JUDGMENT OF THE COURT (SECOND CHAMBER)
5 APRIL 1973 [1]

Luigi Giordano
v Commission of the European Communities

Case 11/72

Proceedings — Non-contractual liability — Action for compensation — Time in which action brought — Period of limitation
(EEC Treaty, Articles 173 and 175; Statute of the EEC Court, Article 43)

In no circumstances can the application of Articles 173 and 175 of the EEC Treaty result in the period of limitation of five years laid down in the first sentence of Article 43 of the Statute of the Court of Justice of the EEC being reduced.

In Case 11/72

LUIGI GIORDANO, a former auxiliary servant of the Commission of the European Communities, represented by Pompeo Corso; of the Palermo Bar, and having chosen his address for service in Luxembourg at the residence of Mme. Magda Belleri, 12 rue de Bragance,

applicant,

versus

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser, Giorgio Pincherle, acting as agent, having chosen its address for service in Luxembourg at the office of its legal adviser, Emile Reuter, 4 boulevard Royal,

defendant,

Claim for damages

THE COURT (Second Chamber)

composed of: P. Pescatore (Rapporteur), President of Chamber, H. Kutscher and A. J. Mackenzie Stuart, judges,

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

gives the following

1 — Language of the Case: Italian.

JUDGMENT

Issues of fact and of law

I — Outline of facts

Luigi Giordano, after having undergone a course of training from 23 March 1964 to 22 October 1964, was, by contract dated 8 December 1964 engaged with the status of auxiliary servant (Category A, group III, class 1), as a scientific assistant at the Directorate-General of Transport, for the duration of one year commencing on 15 November 1964;

The said contract was renewed on various occasions by the Commission for periods of between 3 and 6 months;

By a notification on 23 March 1967, the Commission once more extended Mr. Giordano's contract and gave him notice that his duties would be terminated definitively on 30 June 1967;

Mr Giordano left the Commission's service on that date;

On 12 October 1968, Mr Giordano sought from the Commission the payment of an allowance for seniority, compensation for 'dismissal on improper grounds' and compensation for non-material damage.

This request was rejected in a letter from the President of the Commission on 21 January 1969;

Mr Giordano claims that in November 1968 he was on the point of entering the service of the Court of Justice to take up the post of Italian-speaking administrator in the Library and Research Division, and it appeared from a telegram which was addressed to him on 6 December 1968 by an official of the Court of Justice that he was not engaged by the Court because of information concerning him received from the Commission;

On 7 October 1970, Mr Giordano applied to the President of the Commission claiming compensation for the damage caused to him by the circumstances in which his 'dismissal' had occurred and by the part played by the Commission in the refusal of the Court of Justice to proceed with his appointment;

This request was rejected in a letter from the President of the Commission dated 9 March 1971;

By a letter of 10 February 1971, Mr Giordano, with his lawyer acting as intermediary, informed the Director-General of Administration of the Commission that the termination of his contract of employment concealed a dismissal for disciplinary reasons, whose true grounds were brought to light by the unfavourable information concerning him which had been transmitted to the Court of Justice, and asked the Director-General to re-examine his position;

The Commission did not comply with Mr Giordano's letter of 10 February 1971.

II — Procedure

Mr Giordano brought the present action for damages on 22 March 1972.

By a document filed on 26 April 1972, the Commission, applying Article 91 of the Rules of Procedure, asked the Court to pronounce on the admissibility of the action and to declare it inadmissible, without going into the merits.

The applicant, in his submissions filed on 29 May 1972, asked the Court to reject the plea of inadmissibility and to declare the action admissible and well-founded.

The Court (Second Chambre) of 7 June 1972, on the report of the Judge-Rapporteur and upon hearing the Advocate-General decided, by order dated 7 June 1972, to consider the objection at the same time as the merits. New time limits having been fixed for the proceedings, the written proceedings followed a regular course.

The Court (Second Chamber), on the report of the Judge-Rapporteur and upon hearing the Advocate-General, decided to begin the oral proceedings without any preparatory inquiries.

At the hearing on 22 February 1973, the applicant did not appear and the defendant left the matter to the wisdom of the Court.

The Advocate-General presented his opinion at the hearing on 15 March 1973.

