JUDGMENT OF THE COURT (SECOND CHAMBER)
22 NOVEMBER 1972[1]

Rudolf Thomik
v Commission of the European Communities

Case 19/72

Summary

Officials — Applications to the Court — Period for lodging — Observance thereof unconditional

(Staff Regulations of Officials; text of Article 91 in force prior to 1 July 1972)

The period laid down in Article 91 (2) of the Staff Regulations of Officials, as that provision was worded prior to 1 July 1972, is unconditional; in particular, it therefore applies without its being necessary to ascertain whether the prolonged silence of the administration following the request or complaint of the person concerned constitutes negligence.

In Case 19/72

RUDOLF THOMIK, a former official of the European Communities, represented by Maximilian Himmel, Advocate of the Landgericht, Düsseldorf, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 24b rue Phillippe-II,

applicant,

v

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

defendant,

Application, at the present stage of the procedure, concerning the admissibility of the application seeking annulment of a decision which the applicant considers to flow from the Commission's letter of 21 February 1972 refusing him four — instead of two — months' salary by way of resettlement allowance,

1 — Language of the Case: German.

THE COURT (Second Chamber),

composed of: P. Pescatore, President of Chamber, A. Trabucchi and H. Kutscher, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and Procedure

The facts and procedure may be summarized as follows:

1. By letter of 21 May 1971 the applicant, on termination of service, applied to the Commission for the resettlement allowance provided for by Article 6 of Annex VII to the Staff Regulations of Officials. By letter of 25 May 1971 he submitted further that by virtue, in particular, of certain provisions of the regulations relating particularly to former ECSC officials, he was entitled to a resettlement allowance equal to four months of his last basic salary.
The Director-General for Personnel and Administration of the Commission replied by letter of 24 June 1971 that he could claim only two months' salary. Consequently, an order was made for payment of the corresponding sum in German currency on 30 June 1971 and this sum was paid to the applicant on 15 July 1971. By letter of 8 July 1971 the applicant asked the Director-General to reconsider the position adopted by the Administration; by letter of 21 February 1972 the Director-General replied that he was maintaining that position.
By application lodged at the Court Registry on 4 May 1972 the applicant claimed, *inter alia*, that the decision ('Bescheid') of 21 February 1972, notified on 24 February 1972, should be annulled and that the Commission should be ordered to pay him, by way of resettlement allowance, an additional two months' salary plus interst at 4% as from 15 July 1971.
In its statement lodged on 24 June 1972, the Commission, without adopting an attitude with regard to the merits, put forward an objection of inadmissibility based on Article 91 of the Rules of Procedure. The applicant, in his statement lodged on 31 July 1972, challenged that objection.
By order of 4 October 1972, the Court (Second Chamber) decided, having heard the report of the Judge-Rapporteur and the views of the Advocate-General, to give a ruling on the objection without opening the oral procedure, in accordance with Article 91(3) and (4) of the Rules of Procedure.

II — Submission and arguments of the parties with regard to the admissibility of the action

The submissions and arguments of the

parties with regard to the admissibility of the action may be summarized as follows:
The *Commission* considers that the action is inadmissible on the ground that it is out of time.
It is apparent from the letter of 24 June 1971 and from the credit transfer made on 15 July that the Commission, in reply to the applicant's requests of 21 and 25 May 1971, took a decision within the meaning of Article 91 of the Staff Regulations of Officials rejecting the applicant's claim for two additional months' salary. In order to challenge this decision in due time, the applicant should have lodged, within three months of notification, either an application to the Court or a complaint followed by an application lodged within the prescribed period.
The present application would also be inadmissible if the letter of 8 July 1971 were to be considered as a complaint within the meaning of Article 91 of the Staff Regulations. In fact, in this case, the complaint should be regarded as having been rejected by implication at the end of the period of two months provided for by that provision. The applicant should then have lodged an application against this implied decision of rejection within a further period of two months, in other words, at the latest in mid-November 1971.
The letter of 21 February 1971 did not re-open the period for lodging an application; its nature is merely confirmatory since it repeats the legal considerations expressed in support of the decision of 24 June 1971 and adds additional information on the significance of the position of the Staff Regulations governing resettlement allowance.
The *applicant* replies that his letter of 8 July 1971 constitutes a complaint within the meaning of Article 91 of the Staff Regulations; this the Commission rejected by its decision of 21 February, which was contested, in due time, by this application.
The Commission cannot rely on the expiry of the period of two months laid down in Article 91 of the Staff Regulations, in other words, its own negligence in not replying to the said letter until more than seven months had elapsed and in having thereby disregarded its duty to give assistance, by which it is bound even in relation to retired officials. Higher German courts have, on many occasions, rejected as being fraudulent the plea of prescription relied on by a debtor who had induced the creditor to believe that he would continue negotiations with regard to the subject-matter of the dispute.
The argument that the decision of 21 February 1972 is confirmatory in character is erroneous. The Commission justified that decision on additional legal grounds. The intention to confirm the decision of 24 June 1971 does not alter the fact that the contested decision is a measure deciding on the merits, with the result that the applicant cannot have lost the right on which he relies.

