JUDGMENT OF THE COURT (SECOND CHAMBER)
OF 26 FEBRUARY 1981 [1]

Alain de Briey
v Commission of the European Communities

"Dismissal of temporary staff"

Case 25/80

Officials — Temporary staff — Dismissal for incompetence — Observance of the period of notice stipulated in the contract — Discretion of the administration — Judicial review — Limits

(Conditions of Employment of Other Servants, Art. 47 (2))

It clearly follows from Article 47 (2) of the Conditions of Employment of Other Servants that it lies within the discretion of the competent authority to terminate a contract concluded for an indefinite period, provided that the period of notice stipulated in the contract is given and that period is in accordance with the said provision. In the case of dismissal for incompetence the Court may not therefore review the basis on which that discretion was exercised, except where a patent error or a misuse of power can be proved.

In Case 25/80

ALAIN DE BRIEY, formerly a temporary servant of the Commission of the European Communities, residing in Bergen (Noord-Holland), represented by E. Lebrun of the Brussels Bar, 68 Rue Camille Lemonnier, Brussels, with an address for service in Luxembourg at the Chambers of T. Biever of the Luxembourg Bar, 83 Boulevard Grande-Duchesse Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by D. Sorasio, a member of its Legal Department, assisted by D. Jacob of the Brussels Bar,

1 — Language of the Case: French.

93 Rue Brillat-Savarin, Brussels, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION primarily for the annulment of the decision to dismiss the applicant and of the express and implied decisions rejecting his complaint of 27 April 1979 and, in the alternative, for the claims set out under heading II below,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

1. The facts

Alain de Briey was appointed as a temporary servant for a period of two years from 15 August 1975 and was assigned to Ispra as Head of the Administration and Personnel Division. By a new contract which was signed on 26 May 1977 but took effect on 1 November 1976 his appointment to that post was renewed, this time for an indefinite period, and thereafter he was employed first at Ispra and subsequently from 16 March 1977 at Petten, where he was Head of the Administration and

Infrastructure Division. Clause 5 of the contract read as follows:

"The contract may be terminated for the reasons and on the conditions laid down by Articles 47 to 50 of the Conditions of Employment of Other Servants. The period of notice required shall be one month for each year of service completed, provided that such notice shall not be less than three months or more than 10 months."

It emerges from the documents before the Court — albeit from a letter of 6 September 1978 subsequent to the applicant's transfer to Petten and sent by the Director of the Joint Research Centre (hereinafter referred to as "the Centre") at Ispra to the Director of the Centre at Petten — that the apparent reason for the applicant's transfer to Petten must have lain in the fact that the applicant had not performed his work satisfactorily at Ispra, that it was desired to give him a further chance in a centre where the administration would be less difficult and, finally, that the applicant had been advised of those reasons.

By a memorandum of 31 January 1978 the Director of the Centre at Petten informed the applicant, referring to personal conversations which he had held with him at the end of December 1977 and at the beginning of January 1978 concerning the quality of his work, that he was performing his duties as head of division in a totally unsatisfactory manner for various reasons which were set out in the memorandum.

By a memorandum of 8 February 1978 addressed to the Director, the applicant denied the latter's assertions and, referring to his personal and family problems as well as to his imminent departure to the United States on mission, he asked the Director "to do nothing else which might cause [him] even greater worries".

Towards the middle of February the applicant left for Washington, the official purpose of his mission being the maintenance of relations with the Commission's delegation. That trip enabled him to join his son in the United States who was ill and was to undergo a heart transplant operation. The child died there at the age of 12 years. In addition, during his stay in the United States the applicant was the victim of an armed assault which caused him to suffer a partial permanent invalidity of 27% for which he was compensated pursuant to Article 73 of the Staff Regulations.

At the beginning of September 1978 the applicant returned to Petten. By a memorandum of 5 October 1978 the Director-General of the Centre informed him following a personal conversation that, despite his memorandum of 8 February, his performance as a manager was still considered unsatisfactory and that the Director-General would be "forced to come to a decision on [his] contractual position by the end of 1978".

The applicant replied by a memorandum dated 17 October 1978, stressing that he was being "short-circuited" by the Director of the Centre at Petten in his dealings with his staff. That memorandum led to a more detailed statement by the Director-General on 13 November 1978 followed on 24 November by a further reply from the applicant.