III — Submissions of the parties

The *applicant* asks the Court

— to affirm the liability of the Commission and to order it to pay him the total salary which he was unable to receive from the Court of Justice from December 1968 until the date of the judgment in the case, or any other sum which the Court should think proper;

— to order the defendant to bear the costs and expenses of the action;

The *Commission* asks the Court

— to declare the action inadmissible or unfounded;

— to order the applicant to bear the costs.

IV — Pleas and arguments

The pleas and arguments of the parties can be summarized as follows:

A — Admissibility

The *Commission* is of the opinion that the applicant, by the subterfuge of an action for damages, is trying to obtain the judicial control of decisions or acts which are now beyond attack.

With regard to the submissions which are implicit or express in the action, the following observations must be made:

(a) To the extent that it refers to the decision of the Commission of 21 January 1969, rejecting the claim of the applicant dated 12 October 1968, the action is inadmissible by the reason of the expiry of the time limit laid down in Article 91 of the Staff Regulations.

(b) To the extent that it refers to the decision of the Commission of 9 March 1971, rejecting the claim of the applicant dated 7 October 1970, its inadmissibility results from the expiry of the time limits laid down in Article 91 of the Staff Regulations and in Article 43 of the Statute (EEC) of the Court.

(c) To the extent that it has exclusively as object an action for damages based on the non-contractual liability of the Commission, its inadmissibility results from the expiry of the time limits laid down by the third sentence of Article 43 of the Statute (EEC) of the Court. The grounds invoked in support of the action have all been advanced in the claim dated 10 February 1971; by reason of the implicit rejection of this claim, the action should have been brought within a period of 4 months.

(d) The previous claims of the applicant, dated respectively 7 October 1970 and 10 February 1971, had the same object as the action. Without doubt they interrupted the period of limitation of 5 years; but equally they had the effect that, according to the third sentence of Article 43 of the Statute (EEC) of the Court, the action should have been begun within the period of 2 months provided by Article 173 of the EEC Treaty, or within the period of 4

months provided by Article 175. That is obviously not the position in the case in issue.

The *aplicant* maintains that the Commission's plea is based on an ambiguity concerning the objects of his various claims.

On 12 October 1968, 7 October 1970 and 10 February 1971, he restricted himself to contesting the legality of his dismissal; the present action seeks compensation for the damage which the Commission has caused him by supplying the Court of Justice with unfavourable information and thereby preventing his appointment by this institution.

This difference of object is in particular confirmed by the fact that the 'quantum' of the action for damages is fixed by reference to the salary which the applicant would have been able to gain at the Court of Justice since December 1968 and not by reference to the salary which he has not received from the Commission since his dismissal (30 June 1967).

Moreover, the unfavourable information supplied to the Court of Justice by the Commission constitutes, in the claim of 10 February 1971, one of the factors establishing 'a posteriori' the disciplinary character of the dismissal, the annulment of which is the object ('petitum') of the claim itself. In the action, the unfavourable information is cited as the factor generating the damage, and the reference to the illegal dismissal only underlines its intentionally prejudicial character, the object ('petitum') of the request being solely compensation for the damage suffered.

Thus, the action has not been preceded by any 'prior application' within the meaning of Article 43 of the Statute (EEC) of the Court; the claims made prior to litigation were aimed at obtaining a re-examination of the act of dismissal and not at raising the question of the extra-contractual liability of the Commission. In the absence of an identity of object between the actions and the previous claims, it is the first sentence of Article 43 of the Statute (EEC) of the Court, prescribing a period of limitation of five years which applies to the case in issue. The action is therefore admissible.

B — Merits

The applicant maintains that the Commission, in application of the second paragraph of Article 215 of the EEC Treaty, is obliged to make good the damage he has suffered as a result of his illegal dismissal and the damage caused to his career.

(a) As for the question of fault, the applicant is of the opinion that, behind the inoffensive wording of the Commission's letter of 23 March 1967 which contains both the prolongation of his contract of service and notice of the definitive termination of his duties, is hidden a dismissal for disciplinary reasons, in respect of which the guarantees of defence offered by Article 76 of the Conditions of Employment of Other Servants have been evaded. The real grounds of this dismissal subsequently became manifestly apparent in the notification to the Court of Justice of adverse information.

