Delivered in open court in Luxembourg on 15 July 1960.

Donner Delvaux Rossi
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Registrar

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President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 APRIL 1960[1]

Summary

Mr President,
Members of the Court,[2]

This is the first time since the entry into force of the Treaties of Rome on 1 January 1958 that the Court of Justice has had to consider applications brought against the European Economic Community. These applications concern questions related to the administrative organization of the Commission. In relation to this dispute, the Court will have to decide whether the dismissal of the four servants (the applicants) is open to criticism at law, and what are the consequences of that dismissal. The Court has joined these four applications for the purposes of the report for the hearing and of the opinion. On many points, the facts and the legal relationships on which these applications are based and the purposes of the applications are identical. I shall point out the special features presented by each of

1 – Translated from the German.
2 – This opinion also covers Case 44/59

them. The very full report of the Judge-Rapporteur, to which I may expressly refer, will enable me to be very brief in setting out the facts.

I — Introduction

1. *Facts*

The applicants were employed in the Language Service of the Commission of the European Communities (EEC). They entered the service at different times during the year 1958, the applicant Peuvrier on 23 June, the applicant Fiddelaar on 1 September, the applicant Von Lachmüller on 13 September and the applicant Ehrhardt on 8 October. As appears from the file, three of the applicants (Fiddelaar, Von Lachmüller and Ehrhardt) had previously taken part in a competition held for the drawing up of a list of suitable candidates for the Communities, and they were informed of the results of the competition in December 1958. Two of the applicants at least (Von Lachmüller and Ehrhardt) took 'épreuves écrites' (written examinations) in Brussels before entering the service. All these applicants have in common the fact that the conditions expressly agreed between them and the Commission, in writing or orally, were not fully defined. Written agreements exist only in two cases: the applicant Fiddelaar received a letter from the Director of the Personnel Department dated 1 September 1958 in which the Commission declared that it was willing to employ him 'à titre temporaire et provisoire en qualité d'expert' (on a temporary and provisional basis as an expert) and to pay him a daily allowance of BF 950. Fiddelaar was also entitled to payment of his return fares from his place of origin to Brussels. The applicant Peuvrier was requested by telegram of 19 June to state whether he could take up duty as a translator on 23 June as an auxiliary to begin with. After each applicant entered the service, the Personnel Department informed the other servants of the Commission of his or her duties and scale of remuneration. Three of them were thus described as 'expert' (expert) and entitled to a daily allowance of FB 950. The applicant Peuvrier was described as 'traducteur auxilaire' (auxiliary translator) with a 'traitement de base' (basic salary) of FB 144600 per annum. There is a letter dated 13 September 1958 on the file of the applicant Von Lachmüller in whch she asks for her emoluments to be paid in cash. In that letter she is also described as an 'expert'. The applicants Von Lachmüller, Fiddelaar and Erhardt regularly received advances and, for that purpose, the Language Service issued statements at fairly frequent intervals that they were still employed as experts in the Language Service. The applicant Peuvrier has asserted, and has not been contradicted, that starting with the month of January 1959 he received regular monthly payments of salary. The applicants Fiddelaar and Ehrhardt were issued with 'cartes d'identité (identity cards) by the Commission and on them they were described as translators. The applicant Peuvrier held 'permis de séjour' (residence permit) valid until 29 June 1962, issued by the Belgian authorities, upon the Commission's request, on which his 'qualité' (description) was given as 'fonctionnaire de la Commission Economique Européenne' (official of the European Economic Commission) and 'dispensé de l'inscription au registre des étrangers' (exempt from entry on the aliens register). During their period of residence in Brussels, the applicants Ehrhardt and Peuvrier were permitted to import a car duty-free on the basis of declarations of 13 May and 10 February 1959 respectively made by the Director of the Commission's Internal Services Branch, to the effect that the applicants were 'fonctionnaires à la CEE' (officials of the EEC). On 22 October 1958, the Director of the Commission's Personnel Department gave the applicant Fiddelaar, in order that he might obtain an exemption from customs duties, a certificate to the effect that he was employed as a translator at the Commission, and that on 16 October he had moved into accommodation in Brussels to do the work for which he had been engaged. At the Commission's request, the applicant Peuvrier underwent a medical examination on 30 June 1958. Some time after their entry into the service, the applicants Fiddelaar and Ehrhardt were requested, by letters of 26 January and 12 February 1959 respectively, to undergo a medical examination as to their fitness (visite médi-

cale d'aptitude). The applicant Von Lachmüller received an identical request on 8 September 1959, that is to say *after* she had received notice of the decision dismissing her.

