JUDGMENT OF THE COURT (SECOND CHAMBER)
30 JUNE 1971[1]

Canzio Almini
v Commission of the European Communities

Case 19/70

Summary

Officials — Retirement — Discretionary Powers of the administration — Extent — Defence of the interests of the official concerned
(Staff Regulations of Officials, Article 50)

As a corollary to the discretion conferred on the institutions by Article 29 (2) of the Staff Regulations of Officials with regard to appointments to Grades A 1 and A 2, the appointing authority enjoys wide discretionary powers in so far as retirement from service and dismissal of officials belonging to these grades are concerned.

The Staff Regulations do not limit the reasons which may justify a retirement under Article 50 since these could lie in the objective requirements of the service as well as in the assessment of the officials' specific qualities in relation to such requirement.

The exercise of discretionary powers which are so widely defined nevertheless requires that the official concerning whom such a measure is contemplated should first have an opportunity of stating his case on the factors which have determined his retirement.

In Case No 19/70

CANZIO ALMINI, a former official of the Commission of the European Communities, residing in Luxembourg, represented by Marcel Slusny and Henri Rolin, Advocates at the Cour d'appel, Brussels, with an address for service in Luxembourg at his private address, 48 boulevard Grande-Duchesse-Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, with an address for service at the Chambers of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

1 — Language of the Case: French.

Application for the annulment of three decisions, the first two of 23 July 1969 and the third of 11 February 1970, by which the Commission respectively made provisional appointments to the Directorate of the Office for Official Publications of the Communities, transferred Mr Almini to a post as Principal Adviser in the Directorate-General for Personnel and Administration and decided to retire him in the interests of the service, and also an application for the award of damages,

THE COURT (Second Chamber)

composed of A. Trabucchi, President of Chamber, P. Pescatore (Rapporteur) and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

Mr Canzio Almini entered the service of the High Authority of the European Coal and Steel Community on 14 June 1954 and there successively performed the duties of Senior Administrative Assistant in the Marketing Division, Head Clerk in the office dealing with the assessment of the levy in the Production Division, Assistant Private Secretary to a Member of the High Authority, Assistant Private Secretary and afterwards Principal Private Secretary to the President, Technical Adviser to the President and finally Director of Personnel in the Directorate-General for Administration and Finance.

Within the framework of administrative restructuring and rationalizing of services upon the merger of the executives, Mr Almini was appointed to the post of Director of Publications in the Directorate-General for Personnel and Administration of the Commission on 28 March 1968.

On 16 January 1969, the Assembly, the Council, the Commission, the Court of Justice and the Social and Economic Committees took a decision, implementing the decision of the representatives of Governments of the Member States of 8 April 1965 on the provisional setting up of certain institutions and of certain services of the Community, to set up the Office for Official Publications of the European Communities (OJ 1969, L 13-19).

On 23 July 1969, the Commission, on the advice of the Management Committee of the Office for Official Publications decided as from 15 September 1969 and until 1 January 1971 provisionally to entrust the management of the Office to Mr Reichling, Assistant Director-General for Personnel and Administration of the

Commission in Luxembourg, and to make Mr Jacques Leclerc, Principal Adviser with the Council, his assistant.
On that date also, and pending the ultimate reorganization of the Directorate-General for Personnel and Administration, the Commission decided to post Mr Almini with effect from 15 September 1969 as Principal Adviser to Mr Reichling to assist him in his duties as Assistant Director-General for Personnel and Administration.
Mr Almini was not notified of this decision in writing but was verbally informed thereof by a Member of the Commission and by the Assistant Director-General for Personnel and Administration.
On 22 October 1969 the Council, acting under Article 38 of the Staff Regulations, seconded Mr Leclerc in the interests of the service to the Commission with effect from 15 September.
On 14 January 1970 the Commission decided to retire Mr Almini in the interests of the service under Article 50 of the Staff Regulations and the supplementary provisions which might be applicable under the former ECSC Staff Regulations.
Mr Almini was informed of this intention by a verbal communication from the Director-General for Personnel and Administration and by a letter of 20 January 1970 from a Member of the Commission.
Mr Almini made his observations by letter of 24 January 1970.
On the 11 February 1970 the Commission decided to retire Mr Almini with effect from 1 March 1970 in the interests of the service and stated that it was not possible to put him in another post corresponding to his category and grade.
Mr Almini was granted the right to compensation and pension determined in accordance with Article 42 of the former Staff Regulations of the ECSC of 28 January 1956.
On 18 February 1970 Mr Almini was informed of this decision.
Mr Almini left the Commission's service on 28 February 1970.