Moreover, the Commission has prevented the applicant from being appointed by the Court by providing the latter, in relation to him, with unfavourable information, relating to facts which should have been the object of a debate open to both parties at the time of his dismissal. By notifying a prospective employer of facts which cannot be taken for granted — the party concerned not having been warned beforehand to prepare his defence, contrary to Article 76 of the Conditions of Employment of Other Servants — the Commission infringed the obligation of propriety which ought to govern social relationships.

This obligation is equally valid in relations between the Community institutions. It cannot be deduced from a matter of form — the institutional character or the legal personality of each institution — that such behaviour loses its unlawful character simply because of the fact that it concerns relations between two organs of the same legal person and not between two separate legal persons.

In reality, setting aside the fact that the Community institutions can be seen partially to have recognized in each other the status of legal persons, the important factor in the case in issue is not the relation between two employers in succession, but that which exists between the employer and his employee, this relation is governed by the principle 'alterum non laedere', which manifests itself in the prohibition on expressing unfavourable appraisal of the employee's personality or work.

In compliance with the general principles common to the laws of Member States and therefore to the rules of non-contractual liability, the burden of proof, to bring into play the liability of the public service, is concerned with the fact of damage rather than fault.

In the case in issue, the close relations between institutions allow one to suppose that unfavourable information with regard to the applicant was imparted outside normal administrative channels and without production of documents. On any hypothesis, the evidence produced in support of the action is sufficient to establish the illegal character of the Commission's behaviour.

One cannot ask more of a private individual in a legal dispute with the administration; the latter by the fact that it has sole disposition of official documents, is obliged to comply, on questions of proof, with rules which are stricter than those which the judge imposes on the private individual. In such cases the principle of the the burden of proof is modified; the burden of proof is not wholly incumbent on the applicant, who only has to set up prima facie evidence.

(b) As for the damage, the applicant maintains that the behaviour of the Commission has caused serious damage of a pecuniary nature, bearing in mind the difficulties which he has encountered in re-entering the national employment market, to such an extent that he is still unemployed today.

It is impossible for him to produce a certificate certifying his unemployment, since in Italy there exist no registers of unemployed intellectuals. The general rule must be applied whereby negative facts do not have to be proved; it is sufficient to assert them, subject to the possibility for the opposing party of adducing proof of the contrary positive fact.

(c) As for causality, the applicant considers that, even if the intention of the Court of Justice to appoint him had not been expressly dependant on a favourable opinion of the Commission, the unfavourable information supplied by the latter destroyed that intention; whatever may have been the other possible reasons for not proceeding with his appointment, information unfavourable to him sufficed by itself to prevent it.

In this area the principle must be applied whereby a finding that the damage is due to several concomitant causes is not sufficient to exclude the illegal nature of the tortious act, if the other causes are not sufficient by themselves to give rise to the damage.

Such proof has not been adduced by the Commission; on the contrary, the applicant has supplied proof of the unfavourable information, an adequate cause by itself to lead to his non-appointment. The existance of the relation of causality has thus been amply proved.

The *Commission* recalls that the applicant, in support of an action for damages on the basis of Article 215 (2) of the EEC Treaty, has to prove the

existence of three fundamental factors: fault, damage and the relation of causality between these two elements. None of these elements is established in the case in issue.

(a) As to 'fault', the applicant attempts to raise to the level of 'general principles common to the laws of all Member States' legal concepts which belong only to Italian administrative law and moreover are without relevance to the case in issue.

In order to make it liable, the behaviour of the administration, to the extent that it impinges on the legal rights of others, has to be against the law. In the case of an administrative act, the examination of the legality of the act constitutes one of the essential preliminaries to an action for damages and the principle of the burden of proof falling on the applicant remains unchanged. As for the allegation of 'fault' against the Commission, the applicant does not adduce any precise or relevant factor.

As for the complaint that the termination of his contract conceals a dismissal on disciplinary grounds, grounds evidenced by the communication to the Court of Justice of unfavourable information, it must be pointed out on the contrary that the Commission did not find any 'serious failure to fulfil the obligations' incumbent on the applicant 'committed intentionally or by negligence,' and did not convey to third parties any information capable of causing him harm in any manner whatsoever.