Finally, by letter of 1 February 1979, the Director-General terminated the applicant's contract of employment with three and a half months' notice. As the applicant was absent owing to illness, the date on which his employment was to cease was postponed until 15 August 1979. On 27 April 1979 the applicant submitted a complaint to the Director-

General of the Centre pursuant to Article 90 (2) of the Staff Regulations. The implied decision rejecting the complaint was deemed to have been taken on 27 August; on 17 October an express decision was adopted and was notified to the applicant on 25 October 1979. The applicant has brought this action against the decision dismissing him and against the implied and express decisions rejecting his complaint.

2. Summary of the applicable regulations

As is clear from the clause of his contract reproduced above, the applicant is subject to the Conditions of Employment of Other Servants and not to the Staff Regulations of Officials.

The scheme for temporary staff referred to by Article 2 (d) of the Conditions of Employment of Other Servants was introduced in 1976 in order to replace the scheme under the Staff Regulations for staff paid from the research and investment appropriations so as to enable temporary staff paid from the research appropriations to be engaged for an indefinite period without any amendment of the remaining provisions relating to the obligations and rights of temporary staff.

In the case of discretionary termination of the contract by the institution, the only condition laid down by Articles 47 to 50 referred to in the applicant's contract is that the period of notice must be observed. In contrast, Article 51 of the Staff Regulations of Officials requires the reasons for the decision to be stated and Annex IX thereto lays down a special procedure. Articles 11, 16, 20 and 28 to 30 of the Conditions of Employment of Other Servants expressly provide that Articles 11 to 26, 55 to 61, 63 to 70 (a) and 72 to 76 respectively of the Staff Regulations of Officials shall apply by analogy, whereas no provision of the Conditions of Employment of Other Servants makes Article 51 of the Staff Regulations or Annex IX thereto applicable.

Article 24 of the Staff Regulations reads as follows:

"The Communities shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.

They shall jointly and severally compensate the official for damage suffered in such cases, in so far as the official did not intentionally or through grave negligence cause the damage and has been unable to obtain compensation from the person who did cause it.

It [sic] shall facilitate such further training and instruction for officials as is compatible with the proper functioning of the service and is in accordance with its own interests.

Such training and instruction shall be taken into account for purposes of promotion in their careers."

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

II — Conclusions of the parties

The applicant claims that the Court should:

— Declare the application admissible; and

— Primarily,
Annul the decision dismissing the applicant notified by the letter of 1 February 1979 from the Director-General of the Joint Research Centre;

— In the alternative,
Order that the decision to dismiss him shall not take effect until the

Council of Ministers has taken a decision on a proposal from the Commission intended to protect temporary staff dismissed from the institutions of the European Communities against risks such as unemployment, sickness and invalidity, or at least until the defendant has arranged for the applicant to be covered against such risks, and order that his contract shall meanwhile continue in force with retroactive effect from 15 August 1979;

— In the further alternative,
Order the defendant to adopt such measures as are necessary to enable the applicant to enjoy from the date on which his contract expires, social protection of the same standard and on the same conditions as the protection envisaged for temporary servants in the Proposal for a Council Regulation (ECSC, EEC, Euratom) amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities (Official Journal 1979, C 191, p. 9) or, at least, order the defendant to adopt the measures necessary to enable the applicant to enjoy from the date on which his contract expires social protection in the form in which it will be provided for temporary staff by the regulation adopted by the Council as a result of the said proposal;

— In the still further alternative,
Declare that the applicant should have been granted a period of notice of 10 months;

Consequently, order the defendant to pay the applicant by way of compensation a sum equal to the remuneration which would have been payable to him during the period of notice which he was denied, that is to say, a period of six and a half months, with interest thereon at the rate of 8% per annum from 15 August 1979;

— In any event,
Annul the implied and express decisions rejecting the complaint submitted by the applicant on 27 April 1979; and

— Order the defendant to pay the costs.

The Commission contends that the Court should:

— Dismiss the application as unfounded; and

— Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The applicant puts forward three submissions.

First submission

The *applicant* first claims that the dismissal involves an infringement of the rules and principles of law, in particular those requiring that all administrative measures must set out the reasons on which they are based, something which did not occur in this case. Moreover, the applicant several times challenges the reason which emerges from the documents before the Court, namely his alleged incompetence, and claims that the defendant has the burden of proving the soundness of the reason put forward, which in reality is vitiated by an error of fact and is not legally admissible.

The *Commission* points out in that regard that the decision to dismiss the

applicant was taken pursuant to Article 47 (2)(a) of the Conditions. As the period of notice was observed there was no error of law.