After the translation service of the Commission had been put under a new director at the beginning of 1959, this Director took it upon himself to examine the work of the 'auxiliaires' (auxiliaries) and the 'experts' (experts) of the Translation Department (according to information supplied by the Commission, they were 29, all taken on in 1958) and to determine which of them might be considered for employment on the terms of the Commission's 'lettres d'engagement' (letters of engagement). The head of the Language Service made several reports with his proposals on the results of his investigations. Upon completing his examination, he came to the conclusion that the further services of the applicants could be dispensed with. As a result the latter received identical letters whereby the Directorate-General for Administration informed them that their employment with the Commission as 'expert' or 'auxiliaire' would cease upon a given date. The termination of their employment was subsequently postponed several times by letter and by telegram. The dates concerning each of them are as follows:

Von Lachmüller:

Letter of 25 July 1959, termination of service: 31 August 1959; letter of 18 August 1959, termination of service: 30 September 1959; telegram of 26 September 1959, confirmed by letter of 29 September, termination of service: 31 October 1959.

Fiddelaar:

Letter of 24 July 1959, termination of service: 31 August 1959; letter of 14 August 1959, termination of service: 30 September 1959; telegram of 26 September, confirmed by letter of 29 September 1959, termination of service: 31 October 1959.

Peuvrier:

Letter of 24 July, (communicated on 28 July 1959), termination of service: 31 August 1959; letter of 18 August 1959, termination of service: 30 September 1959; telegram of 26 September, confirmed by letter of 29 September, termination of service: 31 October 1959.

Ehrhardt:

Letter of 18 August 1959, termination of service: 31 October 1959; telegram of 26 September 1959, confirmed by letter of 29 September 1959, termination of service: 30 November 1959.

These letters of dismissal form the basis of the present applications.

I shall not repeat the very comprehensive conclusions, and I shall confine myself to the essential elements thereof.

2. *Conclusions*

The applicants claim in the first place that the decisions of dismissal should be *annulled*, with the exception of the applicant Peuvrier, who, in his reply, withdrew his claim for annulment. The applicants Von Lachmüller and Ehrhardt claim in addition that the Court should *rule* that there exists as between them and the Commission a contract under public law which was concluded for an indefinite period and which may only be terminated under certain conditions. The applicant Fiddelaar claims that the Court should rule that he was provisionally engaged as a translator with the Commission and placed in Grade L/C 1 of the Language Service. The applicant Peuvrier claims that the Commission should be ordered to pay him amounts, of which he gives full details, in *reparation for the loss* which he has incurred as a result of the irregular dismissal. In addition to their claims for annulment and for rulings mentioned above, the other three applicants have put forward the same conclusions *as an alternative*. In these they allege a wrongful act on the part of the Commission as the reason why it is under an obligation to make good the loss, but add that the said obligation would exist even if there were no wrongful act.

The parties have set out a thorough exposition of their differing views concerning the rules of law applicable, in reliance on the Treaty establishing the European Economic Community, the Staff Regulations and the general conditions of service of the European Coal and Steel Community, the decisions of the EEC Commission and the decisions of the Council of Ministers, the case-law of the Court in staff cases, Belgian labour law as being the *jus loci* and the general principles of law in force in the Member States. In order to ascertain which is the law applicable from the point of view of procedure and from the point of view of substance, it is necessary to examine and define the powers and obligations of the Commission and the legal relationship between it and the applicants.

As regards the Treaty, it is necessary to consider Articles 154, 178, 179, 212 and 246, and as regards the Staff Regulations, Article 58.