Grounds of judgment

I — Admissibility

1 The application which was lodged at the Court Registry on 4 May 1972 seeks, first, the annulment of the decision which the applicant considers to flow from the letter of 21 February 1972 by which the Director-General for Personnel and Administration of the Commission rejected the applicant's request for a resettlement allowance equal to four and not merely two months of his last basic salary. The application also seeks an order directing the Commission to pay the applicant, by way of this allowance, a sum corresponding to two months of the said salary.

2 In its statement on the procedural issue the Commission has contended that the application is inadmissable on the ground that it is out of time because the letter of 21 February 1972 merely confirmed the decision conveyed in the letter of 24 June 1971 by which the Director-General, for the first time, rejected the applicant's request. The applicant is said to have failed to contest that decision before the Court within the period of three months laid down by Article 91 of the Staff Regulations of Officials. The Commission asserts that the action is also inadmissible even if it is found that the letter of 8 July 1971, by which the applicant requested the Director-General to reconsider his attitude, constituted a complaint within the meaning of Article 90 of the Staff Regulations. In fact, in the Commission's opinion, in accordance with Article 91 of the Staff Regulations, the complaint must then be regarded as having been the subject of an implied decision of rejection taken at the end of a period of two months from the day on which the complaint was lodged and the applicant, on pain of being time-barred, should have contested the decision within a further period of two months, in other words, by mid-November 1971 at the latest.

3 The objection of inadmissibility must be judged on the basis of Articles 90 and 91 of the Staff Regulations of Officials in the form in which they were in force when the abovementioned letters were written — hereinafter referred to respectively as 'the former Article 90' and 'the former Article 91' — that is, without taking account of the amendments introduced by Articles 38 and 39 of Regulation (Euratom, ECSC, EEC) No 1473/72 of the Council, of 30 June 1972 (OJ, English Special Edition 1972, p. 703) which, according to the terms of Article 90 of that regulation, entered into force only on 1 July 1972.

4 Because it rejected the applicant's request of 25 May 1971, the letter of 24 June 1971 constituted an act adversely affecting him within the meaning of the former Article 91 of the Staff Regulations. The applicant therefore had the choice either of lodging an application directly within the period of three months laid down by the first subparagraph of the former Article 91(2) or of conserving the right of appeal by submitting to the appointing authority, within that period and pursuant to the former Article 90 of the same Staff Regulations, a complaint against the measure taken in this regard. He in fact made use of the second possibility by his letter of 8 July 1971 which must be regarded as a complaint within the meaning of the former Article 90 of the Staff Regulations since it clearly sought a decision reversing that conveyed in the letter of 24 June 1971.

5 Under the second subparagraph of the former Article 91 (2) of the Staff Regulations 'Where the competent authority takes no decision in respect of a request or a complaint ... within two months from the date on which it was lodged, this shall be deemed to constitute an implied decision rejecting it', and: 'an appeal against such decision shall be lodged within a further two months'. Consequently, since

the Commission did not give a decision on the complaint within a period of two months, it was deemed to have taken an implied decision rejecting it in September 1971 which the applicant did not contest within the second period of two months mentioned above, in other words, in November 1971 at the latest.

6 Although this application, which is directed against the express decision of rejection of 21 February 1972, was brought in due time, that decision was however merely in confirmation of the implied decision mentioned above and of the letter of 24 June 1971 and, consequently, was not capable of re-opening the period for lodging an application. It cannot be objected in this case that the decision of 21 February 1972 contains new considerations of law or fact relating to the situation at the time of the implied decision of rejection on the ground that the Commission, to justify its attitude, advanced in that decision arguments supplementing those which it had already adduced in its letter of 24 June 1971. In this connexion, it suffices to note that the Commission did not at any time desist from its argument that the applicant's request was unfounded.

7 The applicant has also objected that the defendant cannot in good faith rely on the expiry of the period laid down in the former Article 91 of the Staff Regulations since this would allow it to take advantage of its own negligence in not replying to the letter of 8 July 1971 until more than seven months had elapsed.

8 This argument disregards the fact that the period in question is unconditional, that, in particular, it therefore applies without its being necessary to ascertain whether the prolonged silence of the institution constitutes negligence on its part.

9 The application is therefore inadmissible.

II — Costs

10 The applicant has failed in his application. According to Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. However, according to Article 70 of the Rules of Procedure, in proceedings commenced by servants of the Communities, institutions shall bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the opinion of the Advocate-General;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;

Having regard to the Staff Regulations of Officials of the European Communities and especially Articles 90 and 91 as they were worded prior to 1 July 1972;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69, 70 and 91,

THE COURT (Second Chamber)

hereby:

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

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

Pescatore Trabucchi Kutscher

Delivered in open court in Luxembourg on 22 November 1972.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber