

JUDGMENT OF THE COURT (FIRST CHAMBER)  
12 DECEMBER 1967<sup>1</sup>

**Alois Bauer**  
**v Commission of the European Communities**

**Case 15/67**

**S u m m a r y**

1. *Procedure — Interest in taking legal proceedings — Type of interest justifying an application to the Court*
  2. *Costs — Applications by officials of the European Communities — Costs which one party has unreasonably caused the opposite party to incur (Rules of Procedure, second subparagraph of Article 69 (3) and Article 70)*
1. The interest justifying the application must not be of an abstract nature.      2. Cf. summary, Joined Cases 5, 7 and 8/60, Rec. 1961, p. 205.

**In Case 15/67**

**ALOIS BAUER**, an official of the Commission of the European Communities, residing in Luxembourg assisted by Fernand Probst, Advocate of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of his Counsel, 26 avenue de la Liberté,

applicant,

v

**COMMISSION OF THE EUROPEAN COMMUNITIES**, taking the place of the High Authority of the European Coal and Steel Community in accordance with Article 9 of the Treaty of 8 April 1965, represented by its Legal Adviser Pierre Lamoureux, acting as Agent, with an address for service in Luxembourg at 2 place de Metz,

defendant,

Application concerning the decision of the President of the High Authority dated 3 March 1967 refusing the applicant's request made on 13 February 1967 for the reports made on him in accordance with the first paragraph of Article 43 of the Staff Regulations to be communicated to him in accordance with the second paragraph of that Article,

<sup>1</sup> — Language of the Case : French.

**THE COURT (First Chamber)**

composed of: A. M. Donner, President of Chamber, R. Monaco (Rapporteur) and J. Mertens de Wilmars, Judges,

Advocate-General: J. Gand

Registrar: A. Van Houtte

gives the following

**JUDGMENT**

**Issues of fact and of law**

**I — Summary of the facts**

By letter of 13 February 1967 Mr Alois Bauer addressed to the President of the High Authority a complaint under Article 90 of the Staff Regulations in the following terms:

‘Am 7. Dezember 1966 wurde von der Verwaltung der Hohen Behörde unter Dokument Nr. 7189/66 eine Liste der Kandidaten veröffentlicht, die für eine Promotion vorgesehen sind.

Anfang Januar 1967 bat ich den Direktor der Personalabteilung um Einsicht in die Beurteilung, die zu meinem Ausschluß aus der Vorschlagsliste geführt hat. Diese Bitte gründet sich auf Artikel 43 Absatz 2 des Personalstatuts.

Ich gestatte mir, dieses Anliegen unter Bezugnahme auf Artikel 90 des Statuts an Sie heranzutragen. Der Vollständigkeit halber möchte ich erwähnen, daß ich die im Artikel 45 Absatz 1 geforderten Voraussetzungen für eine Beförderung erfülle.’;

(‘On 7 December 1966 the Administration of the High Authority published under No 7189/66 a list of candidates considered for promotion.

At the beginning of January 1967 I asked the Director of Personnel for authority to acquaint myself with the report leading to my exclusion from that list. This request is based on the second paragraph of Article 43 of the Staff Regulations.

In submitting this request I refer to Article 90 of the Staff Regulations. For the sake of completeness I must mention that I fulfil the requirements of Article 45 (1) as regards promotion.’);

A translation of the letter into French was also provided by the applicant.

The President of the High Authority replied to this complaint by a note of 3 March 1967 in the following terms:

‘I have received your note dated 13 February 1974 referring to the list of candidates to be considered for promotion, which was brought to the notice of the staff on 7 December 1966.

The question which you raise in this connexion necessitates my reminding you that under Article 45 of the Staff Regulations promotion shall be exclusively by selection; furthermore an official cannot assert any right to promotion. As the Court of Justice has emphasized on several occasions the appointing authority is under no obligation to give reasons for not promoting an official or, consequently, for omitting his name from the list of candidates to be considered for promotion.

In conclusion I would point out that in any event as the Court of Justice has also had occasion to make clear, a statement of reasons with regard to the criteria for an official’s not being promoted would be inappropriate; moreover such a statement might do harm to an official not promoted or not

placed on the list of candidates to be considered for promotion.'