II — Admissibility of the applications

1. *Jurisdiction of the Court*

According to Article 179 of the EEC Treaty, the Court has jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment. At the time when the applications were lodged, neither the Staff Regulations nor the Conditions of Employment applicable to servants of the EEC had been laid down. During the course of the proceedings, the Commission produced a 'Note de Service No 1' (Staff Memorandum No 1) of 18 December 1958 in which the following appears:

'Conformément à la *pratique actuellement* en vigeur et consistant, à considérer le Statut du Personnel et le Règlement général de la CECA comme déterminants pour la réglementation des questions de personnel de la CEE jusqu'à ce que celle-ci soit pourvue de son propre statut ....'

('In accordance with *practice at present* in force, which consists in deeming that the Staff Regulations and General Conditions of the ECSC govern staff matters relating to the EEC until the latter has its own Staff Regulations ...').

This communication of the administration is not enough to support the proposition that the Commission decided to apply the Staff Regulations of the ECSC to its servants and declared, accordingly, that Article 58 of the said Staff Regulations applied. According to Article 212 of the EEC Treaty, it is for the Council to draw up, in collaboration with the Commission, the Staff Regulations of Officials and the Conditions of Employment of other servants of the Community. Article 246 (3) provides that until the Staff Regulations and the Conditions of Employment have been laid down, the Commission shall recruit the staff it needs under contracts of limited duration. Moreover, the Staff Regulations of the ECSC do not set out the particular provisions concerning staff disputes mentioned in Article 179 of the EEC Treaty, and Article 58 of those Regulations does not offer any more protection than does Article 179 of the EEC Treaty.

However, Article 179 of the EEC Treaty does not preclude applications brought by staff prior to the promulgation of Staff Regulations. So long as there are no particular procedural rules governing these disputes—which could perhaps be different from the general rules of procedure in force—staff cases can be governed at law by the general provisions. Thus Article 179 is a provision which is directly applicable. A situation is thus avoided in which the legal protection afforded by the Court of Justice of the Communities would be discarded, at the very time when the setting up and organization of the new Communities gives rise to special problems, in favour of referring the interested parties to their national courts, a procedure which could involve the risk of there being no uniform legal protection or of sterile conflicts over jurisdiction.

The question arises whether staff cases, whch have some characteristics in common with applications for annulment under

general administrative law, can, in the absence of special rules, be based on Article 173 of the Treaty. According to that Article, any natural person may institute proceedings against a decision addressed to that person on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. The wording of that provision clearly shows that the proceedings must be instituted against a *decision* of the Commission, that is to say, against a unilateral administrative measure. Such measures are conceivable in the field of law appertaining to officials, particularly in certain situations involving the exercise of power by a unilateral measure (establishment of an official) on the part of the authority. We have seen that until the entry into force of the Staff Regulations, it is the law of contract which applies, which means that the institutions can conclude contracts of service. The measures whereby these service relationships are regulated, particularly dismissals, are thus based on contractual powers, and do not constitute decisions under administrative law for the purposes of Article 173.[1] Thus the the jurisdiction of the Court is not based on Article 173.

2. *Jurisdiction to hear applications for damages*

As regards applications for damages, a general jurisdiction of the Court results from Article 178 which reads:

'The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 215.'

It should be noted that the second paragraph of Article 215 does not cover *contractual* liability (cf. first paragraph of Article 215), but only the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties. It follows that in the absence of the arbitration clause mentioned in Article 181 no claims to damages based on contracts under private law may be raised before the Court. Nevertheless, as regards staff cases, the jurisdiction of the Court to entertain applications for damages arises generally under Article 179. Furthermore, a reading of Articles 176 and 178 of the EEC Treaty shows that in order to establish a claim that the Community is liable for a wrongful act or omission it is not necessary for the Court to have previously annulled the decision giving rise to the loss. This point could be important in the case of the applicant Peuvrier who has withdrawn his conclusion claiming annulment and restricted himself to putting forward a claim for damages.

From the point of view of the jurisdiction of the Court, I would not hesitate to accept the present applications.

