

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 1971¹

*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.

of Personnel of the Commission, in addition to his other duties, the management of the Office, this being a solution which obviously circumvented the budgetary problem;

- (2) As it was fairly obvious that Mr Reichling, already burdened with numerous responsibilities and heavy duties, could devote no more than a small part of his time to his new tasks, the Commission decided to give him Mr Leclerc, as Principal Adviser in a Grade A 3 post as assistant;
- (3) Lastly, the Commission decided to appoint Mr Almini Principal Adviser to Mr Reichling in order to assist him not in his duties as Director of the Office for Publications but in those as Assistant Director of Personnel.

Some months later, at its 106th meeting on 14 January 1970, the Commission acting on the proposal of Mr Bodson, 'resolved to retire Mr Almini in the interests of the service under the provisions of Article 50 of the Staff Regulations'.

It instructed Mr Bodson to put the necessary procedure into operation and it was even laid down that this matter had to be settled by 21 January.

It proved impossible to adhere to this time-table but matters nevertheless moved quite fast since the Commission on 11 February decided to retire Mr Almini in the interests of the service, at the same time declaring vacant three posts in Grade A 2.

In the present application Mr Almini's principal and essential claim is that the Court should annul the decision to retire him and his alternative claim is that, in so far as may be necessary, the appointments of Messrs Reichling and Leclerc should be annulled and that he should be awarded damages.

Clearly it is the main conclusions directed against the decision to retire him, which must first be examined and which call for the longest explanation.

I

I think that the Court will have to accede to the applicant's submissions on this point, for the decision contested under the main head of claim seems vitiated by several illegalities or irregularities such as to justify its annulment.

1. I think that in the course of the procedure which resulted in his service being terminated Mr Almini was not afforded those safeguards the observance of which is one of the conditions of the legality of the measure finally adopted.

Unlike certain national regulations, the Staff Regulations in fact apply in principle even to officials occupying the highest posts in the service, that is to say, officials in Grades A 1 and A 2.

Nevertheless the Staff Regulations lay down some special provisions in relation to them, the most important of these being Article 29 (2), as regards recruitment and Article 50 as regards dismissal. This lastmentioned Article provides that officials in Grades A 1 and A 2 may be retired in the interests of the service and that such retirement shall not constitute a disciplinary measure. It also provides that if it is not possible to assign them to another post, such officials shall be dismissed and shall receive certain allowances.

Does this therefore mean that officials in Grades A 1 and A 2 do not for the purposes of Article 50 benefit from any kind of safeguard in connexion with their dismissal?

I do not think so; on the contrary I believe that under the general principles of law a measure as serious as retirement, when it is followed by dismissal, a measure which necessarily involves, at least partially, taking into account the individual concerned, implies that at the very least he must be warned of the measure contemplated and put in a position to submit his comments to the appointing authority.

Besides, this would also appear to be the Commission's view, as is shown by the manner in which the administrative pro-

cedure developed in this case.

Mr Almini was in fact warned of the Commission's intention to retire him; he was called upon to submit his comments and he complied with this request.

But in the circumstances of the case, was not this formality deprived of much of its value, in other words was Mr Almini able not only to make his observations but *effectively* to make such observations?

For two reasons I do not think that he was and each of these seems conclusive:

(a) The time given to Mr Almini to make his observations was clearly too short. By letter dated 20 January 1970 Mr Bodson asked him to make his observations by 26 January at the latest.

Even assuming that Mr Almini received this letter in Luxembourg by 21 January and also that he could have taken the risk of not replying until 25 January, instead of on 24 January as he did, it none the less remains a fact that Mr Almini had only four clear days to comment on a measure the purpose of which was, after sixteen years of service hitherto considered satisfactory, to deprive him of his post and to oblige him at the age of 47 to start 'job-hunting', to use current parlance.

This time-limit was clearly insufficient even if one takes into account the fact that on the previous Monday, that is to say on 19 January, Mr Almini had been verbally warned by an official from the Directorate for Personnel in Brussels that he would receive Mr Bodson's letter of 20 January relating to his retirement. Furthermore, in his reply to Mr Bodson Mr Almini pointed out that he considered a period of reflexion to be necessary.

(b) The excessive brevity of the period is not the only reason which leads me to consider that Mr Almini was not enabled *effectively* to make his observations.

In fact, the only reasons given to him as motivating the Commission's intention to retire him were on the one hand the rules relating to the appointment of

the Director of the Office for Publications and on the other hand the reorganization of Directorate-General IX.

In its decision the Commission however also refers to a quite different ground. There one reads in fact that the Commission 'finds that the tasks entrusted to the different directorates' (of the Directorate-General for Personnel and Administration) 'as well as the number and diversity of the staff to be controlled call for special skills which the Commission considers are different from those of Mr Almini'.

Mr Almini was never given an opportunity of presenting his comments on this point as he could have done in particular by calling on the evidence of his former superiors.

I therefore consider that on two grounds Mr Almini was deprived of the safeguards from which he should have benefited and that for this reason alone the contested decision must be annulled.