On 5 May 1967 the applicant lodged the present application at the Court Registry.

## II—Conclusions of the parties

A—In his *application* the *applicant* claims that the Court should:

'declare this application admissible and also well-founded; and accordingly amend the refusal of the President of the High Authority of the European Coal and Steel Community, declare that the applicant's request must be complied with and that the reports made with regard to him must be communicated to him in accordance with the second paragraph of Article 43 of the Staff Regulations of Officials and Servants of the Community, and in particular that dated 11 May 1966 from the Directorate for Other Sources of Energy headed: "Appréciation de M. Alois Bauer" ("Report on Mr Alois Bauer") beginning with the words "En service à la Haute Autorité" and ending "recherche de l'essentiel"; order the defendant to pay the costs'.

In his *reply* the applicant claims that the Court should:

'declare that the lodgment at the Court Registry of the Corradini report together with the other by the High Authority to pay the costs constitutes a clear acceptance of the original request both as to form and content with all consequences in law;

declare in favour of the applicant that there has been this acceptance of his request on the part of the High Authority;

declare further as the law may require; reserving all other rights, claims and actions';

B—In its *statement of defence* the *defendant* contends that the Court should:

'declare that the purpose of the present application has ceased to exist and consequently strike it from the list;

as regards costs accept the above-mentioned declaration by the High Authority and order the applicant to bear all costs of the proceedings subsequent to the lodgment of the High Authority's statement of defence;

reserving all rights'.

In its *rejoinder*

'declare that the purpose of the present application has ceased to exist;

rule on the sharing of costs as the law requires;

reserving all rights'.

## III—Submissions and arguments of the parties

### *Admissibility*

The *applicant* maintains that his application has been made in time; he also claims an interest in taking legal proceedings under Article 43 and the last sentence of the first subparagraph of Article 45 (1) of the Staff Regulations.

In his view it follows from these provisions that the ability, efficiency and conduct in the service of each official must be the subject of periodical reports by the appointing authority and that these reports must be communicated to the official concerned. Every official is entitled to make any comments which he considers relevant on these reports.

These reports are among the factors which the appointing authority must take into account in making its selection when lists of candidates to be considered for promotion are drawn up. Furthermore a more detailed analysis of the promotion system established by the Staff Regulations shows that these reports were intended by the legislature to constitute the main criterion on

which the appointing authority is to select officials for promotion. The selection must be made after consideration of the comparative merits of the officials eligible for promotion and of the reports on them. A comparison of the merits of the individual officials necessarily involves a comparison of their ability, efficiency and conduct in the service. Since it is precisely these factors which are the subject of the periodical reports referred to in Article 43 of the Staff Regulations it follows that the appointing authority's selection must in fact be based, if not exclusively, at any rate mainly on these reports which *inter alia* provide the only reliable standard of evaluation in this matter. Although the applicant meets the requirements laid down in Article 45 (1) of the Staff Regulations he was omitted from the list of candidates to be considered for promotion which was brought to the notice of the staff on 7 December 1966. In view of the provisions referred to above this omission could only have been decided on on the basis of the reports made regarding him under Article 43.

The applicant claims that on these grounds he has a clear interest in having these reports communicated to him and that his application is therefore admissible.

### *Substance*

The applicant asserts that the official's right to have the above-mentioned reports communicated to him is enshrined in Article 43 (2) of the Staff Regulations. The note of 3 March 1967 by the President of the High Authority, whilst avoiding a direct answer, nevertheless contains an implied refusal to accept the applicant's request which is specifically based on Article 43 (2) of the Staff Regulations. The decision contained in this note should accordingly be annulled and readopted in amended form.

The *defendant's* reply in its *statement of defence* is that after lodging the application to the Court the applicant was sent for by the Director of Personnel who communicated to him the report of 11 May 1966 mentioned in the conclusions contained in his application, this being the only existing report with regard to him. In his note of 25 May 1967 the applicant after thanking the Directorate of Personnel for this communication asked that this report be sent to his Counsel by the Agent of the High Authority in the present proceedings, seeing that a case was pending before the Court. This was done by a letter from the High Authority dated 29 May 1967.