3. *Observance of the time-limit*

The applications reached the Court on 24 September 1959 (Von Lachmüller and Fiddelaar), 28 September 1959 (Peuvrier) and 19 October 1959 (Ehrhardt). Neither the Treaty establishing the European Economic Community nor the Statute of the Court, nor the Rules of Procedure of the Court lay down any time-limits within which proceedings in staff cases must be instituted. It follows either that there are no time-limits for applications by Community servants so long as the Staff Regulations have not been adopted, or that the usual time-limit of two months under the third paragraph of Article 173 must be assumed to apply to such applications in so far as they are similar to applications for annulment. Even in the latter case the applications have been instituted within due time as appears from a comparison of the relevant dates.

III — Are the applications well-founded?

After these remarks on the jurisdiction of the Court and on admissibility, let me examine whether the applications are well founded, that is to say whether the Commission's decisions of dismissal are valid at

1 — Cf. de Laubadère, Contrats administratifs, 1956, T.III, p. 309 *et seq.*

law and whether the applicants have a right to damages.

This examination requires some observations on the legal nature of the relationship existing between the applicants and the Commission.

In the first place, it is necessary to discover whether that relationship falls under private or public law. The answer to this question is rendered difficult by the gaps in what was expressly agreed in the contracts of service and by the vagueness of other factors for approaching the problem. The description of the applicants' posts (expert, auxiliare) (expert, auxiliary) in the written or oral agreements cannot alone be decisive in determining their nature. What matters above all is how the service relationship really operated at the time and how, generally speaking, the Language Service was then organized.

We know that as regards the institutions of the ECSC, for which Staff Regulations have been in force since July 1956, the servants on the permanent strength of the Language Service are established officials within the meaning of Article 2 (2) of the said regulations. The reasons for their being so treated are obvious: a supra-national institution, in which the six Member States have four different official languages, can only function if it has a number of translators who can ensure proper communication in the running of the services and the publication of official decisions in all the official languages. The difficult task of drafting official texts which are published in the official languages is of prime importance in an institution in which the decision-making departments do not, in the nature of things, have a perfect mastery of all the official languages. The translation service thus forms a necessary component of such an organization. Moreover, as translators frequently work on confidential texts, their establishment is a prerequisite to the smooth running of the service. This does not mean that one cannot—and the practice of the institutions of the ECSC is evidence of this—also have recourse to auxiliaries for particularly long or urgent tasks. This is why the table which forms part of the conditions of engagement for 'auxiliaires' (auxiliaries) in the ECSC includes the functions of translator and of reviser. But from the point of view of the organization, they constitute an exception. The organization of the services of the Commission was confronted with two difficulties: the absence of Staff Regulations and the fact that it was impossible to foresee what staff would be ultimately needed. This is why a certain amount of improvisation was decided on. More particularly as regards the Translation Department, after a small number of translators (nine) had been appointed at the beginning of the year 1958, a large number of experts and auxiliaries (the file gives the figure of 29) were taken on thereafter. But from the beginning it was clear that these 'experts' (experts) and 'auxiliaires' (auxiliaries) were not really intended to be auxiliaries, over and above the permanent strength. They were integrated into the work system like the other servants of the Language Service, and they did the current work. They also had to keep regular hours. These facts alone preclude the existence of a contract as an expert. When, in order to organize its services on a provisional basis, an administration takes on a considerable number of translators to perform duties normally undertaken by established officials, it may be supposed that the relationship between those servants and the employer is a relationship under public law, regardless of how they are officially described in their conditions of employment. It cannot be accepted that the normal functioning of an essential service of an international administration is performed almost entirely or to a large extent by employees under private law, all the more so when, from the beginning, there is no difference in the services rendered and the tasks allotted. There are some signs that in reality the defendant shares this view. Thus the file of the applicant Fiddelaar contains a letter from a head of department of the Commission of 8 July 1959, which asserts that the position of the 'expert' (expert) Fiddelaar must be regarded as largely artificial and that it can only be explained by the technical administrative difficulties during the period of setting up the organization. Moreover, the defendant has not put forward the argument that in the case of the applicant

Peuvrier, who was taken on as an 'auxiliaire' (auxiliary), the application is inadmissible because according to Article 10 of the Conditions of Engagement of Auxiliary Staff, an arbitration committee has jurisdiction to settle disputes. From all this, I deduce that, despite the manner in which they were described, the relationship between the applicants and the Commission was a contractual relationship under public law.