Nor was there any error of fact vitiating the reasons on which the decision was based. The work performed by the applicant was considered unsatisfactory and, even though he was criticized for this, there was no improvement on his part. The exercise of the discretionary power to dismiss him was not therefore based on a patent error regarding the facts which is open to review by the Court, even though the applicant may not agree with the assessment of his performance.

Second submission

Secondly, the *applicant* claims infringement of Article 51 of the Staff Regulations and Annex IX thereto, inasmuch as he was dismissed for alleged incompetence without being given the opportunity to defend himself on the conditions of equity and impartiality which an official enjoys pursuant to Article 51 of the Staff Regulations and Annex IX thereto, which apply by analogy and/or in pursuance of the principle of respect for the rights of the defence and the principle of equality. If reliance cannot be placed on such an analogy, the application of Article 51 of the Staff Regulations and Annex IX thereto arises from the principle of respect for the rights of the defence and from the principle of equality, inasmuch as the applicant, who was engaged as head of division for an indefinite period, held a position equivalent to that of an official. Furthermore, owing to his age the decision to dismiss the applicant had very serious consequences for him.

The *Commission* emphasizes first that Article 51 of the Staff Regulations and Annex IX thereto only apply to officials and that it follows *a contrario* from the wording of Article 11 of the Conditions of Employment of Other Servants that those provisions do not apply by analogy to temporary staff.

Nor was there any infringement of the general principle of the rights of the defence because it is clear from the documents before the Court that on several occasions the applicant's attention was drawn to the fact that he was not performing his work satisfactorily, that he was given the opportunity to reply to those charges and that he took advantage of that opportunity.

In his reply the applicant rests his case as regards this submission and leaves the question to the Court.

Third submission

Finally, the *applicant* puts forward a submission relating to the infringement of the first paragraph of Article 11 of the Conditions of Employment of Other Servants which states that Article 24, *inter alia*, of the Staff Regulations is to apply by analogy: the applicant was dismissed without being assured of adequate cover against the risks of sickness, invalidity and unemployment even though a proposal has been made to amend the Conditions of Employment of Other Servants in that respect. In the applicant's view there is a general principle of equity and social security which in the absence of written provisions on the matter placed a duty on the defendant, in pursuance of the aforesaid rights or, in any event, by virtue of his status as a temporary servant under Article 2 (d) of the Conditions of Employment of Other Servants with a contract for an indefinite period, to take appropriate measures in order to insure him against the above-mentioned risks. If no such duty exists, there is a deficiency in the written law for which the defendant is responsible, and as a result it must compensate him for the loss suffered.

The applicant takes the view that the defendant also failed to fulfil its

obligations because in his opinion the duty of assistance requires that since the defendant charged him with incompetence it should have enrolled him on the management training course which it organized. Moreover, as the termination of the contract of a temporary servant engaged for an indefinite period constituted an exceptional measure, in view of the applicant's age and his position as head of division the defendant should have allowed him the maximum period of notice permitted by the regulations, that is to say 10 months.

The *Commission* asserts that the termination of the applicant's contract constituted neither an abuse of the right of dismissal nor a misuse of power, but quite simply was a measure which became necessary in the interests of the service.

The period of notice was determined strictly in accordance with the rules and the applicant did not ask to be enrolled on the course in question.

As regards cover against the risks of sickness, invalidity and unemployment, proposals have in fact been submitted to the Council by the Commission but have not yet been adopted by the Council, and consequently the applicant may not benefit from them.

IV — Oral procedure

The applicant, represented by E. Lebrun of the Brussels Bar, and the Commission, represented by D. Sorasio, a member of its Legal Department, acting as Agent, and by D. Jacob of the Brussels Bar, presented oral argument at the sitting on 4 December 1980. Mr Van Westen, Director of the Centre at Petten, answered questions put by the Court.

The Advocate General delivered his opinion at the sitting on 29 January 1981.

Decision

1 By an application lodged at the Court Registry on 16 January 1980 Alain de Briey, formerly a temporary servant of the Commission of the European Communities, brought an action for the annulment of the decision of 1 February 1979 whereby the Commission dismissed the applicant for incompetence, giving him three and a half months' notice. In the alternative, he claims that his dismissal should be prevented from taking effect until the Council has taken a decision on a proposal by the Commission for a regulation protecting temporary staff against the risk of unemployment, sickness and invalidity or until cover against those risks has been arranged for the applicant, or that the Commission should be ordered to adopt measures which will allow him to enjoy social protection in accordance with that

proposal or protection in the form to be adopted by the Council as a result of that proposal. In the further alternative, he claims that the period of notice should have been 10 months and that the Commission should be ordered to pay him compensation in respect thereof.