On these facts the defendant contends that the request made by the applicant in his application having been met, the application has lost its purpose. The defendant adds that by letter of 31 May 1967, the applicant's Counsel specifically asked the High Authority to lay a statement before the Court and expressed the view that the defendant should offer to pay the costs. Therefore the lodgment of its statement of defence meets the applicant's claim. As regards costs although in his note of 13 February 1967 the applicant made a request ('... Einsicht in die Beurteilung, die zu meinem Ausschuß aus der Vorschlagsliste geführt hat . . .') ('... to acquaint myself with the report leading to my exclusion from that list [of candidates considered for promotion] . . .') which differed considerably from that in the conclusions in the application ('... 'communiquer les rapports établis à son sujet . . .') ('... that the reports made with regard to him must be communicated to him . . .'), the High Authority is prepared to pay the costs incurred by Mr Bauer in the action up to the time when it lodged its statement of defence.

In his *reply* the applicant considers that he must define his attitude on the 'non-disclosures' and 'reservations which the

High Authority intends should accompany' its acceptance. On this point he observes that the High Authority, whilst asserting that the purpose of the application has ceased to exist and whilst undertaking to pay the costs of the action up to the time of lodgment of the statement of defence, is seeking to avoid the natural and logical consequences of its acquiescence, that is to say, recognition of the admissibility of the application, or, more accurately, recognition of the applicant's interest in seeing that the reports made with regard to him are communicated to him in accordance with the second paragraph of Article 43 of the Staff Regulations. To this end the Commission is setting up an artificial distinction between the request formulated by the applicant in his letter of 13 February 1967 and the conclusions in the application. In fact this distinction is non-existent. In both cases the request is materially the same, save only that in the letter of 13 February 1967 it is 'in a more condensed form than in the application'. The applicant thus asks the Court to declare that the lodgment of the report of 11 May 1966 at the Court Registry and the High Authority's offer to pay the costs necessarily imply total acceptance on all points of the request contained in the application. The *defendant* observes that the applicant has lodged a statement in reply although there was no occasion for any further pleadings. It is only necessary to refer to the conclusions in the application to establish that the communication to the applicant of the one and only report on him and the offer made by the Commission to reimburse him at

once for the costs he has had to incur in the action have provided in all respects the relief sought (communication to the applicant of the reports concerning him and the bearing of the costs by the defendant) and have rendered the application devoid of all purpose. The lodgment of a statement in reply obliged the Commission to lodge a rejoinder to show that the action had lost its purpose; the applicant has deliberately refused to accept this and has sought to create an artificial confusion on the points of the conclusions mentioned above. For these reasons the applicant is acting improperly in protracting proceedings which no longer serve any useful purpose and are no longer justified. It may well be asked whether the conduct of the applicant in causing the defendant to incur the costs involved is not unreasonable within the meaning of Article 69 (3) of the Rules of Procedure of the Court.

The defendant accordingly asks the Court to declare that the application has now lost its purpose and to rule on costs as the law may require.

#### IV — Procedure

The procedure followed its normal course.

Upon hearing the report of the Judge-*Rapporteur* and the opinion of the Advocate-General, the First Chamber of the Court decided not to make any preparatory inquiry.

The public hearing took place on 9 November 1967.

The Advocate-General delivered his opinion on 21 November 1967.

#### Grounds of judgment

The applicant claims in his applications that the Court should:

'amend the refusal of the President of the High Authority of the Coal and Steel Community and declare that the applicant's request must be complied

with and that the reports made with regard to him must be communicated to him in accordance with the second paragraph of Article 43 of the Staff Regulations of Officials and Servants of the Community and in particular that dated 11 May 1966 from the Directorate for Other Sources of Energy headed: "Appréciation de M. Alois Bauer" ("Report on Mr Alois Bauer") beginning with the words "En service à la Haute Autorité" and ending "recherche de l'essentiel";

order the defendant to pay the costs'.

It is not disputed that the defendant by its letter of 29 May 1967 communicated to the applicant the report of 11 May 1966 which is the only one making an assessment with regard to him. The defendant also produced this report by way of a schedule to its statement of defence. It has further undertaken to pay the costs of the action incurred by the applicant up to the time when its statement of defence was lodged. The communication of this report and the offer to pay the costs satisfy the purpose of the application. There is therefore no occasion for the Court to give any decision on this point.