The applicants take the view that the unilateral termination of that relationship is irregular, and they therefore claim, as their first conclusion, that the Commission's decisions of dismissal should be annulled. As regards this, the following questions arise:

(a) Was a termination of the service relationship permissible?
(b) Should reasons be stated for the decisions of dismissal?
(c) Were reasonable periods of notice given?

(a) Permissibility of the notice

To answer the first question, it is necessary to examine whether the relationship in question was of a secure nature which totally precluded any dismissal or which only permitted it within narrow limits and on certain definite conditions.

I shall start with Article 246 of the EEC Treaty, part of which reads:

'Until the Staff Regulations of Officials and the Conditions of Employment of other servants of the Community provided for in Article 212 have been laid down, each institution shall recruit the staff it needs and to this end conclude contracts of limited duration.

Each institution shall examine together with the Council any question concerning the number, remuneration and distribution of posts.'

That provision gives the institutions of the EEC much less freedom of action to organize their services than do the corresponding provisions of the Convention on the Transitional Provisions of the ECSC Treaty, Article 7 of which simply speaks of contracts and not of contracts *of limited* duration. It may be thought that the narrow terms in Article 246 were chosen so that during the period of setting up their organization, the institutions did not have to tie their hands and were given the opportunity to organize their staff as they thought fit, in the way best suited to their particular needs. If the institutions exceeded these limits when they concluded the necessary contracts, they acted in infringement of the Treaty. Therefore the practice noted in Staff Memorandum No 1, and consisting in deeming the Staff Regulations of the ECSC to govern staff matters appertaining to the EEC cannot have the effect of applying the provisions of those Staff Regulations concerning the appointment of permanent staff in the new Communities. During the proceedings, the practices of the Commission concerning its organization have been described in detail. Mention has thus been made of the decision of the Commission of 21 May 1958, providing for the establishment of a detailed list of posts and stressing the provisional character of appointments. We have learned that the majority of the servants of the Commission are employed on the basis of so-called 'lettres d'engagement' (letters of engagement). These letters which, in principle, are also valid for the Language Service, contain the following clause:

'J'attire d'autre part votre attention sur le fact que dans la phase actuelle de l'organisation de la Communauté, le présent engagement ne peut avoir qu'un caractere provisoire. Il comporte la possibilité d'être résilié de part et d'autre à tout moment et sous préavis d'un mois.

Il sera mis fin dès que possible à cette situation par la conclusion des contrats de durée limitée.'

('Furthermore, I draw your attention to the fact that, at the present stage of the organization of the Community, this engagement can only be of a provisional character. It may be terminated by either party at any time upon one month's notice.

As soon as it is possible, this situation will be brought to an end by the conclusion of contracts of limited duration.')

In the mind of the Commission, therefore, those letters constitute a stage prior to the contracts of limited duration laid down by Article 246 (3), and thus they cannot bind the Commission any more than the said contracts.

It is in the light of the development of the organization described above that the contracts of the applicants must be examined. Since the legal content of the said contracts is extremely slender, they must be interpreted with regard to the evidence as to the will of the parties and to all the circumstances known to the parties when they were made. I have already said that the description of the applicants as 'experts' (experts) or 'auxiliaires' (auxiliaries) in these contracts does not suffice to determine the nature of the contracts. They do not contain any limit as to time, contrary to the usual practice concerning contracts for the employment of 'experts' or 'auxiliaires'. Nor does any limit as to time result from the nature of the work allotted to the applicants, because, as is not denied, they were constantly used as part of the normal work system, and they were not taken on for clearly specified tasks. Moreover, these contracts were concluded at a time when it was not yet possible to foresee what staff would be ultimately needed in the Language Service. Thus they constituted a stage prior to the 'lettres d'engagement' (letters of engagement). The result is that these contracts could not confer any stronger guarantee of a permanent post, or any right to security of tenure. Like the other 'auxiliaires' and 'experts' of the Language Service, the applicants could simply hope that their names would be duly taken into consideration when the permanent staff of the translation service was chosen, but could not expect to receive a definite and unequivocal offer of a post. It was thus the special situation in which the recruiting authority was placed that gave the special character to the contracts of employment: employment for an indefinite period, but on a temporary basis, with only the right, after a reasonable trial period and upon completion of the plans for setting up the organization, to be informed of what their fate under the said conditions of employment was to be, either by being dismissed or by being kept on by way of a 'lettre d'engagement'. It must thus be considered that the contracts contained the tacit reservation, known to everybody concerned, to the effect that the administration had the power, within the framework of the Treaty, to determine its ultimate organization freely, taking into account future decisions of the Council. This finding is valid both for 'experts' and for 'auxiliaires'.

