to assess than those taken into account by the Selection Board which ranks the candidates solely in accordance with the results of written and oral tests namely: age, vocational experience, previous assessments of candidates, etc. In the present case it was these other factors which led to the choice and appointment of Mrs Graf, all the more so since, according to the Selection Board's report, she was very close to the applicant's standard. In this connexion the defendant cites Mrs Graf's greater maturity by reason of her age and consequently her greater experience and longer career; the fact that just prior to the competition her grading was higher and her seniority was greater; finally that a comparison between the various assessments made of the two candidates works out in favour of Mrs Graf.

The *applicant* objects that by relying on factors such as these it is possible for the appointing authority to depart from the result of the competition. She argues that the Selection has already come to a decision on the applicant's qualifications and degree of experience by admitting her to the competition pursuant to Article 5 of Annex III to the Staff Regulations, and this deprives 'the Commission of the opportunity to justify a subsequent refusal to appoint the candidate by reason only of his insufficient experience' (the judgment in the *Serio* case).

The *defendant* takes the view that this line of argument is entirely misconceived since the appointment of Mrs Graf was in no way the result of the applicant's insufficient vocational experience but resulted from the fact that the Selection Board did not, in the method of assessment which it employed, take account of qualifications or at least of the vocational experience of the successful candidates. In its rejoinder it goes on to say that the applicant is confused on this point because the action of the Selection Board to which the applicant refers constitutes a preliminary selection which makes it possible to select candidates whose qualifications satisfy certain minimum requirements or who have equivalent experience but does not necessarily determine the final results of the competition. Lastly, the defendant considers devoid of any legal significance the applicant's argument that, apart from the Selection Board, three other authorities involved in the decision of nomination, that is to say, the Directorate-General for Administration and Finance, the preparatory working party of the Administrative Committee and the Directorate of Personnel, had spoken in favour of appointing the applicant. These authorities are in fact nothing more than administrative departments who have no part to play in the matter under the Staff Regulations.

(c) The *applicant* states that the said appointment was made through a misuse, if not indeed an abuse, of powers since preference was given to Mrs Graf because certain accusations made against the applicant, in particular that she had fraudulently acquired a prior knowledge of the questions in the written test, had

been reported to the President of the High Authority. This presumption is made all the stronger in this case since a member of the Selection Board appears to have mentioned to the Staff Committee certain alleged irregularities and since members of the President's office seem to have discussed these matters. The defendant should have ordered an inquiry in order to establish whether this accusation was well-founded.

The *defendant* replies that even if the facts alleged by the applicant were true, the decision relating to the appointment would not as such have been illegal, since the choice of Mrs Graf was entirely justified by objective factors. On the other hand if the said events had actually occurred it would have been necessary for the President to attach some importance to them. However is it not improbable that the President should have refrained from opening an inquiry but should have contented himself with not appointing the applicant when she would normally be subject to disciplinary proceedings and to severe sanctions? The absence of any inquiry clearly shows that the President did not give the slightest credit to these rumours.

The *applicant* replies that it is contrary to common sense to argue that the accusations were not to be taken seriously and that they were given no credit, since no inquiry was held. Only an inquiry could have brought to light the whole truth about the alleged misconduct. She takes the view that the fact that she was not appointed is tantamount in these circumstances to a sanction lacking in any legal foundation and which must be annulled.

In its rejoinder, the *defendant* denies that there was a sanction. The true nature of the measure adopted following the competition was the appointment of Mrs Graf in preference to the applicant on the basis of objective reasons.

2. The request for retroactive appointment

The *applicant* claims that the Court should declare that the defendant must appoint the applicant to the disputed post with retroactive effect.

The defendant observes that, according to a well established principle of administrative law and to consistent case-law both under national law and under Community law, the power of appointment is exclusively vested in the executive and that therefore the Court cannot place the executive under an obligation to appoint a particular person.

3. The claim for damages

In her application, the *applicant* seeks an award of damages for the loss of income which she has suffered by reason of the decision not to appoint her. She alleges that the circumstances in which it was decided not to appoint her amount to a wrongful act on the part of the defendant and that the said act has given rise to damage affording grounds for compensation. She assesses this damage at 30 000 BF.

The *defendant* takes the view that the applicant's conclusions seeking an award of damages for the injury suffered by her by reason of the decision not to appoint her must also be dismissed, since the decision not to appoint the applicant was perfectly in order.