II — Procedure

The application was entered at the Court Registry on 15 May 1970.
The written procedure followed the normal course.
On the report of the Judge-Rapporteur and after hearing the views of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.
The oral submissions of the parties were heard on 31 March 1971.
The Advocate-General delivered his opinion on 9 June 1971.

III — Conclusions of the parties

The applicant after having amended his earlier submissions, claims that on the substance of the case the Court should:

(a) first, annul the Commission's decision of 11 February 1970 to retire him.

(b) so far as may be necessary, annul the Commission's decision of 23 July 1969 transferring him from the Directorate for Publications to the post of Principal Adviser in the Directorate-General for Personnel and Administration in Luxembourg and provisionally entrusting the management of the Office for Publications to Mr Reichling, assisted by Mr Leclerc, an official seconded from the Council.

(c) alternatively, declare the Commission responsible for the damage caused to the applicant by its wrongful acts or omissions and accordingly order it to extend the compensation and pension allowed to the applicant under Article 42 of the former ECSC Staff Regulations so as to ensure him up to the age of 65 an occupational income equal to that which he would have obtained had he retained his post with the Communities, together with social security cover until his death.

(d) order the Commission to pay the costs of the proceedings.

The *defendant* contends that the Court should:

(a) declare the application inadmissible in so far as it asks for the annulment of the Commission's decision of 23 July 1969 by which the management of the Office for Publications was entrusted to Mr Reichling, with Mr Leclerc as his assistant.

(b) in any event, dismiss the application as wholly unfounded.

(c) order the applicant to pay the costs.

IV — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *Admissibility*

The *defendant* does not contest the admissibility of the application for annulment of the decision of 11 February 1970 to retire the applicant.

It does on the other hand question the admissibility of the application for annulment of the decision of 23 July 1969 to transfer him: he became aware of this decision by a full verbal notification; as an official in Grade A 2 he was also sent the minutes of the Commission's meeting in the course of which it was taken. By reason of these special circumstances and notwithstanding the absence of a written notification it must be admitted that the period for bringing an application started to run at the moment when the applicant had an effective and complete knowledge of the decision and that it therefore expired on 15 December 1969 at the latest. The principle of legal certainty militates against the notion that time for an application only starts to run as from the date when the party involved discovers an act adversely affecting him.

The defendant further points out that the first occasion on which the applicant asked for the annulment of the decision by which the Commission on 23 July 1969 decided provisionally to entrust the management of the Office for Publications to Mr Reichling with Mr Leclerc as assistant was at the time of the applicant's reply. This request is inadmissible for two reasons: it was not set out in the originating application and was not made within the period of three months beginning with the date on which the applicant received notice of the decision which he is contesting, the latter having been published in the Staff Courier of 28 August 1969; more specifically, as regards the request for annulment of Mr Reichling's appointment, this is also inadmissible by reason of the fact that the applicant does not invoke any ground for annulment in support thereof.

The *applicant*, after having taken note of the fact that the Commission does not raise any objection to the admissibility of his principal claim, points out that the decision of 23 July 1969 transferring him to the post of Principal Adviser in the Directorate-General for Personnel and Administration was not notified to him; the fact that it had been read to him obviously could not take the place of a notification, since an application cannot be brought against a decision the text of which the addressee is unable to produce.

In any event the applicant cannot see how the lateness of his application can be held against him. In fact, in itself, the decision in question did not cause any serious harm; not until February 1970 when he was refused appointment to any of the new directorates and retired did the decision of 23 July 1969 begin to affect him adversely.

B — *Substance*

1. The request for annulment of the decision to retire the applicant

The *applicant* argues that the Commission's decision of 11 February 1970 to retire him 'in the interests of the service' in which it is stated that it was not possible to assign him to another post corresponding to his category and grade should be annulled for several reasons:

(a) It was not taken in the interests of the service; the applicant who performed

the duties of Director of Publications of the EEC was replaced by Mr Leclerc who during the whole of his service with the Council had never dealt with problems arising in publication or in publishing.