This interpretation of the employment relationship is not affected by the arguments of the applicants: the making out of an identity card on which the holder is described as a translator, authorization to import a car and furniture duty-free, and order to undergo a medical examination. Apart from the fact that these measures are doubtless partly due to certain defects of organization and to a failure of coordination in a large institution which was only just getting under way, the interested parties knew that the initial situation, created by their recruitment, would only be altered by the sending of a letter of engagement emanating from the appointing authority, and not by the description of their duties in official identity cards or by other measures on the part of the administration. There is, on the file of the applicant Von Lachmüller, a letter of 26 May 1959 from which it appears that at that time she was still well aware that her position was provisional and uncertain.

So I think that the special features of the defendant's period of organization gave it, in principle, the right to put an end to employment relationships entered into on an indefinite but provisional basis at the end of that period. That right corresponds to the usual power of an employer to terminate a contract of indefinite duration under civil law, public law and labour law.

Without throwing doubt on the soundness of the case-law of the Court of the ECSC concerning the rights of those who were servants of that Community prior to the promulgation of the Staff Regulations thereof,

whereby their rights included a reasonable expectation of permanent employment, no reliance may be placed on that case-law in the present cases. The differences in the actual situation of the applicants are obvious. But above all, according to the system established by the EEC Treaty, the existence of such an expectation is manifestly precluded on principle, even for servants who have been taken on prior to the entry into force of the Staff Regulations under Article 246 of the EEC Treaty.

(b) Forfeiture of the right to dismiss

However, it must not be forgotten that the ordinary right to dismiss may be forfeited in certain circumstances. Dismissal must not be contrary to the principle of good faith or to what is fair and reasonable.[1] Moreover, dismissal is not permissible when it has obviously not occurred in the interests of the service, but for other reasons disadvantageous to the servant. In this respect, it is necessary to examine whether the Commission's decision of dismissal infringed certain principles of law, which would be grounds for annulling the notice.

During the written procedure, the Commission produced notes on the ability of the 'experts' and 'auxiliaires' of the Language Service, drawn up by the head of that service. It appears from those notes that the competence of the different translators was examined on the basis of draft translations and assessments by the revisers. On the basis of these notes the translators were listed in order of merit, and the applicants Von Lachmüller, Ehrhardt and Peuvrier came bottom of the list for their national group. It would not appear that this assessment of ability and work done was vitiated by any irregularity.

However, the assessment on the applicant Fiddelaar and certain details which clearly influenced the decision concerning this servant deserve special examination. It appears from the applicant's file that on 15 October 1958 the head of the Language Service evinced the intention to keep this applicant as a permanent translator. In the first note of January 1959, and in a note by the revisers of 6 February 1959, his abilities and his output received a more favourable assessment than did those of another Dutch translator. The applicant Fiddelaar has alleged, without being contradicted, that the said Dutch translator, who was taken on after him in January or in February 1959, was also placed below him in the competition at Ammersfoort, and that he is still in the service of the Commission as a translator. A note from the head of the Language Service of 25 May 1959 includes as a reason for his proposal that the applicant Fiddelaar be dismissed for the publication of an article in a newspaper. Part of the note read:

'En publiant le fameux article ..... il a fait preuve d'un manque inquiétant de bon sens et de loyauté qui fait craindre d'autres surprises désagréables.'

'In publishing the notorious article ..... he displays a disturbing lack of good sense and of loyalty which gives ground for fearing other unpleasant surprises.'