The applicant has taken the view that the defendant made its acceptance subject to 'reservations or non-disclosures' so as to avoid recognizing the admissibility of the application and in particular to avoid admitting the applicant's interest in securing the communication to him of reports made with regard to him in accordance with the second paragraph of Article 43 of the Staff Regulations. He accordingly lodged a statement in reply in which he claims that the Court should declare that the lodgment of this report and the offer to pay the costs of the proceedings constitute a clear acceptance of the original request, with all its consequences in law.

In its statement of defence the defendant has alleged incidentally that the request made by the applicant in his note of 13 February 1967 addressed to the President of the High Authority was in terms different from those in the conclusions contained in the application. Such an allegation even if well-founded is irrelevant to the question at issue and in the present case cannot therefore adversely affect the applicant. The interest which the applicant claims in the conclusions contained in his reply assumes an abstract character after the communication to him of the report of 11 May 1966 and is therefore insufficient to justify the admissibility of such submissions and the continuation of the proceedings. For these reasons the steps taken by the applicant from the time of the reply must be considered as having been unnecessary.

## Costs

The defendant has agreed in its statement of defence to bear the costs incurred by the applicant up to the time when it lodged this statement; it is proper for the Court to take judicial notice of this.

Under Article 70 of the Rules of Procedure of the Court of Justice, costs incurred by the institutions in proceedings commenced by servants of the Communities shall be borne by those institutions, without prejudice to the second subparagraph of Article 69 (3) of those Rules, under which the Court may order even a successful party to pay costs which the Court considers that party to have unreasonably caused the opposite party to incur.

The applicant must be regarded as having unreasonably caused the defendant to incur the costs from the time of the reply, in view of the unnecessary nature of the subsequent proceedings.

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 of the European Coal and Steel Community, especially Articles 43 and 45;  
 Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;  
 Having regard to the Rules of Procedure of the Court of Justice, especially Articles 69 and 70,

THE COURT (First Chamber)

hereby :

1. Declares that there is no occasion to proceed to judgment on the conclusions contained in the application;
2. Rejects the conclusions contained in the reply as inadmissible;
3. Orders the defendant to pay the costs of the proceedings prior to the lodgment of the reply;

4. **Orders the applicant to pay the costs incurred from the lodgment of the reply, including those incurred by the defendant.**

Donner

Monaco

Mertens de Wilmars

Delivered in open court in Luxembourg on 12 December 1967.

A. Van Houtte  
Registrar

A. M. Donner  
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER  
DELIVERED ON 21 NOVEMBER 1967<sup>1</sup>

*Mr President,  
Members of the Court,*

The applicant in the proceedings on which I have to give an opinion today is an official of the European Coal and Steel Community. At the time when the proceedings were brought he was employed as a Principal Administrator by the High Authority which was then still in being. He has brought the present proceedings against the High Authority after having established that his name did not appear in the list of candidates to be considered for promotion, which was issued on 7 December 1966. His application is not however for annulment of this list of candidates or for annulment of the decisions on promotion, but for communication to him of the relevant reports on himself. Before making the application he addressed a letter to the President of the High Authority on 13 February 1967 in which he asked that, having regard to the second paragraph of Article 43 of the Staff Regulations, he might 'acquaint himself with the report' (*Einsicht in die Beurteilung*) leading to his exclusion from the list of candidates to be considered for promotion. The Presi-

dent of the High Authority replied in a note of 3 March 1967 that there is no right to promotion, promotions being made rather by selection in accordance with Article 45 of the Staff Regulations. According to the case-law of the Court reasons do not have to be given for promotion decisions relating to candidates who have been passed over; there are therefore still fewer grounds for giving reasons for omission from the list of candidates to be considered for promotion.

Mr Bauer was not satisfied with this answer. Accordingly he brought his application before the Court claiming that it should annul the refusal of the President of High Authority to agree that his reports, in particular that of 11 May 1966, should be communicated to him. It seems that the officials of the High Authority did not grasp with what the applicant was concerned until the application was lodged. In any event he was then summoned to the Director of Personnel, who handed him a photocopy of the report of 11 May 1966 (there were no other reports). In addition at the request of the applicant a further copy was sent with a letter of 29 May 1967 to his Counsel.

<sup>1</sup> — Translated from the German.