2. This it seems to me could also be done for a second reason.

According to the observations before the Court, the grounds for the contested decision were at least partly the Commission's inability to obtain in respect of Mr Almini's appointment as Director of the Office for Publications the assent of the Management Committee of that Office, an assent which according to Article 5 of the decision setting up the Office must be unanimous.

But for a reason of competence, which is therefore a matter of public policy, the Article 5 in question seems to me illegal. This 'decision' of 16 January 1969 which is in fact an agreement between the Presidents of the different institutions could certainly provide for the organization of the Office which it was intended to set up but it could not in my view amend the Staff Regulations of the Communities made in accordance with Article 24 of the Merger Treaty and entering into force on 4 March 1968.

An amendment of the Staff Regulations, requires in fact that

- on the one hand a proposal for amendment be submitted to the Staff Regulations Committee, which was not done in this case;
- on the other hand the amendment be decided on under the same conditions as the original text, that is to say by regulation of the Council acting on a proposal from the Commission, after consulting the Assembly and the Court of Justice.

Article 5 of the decision of 16 January 1969 amounts to a clear derogation from the provisions of the Staff Regulations and to a partial amendment of those regulations in so far as officials of the Office are concerned.

In fact the Staff Regulations provide that in respect of each post there shall only be one appointing authority.

The case before the Court shows very well the different consequences which this general provision of the Staff Regulations and the special provisions instituted by Article 5 of the decision of 16 January 1969 can have.

If in fact the general rule in the Staff Regulations had been applied in the present case and if the Commission is to be believed, Mr Almini would have been appointed since the Commission confirmed to the Court that he was its candidate and that only the impossibility of obtaining the necessary unanimity for him within the Management Committee prevented his appointment.

Admittedly, it will be said that the appointing authority—in the present case the Commission—may lay down certain conditions for exercising its powers.

This is perfectly true but these particular conditions may not go so far as to amount to a sharing of powers with a collegiate institution which is required to give its unanimous assent; the very example of Mr Almini shows the serious consequences which such a system may have for officials.

Whilst the rules laid down by Article 5 of the decision of 16 January 1969 are probably necessary for the efficient functioning of the Office they cannot, let me

repeat, in the light of the consequences which they may have for the officials, legally be made except by way of an amendment of the Staff Regulations in accordance with the requirements of form and substance which I have just mentioned.

I therefore consider that the Commission's decision which in part rests on an illegal provision by regulation must, for that reason also, be annulled.

3. In the applicant's view there finally remains a third ground for annulment.

In fact, only a few weeks after having retired Mr Almini, the Commission declared vacant an A 2 post as Principal Adviser in the Office for Publications. The applicant argues that this vacancy was created for no other purpose than the appointment of Mr Leclerc to this post.

If this fact were established then the principle in the *Reinarz* case, relied on by the applicant, could perhaps be applied. In fact by the Court's judgment in Case 55/70 of 12 May 1971 it was decided that in a case of reorganization of a service the concern to preserve posts for officials in that service must take precedence over considerations relating to the position of colleagues of the interested parties.

Admittedly, in the *Reinarz* judgment the issue was the application of measures taken consequent upon the 'merger' but for my part I would be tempted to suggest the same solution in relation to the application of Article 50.

Nevertheless, I would be very hesitant in the present state of affairs to suggest the acceptance of this ground for annulment, since the post declared vacant has so far never been filled, the reason apparently being that the responsible authorities wished to await the outcome of the present case before coming to a decision on the point.

II

Since there are at least two grounds which seem to lead to an annulment of the act contested in the main submission, I shall be quite brief on the other sub-

missions and arguments contained in the application.

In support of his arguments for annulment of the decision to retire him from his post, the applicant puts forward two further grounds in addition to those already examined:

1. He claims that he had the necessary experience and ability to fill one of the posts of director declared vacant and that it was wrong not to entrust him with one of these directorates. But as consistently appears from the case-law, the Court will only interfere with the assessment of an official's qualifications for a post if such assessment is based on materially inaccurate facts, which does not appear to be the case here.

2. According to the applicant the decision is vitiated by misuse of powers since the Commission only took its action in order to enable Mr Leclerc who was

until then employed in Brussels to find a post in Luxembourg.

Admittedly some doubts might be permissible but I do not think that misuse of powers can be shown from the documents on the file.

Finally, by way of alternative claim and in so far as necessary the applicant asked for the annulment of the appointments of Messrs Reichling and Leclerc, as well as of the decision of 28 March 1968 posting them to Directorate-General IX.

For my part I interpret these claims as made solely in case the Court considers that the legality of the decision retiring Mr Almini depends on the legality of the decisions to appoint Messrs Reichling and Leclerc or on the transfer decision.

Consequently if the Court adopts the solution which I have just suggested, these claims become pointless and so does the claim for damages.

I am therefore of the opinion that:

1. the decision dated 11 February 1970 by which the Commission, applying Article 50 of the Staff Regulations, withdrew Mr Almini from the post which he occupied should be annulled;
2. the Commission should be ordered to pay the costs.