2 The applicant was engaged in 1975 as a temporary servant for a period of two years in the capacity of Head of the Administration and Personnel Division of the Joint Research Centre (hereinafter referred to as "the Centre") in Ispra. As the work performed by the applicant in his post was considered unsatisfactory by his superiors, a fact which was brought to his attention, he was transferred in March 1977 to the Centre in Petten as Head of the Administration and Infrastructure Division in order to give him a further chance. At the same time his contract was renewed for an indefinite period pursuant to Article 2 (d) of the Conditions of Employment of Other Servants, a provision which was inserted at that time in order to replace the terms of employment laid down by the Staff Regulations for staff paid from the research and investment appropriations.

3 Following conversations with the applicant, the Director of the Centre in Petten criticized him in a memorandum of 31 January 1978 for the manner in which he had performed his duties and requested him to "take the division in hand". Following a written denial of those assertions, the applicant left towards the middle of February for the United States where he remained on mission until the beginning of September. During that stay the applicant was the victim of an armed assault and suffered a partial permanent invalidity of 27% for which he was compensated pursuant to Article 73 of the Staff Regulations which applies to officials and other servants.

4 On his return the applicant had a further personal conversation, on this occasion with the Director-General of the Centre, which was followed by an exchange of memoranda from which it is clear that his work was still considered unsatisfactory. Finally, by a letter dated 1 February 1979 his contract of employment was terminated with three and a half months' notice, but this was postponed until 15 August 1979 on account of illness.

The principal claim

5 In support of his claim for the annulment of the decision the applicant submits first that the decision to dismiss him is vitiated both by an error of law and by an error of fact inasmuch as it is not supported by a statement of reasons and is based on an assessment of the applicant's work which he challenges and in respect of which the burden of proof lies on the Commission. In this regard he stresses in particular that he was not given the necessary time after his return from the United States to demonstrate an improvement in his work and thereby comply with the request to take the division in hand, a request which was contained in the memorandum of 21 January 1978 and which, in the applicant's view meant that the dismissal might not be based on his previous work. Furthermore, the Commission cannot rely on incompetence as a manager on the part of the applicant, because the Director of the Centre in Petten "short-circuited" him by dealing directly with the applicant's subordinates and because the Commission failed to fulfil its obligation to assist him by not enrolling him on the management training course which it organized.

6 In addition, the applicant submits that the decision is vitiated by a procedural flaw inasmuch as he did not have the opportunity to defend himself on the conditions enjoyed by officials under Article 51 of the Staff Regulations and Annex IX thereto, which, in view of the fact that he held a post which in other spheres of Community work would be held by an official, apply by analogy or by virtue of the principle of respect for the rights of the defence and the principle of equality.

7 In answer to these arguments it must first be emphasized that it clearly follows from Article 47 (2) of the Conditions of Employment of Other Servants that it lies within the discretion of the competent authority to terminate a contract concluded for an indefinite period, provided that the period of notice stipulated in the contract is granted and that that period is in accordance with the said provision. In a case of dismissal for incompetence the Court may not therefore review the basis on which that discretion was exercised, except where a patent error or a misuse of power can be proved.

8 The facts and arguments put forward by the applicant make no suggestion that such was the case. Notwithstanding the request to take the division in

hand sent to the applicant by his immediate superior on a certain date, the competent authority, in order to come to a decision on his dismissal, was able and obliged to take into consideration the entire career of the person concerned, including the period prior to that warning. With regard to the so-called "short-circuiting", it has not been established that in his direct dealing with the applicant's subordinates the Director exceeded what he might reasonably consider necessary in order to remedy a situation caused by the applicant's own incompetence. Moreover, the competent authority was aware of the applicant's argument on that point when it took the decision to dismiss him. Finally, the administration cannot be criticized for failing to enrol the applicant on a course when he did not ask to be enrolled and when the course was on a subject with which he should have been familiar.

9 As regards the applicant's arguments regarding procedure based on the Staff Regulations of Officials, it must be remembered that the provisions of the Staff Regulations which apply by analogy to other servants are expressly listed in the Conditions of Employment of Other Servants. Article 51 of the Staff Regulations and Annex IX thereto are not included in that list. Moreover, it is clear from the documents before the Court that the applicant had every opportunity during the personal conversations and numerous exchanges of memoranda to put forward arguments in his defence. For the same reason the applicant cannot complain that the decision itself failed to set out the reasons on which it was based; such a failure was in any case justified by virtue of the discretion which Article 47 (2) confers on the competent authority.