(b) It is vitiated by misuse of powers since it was taken in order to satisfy Mr Leclerc who, owing to his own and his wife's political activities in a French département bordering on the Grand Duchy of Luxembourg, had a personal interest in obtaining a transfer from Brussels to Luxembourg.

(c) The Commission had maintained that it had been unable to keep the applicant in the post of Director of the Office for Publications since there was an absence of unanimity within the Management Committee in his favour yet, as soon as the applicant was no longer in service, the A 2 post with the Office was declared vacant as a post of Principal Adviser, to which the unanimity rule does not apply.

(d) The Commission did not use the necessary diligence in order to safeguard the applicant's legitimate career prospects. Since July 1969 the Commission had at least five opportunities to assign the applicant to a post of Director for which he had the necessary qualifications; in respect of some of these posts the applicant could have offered much special experience acquired in the service of the Community.

It appears that the Commission utilized the A 2 post which became available through the applicant's being retired, in order to give promotion to an official of Grade A 3; this mode of procedure has already been criticized by the Court in its judgment of 6 May 1969 in Case 17/68 (*Reinarz,* [1969] ECR 61). The Court has recognized the importance of an official's entitlement to career prospects within the framework of Article 4 of Regulation No 259/68, which grants the Commission an exceptionally wide discretion by requiring the administration to undertake an examination of the qualifications and circumstances of officials who must be considered for retirement or retention in office; these career prospects must be all the more safeguarded in a normal case of applying the Staff Regulations.

In the present case the Commission has only decided on the impossibility of assigning the applicant to another post on the basis of its own previous decisions of 23 July 1969 or on the basis of unfounded considerations.

As regards the former, the Commission ought, in order to discharge its responsibilities at the least to establish that it instructed its representative on the Management Committee of the Office to support the applicant's candidature for the post and that, faced with the opposition of certain institutions, it had attempted to change their attitude; in any event unanimity was not required in order to fill a post of Principal Adviser in the Office.

Besides, at the time of the reorganization in January 1970 of the Directorate-General for Personnel and Administration, the Commission, which in this field is fully competent to make its own decisions, could have re-established the applicant's position. However, it considered that 'the tasks entrusted to the various directorates as well as the number and unusual diversity of the staff to be controlled call for special skills' different from those of the applicant. This assessment was not given in good faith: in particular, it is contradicted by the applicant's previous work, it cannot be reconciled with the decision of 23 July 1969 to transfer the applicant and was not put forward at the time of the Commission's meetings concerned with the decision to retire him. Considerations of geographical allocation were in fact decisive: since two of the three new directorates went to officials of Italian nationality the applicant could not be appointed to the third.

The *defendant* in essence replies as follows:

(a) The applicant lost sight of the fact that the contested decision has nothing

whatever to do with filling the post of Director of the Office for Publications and therefore all the expositions, which in any event are wholly subjective, as regards his alleged ability to fill this post are irrelevant.

(b) Mr Leclerc is at present seconded to the Commission but remains Principal Adviser at the Council; this provisional assignment was not made for political reasons. Besides, the reasons which an official may have for preferring one place of work to another are not such as to support a charge of misuse of powers on the part of the Commission in deciding to retire the applicant.

(c) There can be no question of 'keeping' the applicant in the post of Director of the Office for Publications since he never exercised this function; furthermore his application for this post was not supported by the majority of the members of the Management Committee.

(d) As regards the five posts to which the applicant could have been appointed, it must be pointed out that, as regards the first post, the applicant, about whom no decision as to retirement was even yet being contemplated, did not apply for it and that as regards the four other posts of Director created within the framework of the reorganization of the Directorate-General for Personnel and Administration, there was an express finding that the applicant did not possess the skills required for them. In these circumstances the Commission had in the interests of the service been led to take the decision, in question in these proceedings, to retire the applicant; the alleged misuse of powers is in no way established.

As regards the Commission's having utilized the A 2 post, which became available through the decision to retire the applicant, to promote an official from Grade A 3 to Grade A 2, it must be said that the circumstances in which the official was retired in this case are quite different from those in the *Reinarz* case: in the present case geographical allocation played no part at all and the decision to retire the applicant did not result from a reduction in the number of posts. Moreover, to make the application of Article 50 of the Staff Regulations subject to the condition that the post which has become available shall not be filled by way of promotion would be equivalent to adding to this provision a condition of application not laid down by the Staff Regulations.