IV — Procedure

By letter of 18 October 1967, the First Chamber of the Court called upon the parties to submit their oral observations on the admissibility of the application.

The oral submissions of the parties were heard by the Chamber on 15 November 1967.

The Advocate-General delivered his opinion on the admissibility of the application at the hearing on 21 November 1967.

Grounds of judgment

Admissibility

In its pleadings, the defendant on the one hand leaves the question of admissibility to be determined by the Court and on the other hand at the end of its conclusions contends that the application is inadmissible. During the oral procedure the defendant explained this apparent contradiction, saying that, although it regarded the application to be inadmissible, it did not wish to 'shelter behind the said inadmissibility' but to leave the Court free to raise the matter or not.

However, the periods prescribed for instituting proceedings are mandatory in nature and are not subject to the discretion of the parties or of the Court. The present case is particularly well suited to demonstrate how justified this rule is, since the proceedings concern not only the defendant institution but also, and possibly to a greater degree, the official whose appointment is the subject-matter of the application.

The purpose of the application is, in the first place, the annulment of the appointment of Mrs Graf and an order that the defendant should appoint the applicant with retroactive effect to the post for which she had competed.

In the second place, its purpose is an award of damages for the loss of income which the applicant is said to have suffered by reason of the decision not to appoint her, as the circumstances in which this decision came about are said to amount to a wrongful act or omission on the part of the defendant institution.

The first head of claim in the application takes the form of a claim directed against the implied refusal resulting from the failure on the part of the President of the High Authority to give a reply to the complaint which is said to have been made by the applicant in her letter of 13 October 1966.

This letter, however, refers to the request which the applicant made on 2 September 1966 to the President of the High Authority in which she asked him 'to examine to what extent and by what means you consider that it would be possible to make up for the injury which I have suffered to my good name and to my career prospects'. The letter of 13 October does no more than state that the requests made on 2 September are now to be regarded as formally

submitted within the meaning of Article 90 of the Staff Regulations of Officials. The letter of 13 October 1966 virtually crossed with a letter from the President of the High Authority of 17 October 1966 which fully answered the request contained in the letter of 2 September 1966 to which the letter of 13 October 1966 referred. The claim that the request through official channels is only contained in the letter of 13 October 1966 and that the letter of 17 October does not reply to it cannot therefore succeed.

During the oral procedure Counsel for the applicant again referred to confidential discussions and correspondence which are said to be capable of proving that the letter of 17 October 1966 did not represent the final views of the President of the High Authority. However, such statements which, moreover, are difficult to verify by reason of their confidential nature, cannot be taken into consideration. Thus there was no implied refusal in the present case.

Thus, even supposing that the request through official channels did indeed refer to the appointment of Mrs Graf and to the decision not to appoint the applicant, which to say the least is open to question, the period for bringing an appeal against the measures complained of expired, at the latest, three months after the reply of 17 October 1966. Accordingly the appeal made on 3 February 1967 is out of time.

It remains to be considered whether the fact that the application for annulment has been found to be inadmissible entails the inadmissibility of the claim for damages on the ground of a wrongful act or omission which forms part of the said application.

The close connexion between the claim for damages and the application for annulment is confirmed by the applicant's observation that the assessment of the damage depends upon the decision of the Court, that is to say, the date of her appointment to the post which she says is rightfully hers.

It is clear from this that the damage is founded on the non-appointment of the applicant and more exactly on the appointment of Mrs Graf. The applicant could have avoided this damage by contesting the measures in question in good time. It is apparent from the foregoing that she has failed to do so.

In these circumstances she cannot repair this omission and, so to speak, acquire the opportunity of bringing a new appeal by means of a claim for damages.

Accordingly the inadmissibility of the request for annulment must inevitably bring with it the inadmissibility of the claim for damages.

Costs

The appeal is inadmissible. The applicant must therefore be ordered to bear her own costs. The defendant must bear its own costs in accordance with the Rules of Procedure.

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 Coal and Steel Community, especially Article 40;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Staff Regulations of Officials of the European Coal and Steel Community, especially Articles 90 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 70;

THE COURT (First Chamber)

hereby :

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

2. **Orders the applicant to bear the costs of the proceedings, save those incurred by the defendant.**

Donner Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 12 December 1967.

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber