THE COURT (First Chamber)

hereby:

1. **Dismisses Application 36/62 as unfounded;**

2. **Orders the costs incurred by the defendant to be paid by that party. The balance of the costs shall be apportioned, and shall be borne as to four-fifths by the defendant and as one-fifth by the applicant.**

Delvaux Trabucchi Strauß

Delivered in open court in Luxembourg on 4 July 1963.

A. Van Houtte
Registrar

L. Delvaux
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL M. LAGRANGE DELIVERED ON 26 MARCH 1963[1]

Mr President,
Members of the Court,

I

This case has been given such extensive treatment in both the written and the oral procedures that I am prompted to limit my own account to the very minimum. This applies in particular to certain questions of fact on which you have all had an opportunity to form an opinion and I do not intend to discuss these matters in detail again. I should like above all to emphasize the legal aspects of the dispute.

Mr Alvis was employed under contract as a member of the auxiliary staff by the Secretary-General of the Councils from 6 November 1961 in connection with the Conference between the Member States of the European Communities and third countries which had applied for membership of those Communities. The contract was for an indefinite period terminable by one month's notice given at any time by either party. However, the first three months were considered as a 'trial period' after which the employment became 'definitive'.

The contract was terminated by a decision dated 8 August 1962, signed by the Director-General, in the form of a notice of dismissal taking effect from the following day and giving reasons which clearly showed it to be of a disciplinary nature. However, the decision ended with the following words: 'In accordance with the terms of your contract you will be allowed one month's notice' indicating that the equivalent of one month's salary would be paid to the applicant despite his immediate dismissal.

By an application dated 27 September 1962, Mr Alvis sought first the annulment of the decision taken on 8 August

1 — Translated from the French.

1962 and his reinstatement and, secondly, an order that the European Economic Community pay five million Belgian francs as compensation.

However, in his 'conclusions' dated 2 October 1962 and lodged at the Court Registry at the same time as the application, Mr Alvis claimed only the five million francs compensation; he appears thus to have abandoned his claim for reinstatement.

The Court clearly has jurisdiction under Article 179 of the EEC Treaty, which you have already applied several times.

There is also no difficulty concerning the *nature of the relationship* between the applicant and the Council: it is a contractual relationship governed by public law, similar to that already defined, in particular in your Judgment of 15 July 1960 in Lachmüller and Others. The difference in this case however is that the capacity of auxiliary was clearly specified in the letter of employment. It does not follow that the provisions of Regulation No 31 laying down the conditions of employment of auxiliary staff (Articles 51 et seq., Official Journal of 14 June 1962) are applicable in this case, for the contract was concluded before the date of entry into force of that Regulation (1 January 1962). Furthermore, the transitional provisions of Article 99 of the same Regulation have not been applied to Mr Alvis. However, having regard to the rules known and already published in the Official Journal of the Communities at the time when these incidents took place we may ask whether certain rules contained in this publication can be deemed to govern the contract, at least where they appear as the expression of a general principle of law.

II

There is one complaint to which I should like particularly to draw your attention: it is that based on the failure of the Commission to inform the applicant before his dismissal of the allegations made against him. It is clear that the applicant was neither informed of these allegations nor invited to give an explanation *before* the decision was taken, as this invitation was made at the time when the decision of dismissal was handed to him. The principal objection made by Mr Alvis is to the damaging manner in which he received the decision of dismissal without being allowed to give any explanation. This is, in fact, a misrepresentation since he was clearly invited to submit his observations and it was quite reasonable that this request be made in the presence of the two responsible heads of department.

On the other hand, the legal aspect of this question is more difficult and, although it was not emphasized by the applicant during either the written or the oral procedure, I should like to set it out as clearly as possible.

Article 76 of the Regulation laying down the 'Conditions of employment of other servants of the Communities', that is, of servants other than officials governed by the Staff Regulations to which I have already referred, is expressed as follows:

'The employment of a member of the auxiliary staff may be terminated without notice on disciplinary grounds in serious cases of failure to comply with his obligations, whether intentionally or through negligence on his part. A reasoned decision shall be taken by the authority referred to in the first paragraph of Article 6, *after the servant concerned has had an opportunity of submitting his defence.*'

In this case, the decision was reasoned, but the servant concerned was not given an opportunity of submitting his defence before receiving it. The question therefore arises whether this Article was applicable and, if so, whether it was infringed.

It is important to remember here that this provision envisages cases in which

the employment of a member of the auxiliary staff is terminated *without notice*. The question arises, therefore, whether a dismissal on disciplinary grounds with immediate effect, but with payment of the equivalent of one month's salary in lieu of notice, amounts to a dismissal *with* notice to which Article 76 does not apply. This is doubtful, having regard to the provisions of Article 75 of the same Regulation which, in certain cases (paragraph 2 (a) and (d)), provides for the grant of certain allowances in favour of a servant whose contract is terminated without notice: does this not show that the authors of the Regulations based the concept of 'dismissal without notice' upon the criterion of immediate dismissal and not upon failure to pay the allowances provided for in the contract? It does not seem so; in fact the text shows that the allowances payable by virtue of paragraph 2 (a) and (d) of Article 75 are not necessarily equivalent to the sum which would be payable under a contract where normal notice is given. I think, therefore, that where the servant concerned receives the whole sum provided for in the contract, the administration has fulfilled its contractual obligations and it is then a case of dismissal with notice even if the servant concerned is requested to cease work immediately in the interests of the service. If this interpretation is accepted then Article 76, even if it had governed the contract with Mr Alvis, would not have been infringed in this case.

Moreover, as I have mentioned, the 'Conditions of employment of other servants of the Communities' in which Article 76 is found, did not govern the applicant's contract.

But the question then arises whether the failure to inform the applicant of the allegations against him before taking a decision concerning him is contrary to a general principle of law and whether Article 76 is only an example of its application to one particular case. In this respect I must distinguish between servants whose terms of employment are governed by the Staff Regulations and servants governed by contracts; I use the words 'governed by Staff Regulations' in this case to refer to the classic concept of appointment by a unilateral action on the part of a public authority, as opposed to the concept of a contract.

In the first case, it is only within the framework of existing laws and regulations that an administration can alter the legal position of a servant and in particular can terminate his activities by dismissal, retirement, etc. The proceedings which follow such decisions are proceedings involving legality, which normally take the form of an application for annulment and, however wide the court's powers, they are necessarily limited by the discretionary power of the administration, which always exists to some extent even in the most advanced staff regulations.

In the second case, a judge to which the matter is referred is a 'judge of the contract', and he has all the powers necessary to inquire whether the mutual obligations of the parties have been observed and to draw inferences from any non-observation. The fact that the contract is governed by public law does not alter this in any way, except that the nature of the mutual obligations must be considered in the context of public service, with its own special requirements (see on the question of contractual agents in public service, Duez and Debeyre, *Droit Administratif*, 1952, pp. 744-746).

It appears that the general principle of law relating to the communication of allegations must be applied in a different manner in each of the above cases. In the case of a servant governed by Staff Regulations, this communication must be made *prior* to the decision, and must be made in such circumstances as to allow the servant concerned an oppor-

tunity to give an explanation of the allegations against him even in cases where no true disciplinary procedure has been provided. On the other hand, in the case of a contractual servant, the only *formal* rules which are applicable are those provided in the contract itself and, possibly, by general or special provisions laid down by law or regulation which are of *direct application.* None exist in this particular case. The only formal requirement was a decision of dismissal accompanied by one month's notice which was provided for in the contract. On the other hand, as you have mentioned in your judgments, 'decisions of dismissal terminating contracts must be justified on grounds relevant to the interests of the service without any arbitrary considerations' (Lachmüller and others, 15 July 1960, Rec. 1960, p. 956).

The question therefore concerns not formal but material requirements. When, as in this case, dismissal is based on disciplinary grounds, this requirement is particularly strict; the servant concerned must be given an opportunity to give a complete explanation and to this end the administration must inform him of the allegations in a precise and explicit manner. But, as regards the decision of dismissal, it is simply a question of *giving reasons* for the decision, the purpose of which is twofold: (1) to allow the party concerned to give an explanation before the judge of the contract; (2) to enable the judge himself to give his judgment with full knowledge of the case. The procedure in defended cases before a court such as ours offers all the desired guarantees and allows the party concerned not only to be aware of the allegations against him but also to give a full explanation of them. On the other hand, the Court, enjoying unlimited jurisdiction in such a case, has all the powers to enable it either to ensure the performance of the contractual obligations which have been disregarded or to order redress by way of compensation for the total damage suffered. Thus for the guarantee prior to the decision, consisting of the notification of charges by the administration—which is indispensable when the decision can only be followed by an application for annulment bearing only on legality—there is substituted a guarantee of a judicial nature which is necessarily more powerful than the original guarantee and overrides it.

For these reasons, although I consider the matter difficult, I have come to the conclusion that the failure to inform the applicant of the allegations before taking the decision of dismissal must not be considered decisive in this case.

III

As regards the 'reasons' for the decision, which is really a question of substance rather than of form, the problem must be considered from two angles: (1) Are the facts alleged against the servant concerned materially correct? (2) If this is so, were they capable, either in themselves or as a whole and by the conduct which they revealed on the part of the applicant, of justifying the decision to dismiss?

As regards the truth of the allegations there is no dispute as to the first, the letter sent to Mr Newing.

As regards the second, concerning the incident of 11 July 1962, the administrative inquiry, confirmed by the legal inquiry, leaves no doubt, in my opinion, as to the truth of the allegation. The extremely precise evidence of Miss Potz is not seriously challenged by the applicant, at least as regards the vital points.

There remains the third and most serious incident, or series of incidents, which, coupled with the other two, was the determining factor in the dismissal.

As I said at the beginning of my observations, I do not intend to go over this question again, since you have before you all the necessary information.

I shall only say that here again the truth of the allegations appears to me to have been 'sufficiently established in law', to use an expression often found in your judgments. In my opinion it is not only the state of intoxication noted by witnesses, but also the throwing of the glasses, for which there is 'serious, detailed and consistent' evidence coupled with the refusal of the applicant to provide the least explanation as to what he was doing and where he was between 8.30 and 8.55 p.m., which indicates to me that he was responsible.

As regards the second point, the Court, as I have already mentioned, has all the powers necessary to review the decision taken by the administration on the question whether the incidents, as a whole and in the conduct which they revealed, were capable of justifying the dismissal. I consider that the reply to this question must without doubt be in the affirmative. As regards the first incident, the letter addressed to Mr Newing, it is enough to read this letter and to know that it was sent by the applicant to the head of the Translation Department and to Mr Alvis's lawyers in London. As regards the two other incidents, even making allowances for the circumstances under which translators work during a conference of diplomats —and even taking into account the climate in Brussels during hot weather —it is clear that the functioning of a public service, whatever it is, and particularly when it is as much 'in the public eye' as the European institutions, cannot allow such conduct. This would be true even if you should not consider sufficient evidence to have been shown for the throwing of the glasses: there is no doubt that together the other incidents justify the dismissal with notice of Mr Alvis.

I am therefore of the opinion:

— that the application should be dismissed; and

— that the costs should be borne by Mr Alvis to the extent laid down in Article 70 of the Rules of Procedure.