We do not know what was in that article. It has not been asserted that it was the applicant Fiddelaar who wrote it or that he instigated the drafting and publishing of it and that he was thus responsible for its being published. Nor has the Commission indicated in what way the author of that publication has, in its opinion, acted counter to the interests of the Community and caused it harm. Finally, we do not know whether the applicant Fiddelaar was heard on this accusation in the note on his abilities, nor de we know whether he was given an opportunity to explain and justify himself.

The abovementioned note also says that the servant Fiddelaar produced mediocre work, not through lack of knowledge or ability, but through not trying. That assessment is in contradiction to several earlier assessments. There is nothing in the written or in the oral procedure to suggest that a warning or a gentle hint would not have spurred the applicant on to putting his abilities and his

1 – Cf. Hueck–Nipperdey, Lehrbuch des Arbeitsrechts, 1959, T.I, pp. 499, 504 *et seq.*

knowledge to better use. Finally, in this note, there is the surmise that Fiddelaar might have other unpleasant surprises in store. But the note is not based on any recognizable objective facts, which alone are acceptable as a basis for assessing the efficiency and conduct of a servant.

The employer must also, in its decision, take the social factors into account, such as family circumstances, age; nor must it fail to take cognizance of the fact that the applicant has, to the knowledge of the authority, taken an apartment in Brussels for himself and for his family, that he has moved all his furniture there from his country of origin, and that he has lived with his wife and children at his place of work in the evident intention of staying there.

These circumstances would suggest that the dismissal of the applicant Fiddelaar was not decided upon in the interests of the service or at least not primarily in those interests, and that it must be considered as a disguised disciplinary measure for having published a newspaper article. Where a public servant behaves in a way which is contrary to the interests of the service, the employer may take disciplinary measures, but he must first give the applicant an opportunity of explaining himself, in accordance with the proper procedure. My finding is that in this case the applicant was not heard on the facts held against him. But if—and we have no proof in this—the abilities and the efficiency of the applicant were greater than those of a colleague who has remained in the service, it may be asked whether a dismissal which occurred in those circumstances was not improper and contrary to good faith. I have already said that even the ordinary right to dismiss, the exercise of which is at the discretion of the employer, is subject to certain limits. I think that in the case of the applicant Fiddelaar those limits were exceeded. Therefore his dismissal must be declared irregular for infringement of generally accepted principles.

If the Court were not to share this view, it would, faced with the applicant's detailed assertions and offers of proof, have to undertake inquiries under Article 45 of the Rules of Procedure. Thus it would be necessary, *inter alia,* to examine the assertion that it was no secret that his dismissal was in some way due to the publication of a newspaper article being attributed to him. For that purpose it would be necessary to hear the servants of the Commission mentioned in the offers of proof. On this point, I refer to the application, pages 1 and 3, and to the reply, page 2 and especially page 20.

(c) Formal requirements for dismissal

The applicants allege, as to form, that they were only informed of the date when their employment was to terminate and that they were not given any reason for this, for example unsuitability for the translation service or the abolition of translators' posts. This complaint is of no relevance to the applicant Fiddelaar if my observations concerning the regularity of his dismissal are followed.

The Commission is of the opinion that the provisional character of the employment of the applicants gave it authority to terminate that employment at any time at its *discretion.* There was no infringement of essential procedural requirements because the exercise of the right to dismiss did not depend on particular requirements subject to review by the Court, and accordingly it was not necessary to state reasons for the same.

Article 190 of the EEC Treaty provides that decisions of the Commission shall state the reasons on which they are based. But that provision only applies to administrative decisions properly so-called and not to legal measures taken in the exercise of contractual rights.

Therefore the complaint as to infringement of procedural requirements is unfounded.

(d) Calculation of the period of notice

Finally, some remarks must be made on the calculation of the period of notice, which is of some importance, in the case of the applicants Von Lachmüller, Peuvrier and Ehrhardt. Here again, there is no express

provision or stipulation. We have therefore, to fall back on applying general principles and, maybe by analogy, from the provisions of the law of the ECSC.