The particular nature of relations between the Community institutions makes it questionable whether the principle that an employer must refrain from any unfavourable appraisal with regard to an employee applies in the field of the Community public service. The court of Justice and the Commission are two institutions of the same Community; this relation, even if one accepts the applicant's argument, must, of itself, lead one to consider the complaint of illegal behaviour by the Commission as being without foundation.

Moreover, it is not possible to ascribe to the Commission events which occur outside the field in which it has a power of control. From the Court's case law, the Community can only be made liable for acts which are an indispensable extension of the functions of its institutions and which are performed by its services or servants and by virtue of a direct and internal relationship.

Even if, hypothetically, it were admitted that the Commission behaved illegally in supplying the Court with unfavourable information about the applicant, the latter's personal file and the pleadings must afford proof of a formal request for information on the part of the Court and a reply, still in official terms, from the Commission. There is nothing of the sort in the case in issue. Thus the Commission finds it impossible to supply the Court with any factor capable of facilitating the appraisal, on the basis of objective facts, of the events described by the applicant, for his part, the applicant, on whom the burden of proof falls in the first place, does not produce any evidence.

(b) Likewise, it is for the applicant to produce proof of the existence of damage.

Proof of total or partial unemployment is entirely lacking. In this respect, the applicant is content with a simple assertion, and does not produce the slightest indication of any damage whatever. One cannot require the Commission, on whom the burden of proof does not lie, to prove the absence of damage.

It must be admitted that the applicant would have been able, without the Commission's knowledge, to work full time during all the years when he asserts that he was unemployed, either by pursuing a professional occupation or by employment in the public or private sector.

(c) As for the relation of causality between fault and damage, an event such as the termination of the contract, foreseeable from the date when it was drawn up, cannot be connected, by a direct relation of causality, to possible unemployment in Italy.

Moreover, the applicant does not by any means establish that he was on the point of entering the service of the Court of Justice. Even if, hypothetically, the Commission had supplied favourable information concerning him, nothing proves that the Court would have proceeded with his appointment. This would have depended exclusively on the discretionary power of the institution. It is not possible to base an action for damages on a simple legitimate hope of being appointed; not having yet undergone any competitive test, the applicant cannot even show that he had such a hope.

Having no influence on the applicant's possible entry into office with another institution, even illegal behaviour on the part of the Commission could not, then, have caused him any damage.

As far as the Court is concerned, its decision not to proceed with his recruitment, to the extent to which it constitutes an autonomous expression of free will, is in no way directly related to the alleged unemployment of the applicant in Italy.

Grounds of judgment

1 The action, brought on the basis of the second paragraph of Article 215 of the EEC Treaty, seeks to establish the liability of the Community by reason of the circumstances under which the applicant after the non-renewal of his contract as an auxiliary agent, was unable to obtain a post which he solicited in the services of the Court of Justice, in consequence of unfavourable information forwarded by the Commission with regard to him.

By virtue of this, the applicant claims the total salary which he was unable to obtain from December 1968 — when his candidature was rejected by the Court of Justice — until the date when judgment is delivered by the Court, or any other sum which the Court thinks proper.

Admissibility

2 According to the Commission the action is inadmissible since it is in reality directed towards obtaining judicial control of decisions which are now beyond attack, namely the non-renewal of the applicant's contract and the rejection by the Commission of financial claims which he had made on this account.

3 The applicant for his part asserts that his claim relates to making good the damage resulting from the fact that he has not been appointed by the Court

of Justice because of damaging information supplied by the former employer who, 'not satisfied with having illegally broken the contract of employment,' has by his subsequent behaviour prevented the creation of a contract of employment with another Community institution.

He specifies that whilst the object of the claim is solely to make good the damage allegedly suffered, the intentionally injurious character of the alleged act is made apparent by the whole of the previous behaviour of the defendant 'including the illegal dismissal.'

4 The terms of the application, as specified in the observations made in reply to the interlocutory application of the Commission relating to the admissibility of the action, define the object of the claim as referring to the award of damages by reason of the Commission's behaviour subsequent to the expiry of the contract of employment.