10 It follows that the principal claim must be dismissed.

The alternative claim

11 In support to this claim the applicant points out that he does not enjoy adequate cover against the risks of sickness, invalidity and unemployment, even though the Commission has made a proposal to the Council for the amendment of the Conditions of Employment of Other Servants in that respect. In the absence of written provisions to that effect it is argued that the administration should take appropriate steps in order to insure the applicant against such risks in pursuance of the general principle of equity and social security and by virtue of its duty to assist officials under Article 24 of the Staff Regulations, a duty which is stated to apply by analogy to other

servants. Even if such a duty does not exist, the defendant is alleged to be responsible for that deficiency in the law.

12 In this connexion it must be remembered that Council Regulation (ECSC, EEC, Euratom) No 2615/76 of 21 October 1976 amending Regulation (EEC, Euratom, ECSC) No 259/68 as regards the Conditions of Employment of Other Servants of the European Communities (Official Journal 1976, L 299, p. 1) made it possible in the fields of research and investment to employ temporary servants for an indefinite period and to require them to perform duties which in other fields of Community work are carried out by officials. That Regulation, which, according to the third recital in the preamble, is not under any circumstances to constitute a precedent with regard to employment in the European public service, has made flexible administration possible in those fields, which may be readily adapted to the varied needs of the service and the available financial resources. However, although these temporary servants perform the same duties as those otherwise entrusted to officials, they do not enjoy the same security of employment.

13 In that respect it certainly seems regrettable that the Community authorities have not yet succeeded in establishing in favour of such staff a social security scheme which includes insurance against the risk of unemployment. Nevertheless, the existence of such a deficiency constitutes a reason neither to postpone the applicant's dismissal nor to set up in his favour an *ad hoc* scheme modelled on a proposal for a regulation upon which the Council has not yet acted. Since the applicant was aware, or ought to have been aware, of the absence of such insurance when he was engaged as a temporary servant, such a deficiency cannot provide the basis of a claim for compensation either.

14 The alternative claim must therefore be rejected.

The claim made in the further alternative

15 By this claim the applicant submits that, in view of the fact that the termination of a contract concluded for an indefinite period is an exceptional occurrence, the period of notice should have been the maximum, that is to say 10 months.

16 With regard to notice, Article 47 (2) of the Conditions of Employment of Other Servants refers to the terms of the individual contract, whilst laying down minimum limits and providing for the suspension of the period of notice for a maximum of three months in the event of sick leave, a provision which was applied in the applicant's case.

17 In the applicant's contract the period of notice was stipulated in accordance with the minimum requirements laid down by Article 47 and the notice given to the applicant corresponded to the terms of the contract. Thus the competent authority cannot be criticized for having complied with those provisions.

18 For all these reasons the application must be dismissed in its entirety.

Costs

19 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs.

20 The applicant has failed in his submissions.

21 However, Article 70 of the Rules of Procedure provides that in staff cases the institutions shall bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 26 February 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 29 JANUARY 1981 [1]

Mr President,
Members of the Court,

The applicant in the case on which I shall give my views today entered the service of the Commission as a temporary servant in Grade A 3 on a two-year contract which was concluded on 14 July 1975 and took effect on 15 August 1975. Initially he was employed as Head of the Administration and Personnel Division at the Joint Nuclear Research Centre in Ispra. From 16 March 1977 he worked at the Joint Nuclear Research Centre in Petten as Head of the Administration and Infrastructure Division. His original contract of employment was replaced on 26 May 1977 by a contract for an indefinite period concluded pursuant to the combined provisions of Articles 2 (d) and 8 of the Conditions of Employment of Other Servants. Clause 5 of that contract, which took effect on 1 November 1976, allowed employment to be terminated in accordance with Articles 47 to 50 of the Conditions of Employment of Other Servants; under those provisions the period of notice required depended on the length of service (one month for each year of service subject to a minimum of three months and a maximum of ten months). As the applicant's 12-year-old son, who was seriously ill with heart disease, needed to undergo an operation in the USA which in fact led to his death a few months later, the applicant was assigned to the Commission's delegation in Washington with effect from 15 February 1978 in order to enable him to stay near his son. During that period (in April 1978) he was the victim of a street assault and received severe gunshot wounds. This resulted in a partial permanent invalidity for which compensation calculated initially at 20% and later at 27% was paid to him in pursuance of Article 73 of the Staff Regulations.

1 — Translated from the German.