There is a fundamental difference between the application of Article 4 of Regulation No 259/68 or of Article 41 of the Staff Regulations, and the application of Article 50 of the Staff Regulations. The applicant's thesis that the Commission was under an obligation to undertake a comparative examination of his own skills and those of any candidates for vacant posts in the Directorate-General for Administration is not compatible with the characteristics of a decision to retire an official under Article 50. The latter provision confers discretionary powers on the competent authority in relation to officials of Grade A 1 and A 2; and the decision to retire an official does not require any external motivation.

The applicant's analysis of the decision to retire him is altogether too simple: this decision was in the first place brought about by the fact that for service reasons the post to which he was transferred could not be retained in being when the reorganization of the Directorate-General for Administration and Personnel rendered necessary the creation of a new post of Director, and this was only possible if the applicant's post was abolished.

The circumstances relied on by the applicant to support his allegation that the finding that it was not possible to assign him to another post was not made in good faith are not such as to prove, or even to render plausible, the alleged misuse of powers.

2. The claim for annulment of the decision to transfer the applicant

The *applicant* is of the opinion that the Commission's decision of 23 July 1969

transferring him to a post of Principal Adviser in the Directorate-General for Personnel and Administration must be annulled since, contrary to Article 25 of the Staff Regulations, no reason for this decision was communicated to him.
The *defendant* replies that since the case is concerned with a decision to transfer an official, based on the interests of the service, it did not have to state the reasons on which it was based.

3. The claim for damages

The *applicant* adheres to the view that the Commission was guilty of a wrongful act or omission and bears the responsibility for having by its equivocation and delays placed the applicant in an impossible position in so far as his career is concerned and for having caused him serious harm at an age when his reclassification has become practically impossible.
The material damage can be evaluated at the difference between the financial benefits which the applicant obtains and will obtain by the application of Article 42 of the former ECSC Staff Regulations and those he would have obtained and would obtain if he had continued in normal employment up to the age of sixty-five.
The applicant states that he renounces any claim to damages for non-material damage.
The *defendant* points out that the application for damages is only made as an alternative in the event of this application for annulment of the decision to retire him being rejected.
In that case it is difficult to see how this decision could constitute a wrongful act or omission.
In any event no wrongful act or omission can be established against the Commission and consequently the alleged material damage cannot be imputed to it.
Moreover the damage which an official affected by a measure of retirement in the interest of the service is deemed to suffer, is compensated by the benefit under Article 42 of the former ECSC Staff Regulations. The damage referred to by the applicant is not certain and cannot in any event under current conditions give rise to compensation.

Grounds of judgment

1 The application seeks in the first place the annulment of the decision taken by the Commission on 11 February 1970 under Article 50 of the Staff Regulations to retire the applicant in the interests of the service.

2 The applicant, who entered the service of the High Authority of the ECSC on 14 June 1954, held several posts within the European Coal and Steel Community and was established in Grade A 2 as from 1 January 1962.

3 Within the framework of the administrative restructuring which followed the merger of the executives, he was assigned on 28 March 1968 to the post of Director of Publications with the Directorate-General for Personnel and Administration of the Commission of the European Communities.

4 By decision of 23 July 1969 the Commission decided to discharge him from this post and to assign him as Principal Adviser to the Assistant Director-General for Personnel and Administration in Luxembourg.

5 In deliberations held on 14 January 1970 the Commission decided to retire him in the interests of the service under Article 50 of the Staff Regulations.

6 By letter of 20 January 1970, confirming a previous verbal notification, the Commission informed the applicant of this intention and asked him to make his views known before 26 January 1970.

7 After the applicant had made his comments by letter of 24 January 1970, the Commission on 11 February 1970 took the decision to retire the applicant in the interests of the service with effect from 1 March 1970, granting him the allowance and the pension laid down for such a case by the Staff Regulations.

8 Under the provisions of Article 50 of the Staff Regulations of Officials 'an official holding a post in Grades A 1 or A 2 may be retired in the interests of the service by decision of the appointing authority.