On the other hand, not having contested in Court the legality of the cessation of his duties, the applicant cannot be allowed to describe such cessation as illegal, nor to base an argument on the circumstances in which it allegedly occurred.

Since that part of the argument cannot be taken into consideration, the plea of inadmissibility raised by the Commission is devoid of any object.

5 To the extent to which the action is concerned exclusively with liability properly so called, the Commission also bases its argument against the admissibility of the action on the expiry of the time limits laid down by Article 43 of the Statute (EEC) of the Court.

The applicant having already brought before the Commission, by requests dated respectively 7 October 1970 and 10 February 1971, claims in substance identical with those which are the object of the action, the time limit laid down by Article 43 of the Statute of the Court expired before the filing of the application.

6 Such plea in bar rests on an erroneous interpretation of Article 43 of the Statute.

By the first sentence of this Article, proceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto.

The second and third sentences of the same Article have reference exclusively to the interruption of the period of limitation thus laid down.

It is provided on this point that the period of limitation shall be interrupted either by the application brought before the Court, or by a preliminary request addressed to the relevant institution, it being however understood that, in such latter case, interruption only occurs if the request is followed by an application within the time limits determined by reference to Articles 173 and 175, depending on the case in issue.

7 Henceforth it appears that in no case can the application of these provisions have the effect of cutting down the five-year period of limitation laid down by the first sentence of Article 43 of the Statute.

The applicant having commenced his action within such period of limitation, the action is admissible.

Merits

8 With a view to establishing the basis for the liability of the Community, the applicant must in the first place be able to prove the existence of a fact creating the damage, which is attributable to the action of one of the institutions.

In this respect the applicant explains that he had a real chance of being appointed as an administrator in the 'Library and Research' Division of the Court of Justice, but that he was foiled by unfavourable information forwarded by the Commission on the subject of his former employment.

9 However he has been unable to adduce any proof whatever, either as to the reality of his chance of recruitment, or as to the information allegedly forwarded by the Commission.

A preparatory document drawn up by the departments of the Court on the subject of a possible training course for the party concerned, and put in evidence by the latter, cannot be considered as conclusive because of its purely internal and preparatory character.

10 In addition, the plaintiff has produced a telegraphic communication which emanated from an official of the Court's administration, letting him know

that his chances of obtaining a post deteriorated after 'enquiries made in Brussels'.

This communication, allusive and of a personal nature, does not however establish more than the existence of preliminary contacts or enquiries in relation to the party concerned with a view to his possible appointment.

11 The applicant has not produced, nor even offered to produce, any additional proof in support of his allegations.

Hence, the prospects of a post which he claims to have had, in the same way as the effect of allegedly unfavourable information on the part of the Commission on his supposed chances, must be considered as belonging to an area of pure conjecture.

12 Thus the action must be rejected inview of the applicant's failure to establish even the semblance of a fact capable of giving rise to liability on the part of the Community.

Costs

13 By Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

The applicant has failed in his pleas.

However, by Article 70 of the Rules of Procedure, the expenses incurred by the institutions in actions by Community servants shall be borne by the institutions.

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 Treaty establishing the European Economic Community, especially the second paragraph of Article 215;
Having regard to the Staff Regulations, especially Article 90 and 91;
Having regard to the Conditions of Employment of Other Servants, especially Article 73;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 43;
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 action;**
2. **Orders each of the parties to bear its own costs.**

Pescatore Kutscher Mackenzie Stuart

Delivered in open court in Luxembourg on 5 April 1973

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 15 MARCH 1973 [1]

Mr President,
Members of the Court,

I — The Facts

For three years Mr Luigi Giordano was employed in the Commission of the European Communities. After a probationary period from March to October 1964, he was engaged as a member of the auxiliary staff in Category A (Group III, Class I) for a period of one year from 15 November 1964, under a contract which was regularly renewed for periods of 3 to 6 months. He was allocated to the Directorate-General of Transport as a scientific assistant, and initially gave satisfaction there but, from October 1966, his standard of work and his general behaviour called for some reservations and were then judged to be clearly unsatisfactory by his superiors. On 23 March 1967 the Administration gave him notice that his duties would be terminated definitively on the following 30 June. His engagement terminated effectively on that date.

1 — Translated from the French.