In my exposition of the facts, I have stated the dates of the letters of dismissal and of final departure. In my opinion, it is not the date stated in the first letters of dismissal that is decisive; it is also necessary to take the later postponements into account. But it is necessary to consider whether the period which elapsed between notification of the letter of dismissal and final departure was too short. In any case that period exceeded three months (25 July to 31 October; 24 July to 31 October; 18 August to 30 November). Taking into account the effective length of service, the *a priori* manifestly provisional character of the employment, the remuneration, the reasonable chances of being taken on in another service, and finally the provisions on dismissal applicable to 'auxiliaires', (auxiliaries) that period cannot be considered as unreasonable.

From this point of view also, there are no grounds for declaring the dismissal of no effect or for altering the period of notice.

IV – Other conclusions

There remain the conclusions claiming *rulings* and *damages*.

(a) Applications for rulings

My remarks on dismissal have disposed of the conclusion claiming a ruling that the applicants Von Lachmüller and Ehrhardt were taken on as translators, that the contract of employment under public law was concluded for an indefinite period, and that therefore it can only be terminated on certain specific grounds. In addition to his conclusions claiming annulment, the applicant Fiddelaar claims that the Court should rule that he was appointed on a provisional basis (the application says: appointed on definitively) as an official in the Language Service in Grade L/C 1. That calls for the following remark: if the Court were to declare that the decision of dismissal was irrregular, it would find *ipso facto* that the applicant Fiddelaar could not be dismissed from the Language Service of the Commission and that his situation should be assimilated to that of the other translators, possibly after the application of disciplinary measures for publishing a newspaper article. But it seems to me doubtful whether the Court may itself undertake to give a specific grading in the table of salaries of servants of the Commission.

One may think of following the procedure of ulimited jurisdiction[1] in staff cases, and thus substitute a decision of the Court for a decision of the administration. But it is doubtful whether this principle is applicable so long as, in the absence of any Staff Regulations, staff cases must be judged according to general principles.

In the present case, this question can be left to one side, because the Court does not possess enough essential information to proceed to a precise grading in the table of salaries. So I propose that this part of the conclusions of the applicant be rejected.

(b) Applications for damages

The applications for damages are wholly unfounded in so far as the applicants wrongly allege that their dismissal was decided upon in infringement of legal principles. However, the applicants say that the Commission gave them a reasonable expectation of permanent employment and so induced them to accept posts in Brussels. The applicants can only, by means of these allegations, claim damages for hope unfulfilled, that is to say ask to be placed in the situation in which they would have been if that expectation had not been put into their minds. They cannot allege that they have a positive interest in the carrying out of a promise—to use the terminology of civil law. Moreover, the oral arguments have shown that the applicants ought to have realized from the beginning that their employment was of a provisional and uncertain nature. Certainly, like all the 'auxiliai-

1 – Cf. de Laubadère, *ibid.*

res' (auxiliaries) and 'experts' (experts) of the Language Service, they had indeed some hope of being taken on permanently after the period of organization. But there can be no question of any certainty which would form a basis for a legal remedy. The proceedings in this case have not yielded any material in support of the applicants' claims on this subject.

Assumning that the Court upholds my proposal that the decision of dismissal be annulled in the case of the applicant Fiddelaar, it is superfluous to examine any further the claims for damages, which are only of a secondary nature.

V — Summary and results

Summarizing what I have said, I am of the opinion that the Court should:

reject the applications in Cases 43/59 and 48/59 as unfounded;

as to Case 44/59:

(a) declare that the decision of dismissal of 24 July, and finalized by the decisions of 14 August and 29 September 1959, was of no effect;

(b) reject the conclusions claiming a ruling.

As to costs, Article 70 of the Rules of Procedure must be applied so far as the applications are rejected. As to Case 44/59, I suggest that you order that all costs and expenses be borne by the defendant in accordance with Article 69 (2) and (3) of the Rules of Procedure.

ORDER OF THE PRESIDENT OF THE COURT
20 OCTOBER 1959[1]

In Joined Cases 43/59, 44/59 and 48/59

In Case 43/59

MISS EVA VON LACHMÜLLER, legally domiciled at Bressanone (Bolzano), residing in Brussels, represented and assisted by Marc-Antoine Pierson, Advocate at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of Paul Beghin, 9 avenue de la Gare,

and in Case 44/59

1 — Language of the Case: French.