9 As a corollary to the discretion conferred on the institutions by Article 29 (2) as regards appointments at this level, the appointing authority enjoys wide discretionary powers in so far as retirement from the service and dismissal of officials belonging to these grades are concerned.

10 The Staff Regulations do not limit the reasons which may justify a retirement under Article 50, since these could lie in the objective requirements of the service as well as in the assessment of the officials' specific qualities in relation to such requirements.

11 The exercise of discretionary powers which are so widely defined nevertheless requires that the official concerning whom such a measure is contemplated should first have an opportunity of effectively defending his interests.

12 On this point it must first be said that the applicant who had given proof of a cooperative attitude at the time when he was transferred from the post of Director of Publications to that of Principal Adviser, to the point of accepting a decision the form of which was open to criticism, found himself, as a result of the Commission's letter of 20 January 1970, suddenly faced with the prospect of being retired at short notice.

13 By this letter he was asked to make his comments within a period which, taking into account the distance, amounted at the most to four days.

14 In his reply of 24 January, after having conveyed to the Commission that he found it difficult to deal effectively with the matter in the absence of more precise information as to the 'reasons of public interest' upon which the action

envisaged in respect of him was based, the applicant emphasized that a less precipitate course of action might possibly allow a favourable solution to be found for his case.

15 Moreover, in contrast to the letter of 20 January 1970, the purport of which was to suggest objective service reasons, it can be seen from the minutes of the Commission's meeting of 11 February 1970 that the decision to retire him was finally taken by reason of an assessment of the applicant's personal ability in relation to the requirements of certain possible postings.

16 It therefore appears that in giving him by its letter of 20 January 1970, the opportunity of making his views known, the Commission did not give him an opportunity of commenting on the factors which in the final analysis seem decisive.

17 Taking into account all the circumstances, in particular the applicant's record, his seniority and his age at the time of the contested decision, the procedure adopted by the Commission did not have regard to the elementary safeguards which must be given to an official in case of abolition of his post under Article 50 of the Staff Regulations.

18 The Commission's decision of 11 February 1970 to retire the applicant must therefore be annulled.

19 It is not therefore necessary to examine the applicant's other arguments or to rule on the alternative conclusions.

Costs

20 Under the first subparagraph Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

21 The defendant has failed in its submissions and must accordingly be ordered to pay the costs.

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 Staff Regulations of Officials, especially Articles 29 and 50;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Rules of Procedure;

THE COURT (Second Chamber)
hereby:

1. **Annuls the decision of 11 February 1970 by which the Commission of the European Communities retired the applicant;**

2. **Orders the Commission to pay the cost of the proceedings.**

Trabucchi Pescatore Kutscher

Delivered in open court in Luxembourg on 30 June 1971.

A. Trabucchi
President of the Second Chamber

A. Van Houtte
Registrar

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 9 JUNE 1971[1]

Mr President,
Members of the Court,

Mr Almini who had entered the service of the High Authority of the ECSC in 1954, performed the duties of Director of Personnel of that institution in Grade A 2 until 28 March 1968.
Consequent upon the 'merger' and the restructuring activities of the services necessitated thereby, Mr Almini was appointed Director of Publications in the Commission's Directorate-General for Personnel and Administration on 28 March 1968.
But at that same time the competent authorities—under, it must be said, somewhat confused conditions—were engaged on the establishment of an Office for Publications of the Communities the creation of which was envisaged by Article 8 of a decision of the representatives of the Governments of Member States, annexed to the Merger Treaty.
Their work resulted in a decision of 16 January 1969, to which I shall in due course return, whereby the Office for Official Publications of the Communities was organized.
But at this point one realizes that no arrangements had been made for getting together the staff of this new body.
It was in fact considered that the Director of the Office be an official in Grade A 2 but at that time no post in that grade was vacant.
Obviously, from that point of view it might have seemed simpler to appoint Mr Almini to the post as he was performing identical duties and was already established in Grade A 2.
But for reasons which are somewhat complex this was not the solution adopted by the Commission.
Acting upon a proposal of the Management Committee of the Office of 18 April 1969, the Commission decided on 23 July of that year:
(1) provisionally to entrust to Mr Reichling, the Assistant Director-General

1 — Translated from the French.