

Communities. For the rule against concurrent payment to be applicable, it is sufficient that the salary paid by an institution of the European Communities should be financed entirely from the appropriations contained in the estimates of expenditure of one of the institutions mentioned in the general budget of the European Communities. The existence of an employment relationship between the official being paid and the institution bearing the cost entailed by his remuneration is not an essential condition in that respect for the application of the abovementioned provision.

2. The provisions of Regulation No 2530/72, introducing special and temporary measures applicable to, *inter alia*, the termination of service of officials of the Communities in consequence of the accession of new Member States, contain no exception to rule against concurrent payments of a retirement pension and a Community salary laid down in the second paragraph of Article 40 of Annex VIII to the Staff Regulations. An official who has had the benefit of a measure terminating his service under the said regulation cannot

therefore claim that since Article 5(3) of the regulation authorizes concurrent payment of the termination-of-service allowance and of income accruing after termination, that provision must be regarded as of equal standing with the rule against concurrent payments cited above and conclude that there is no legal obstacle to his retirement pension being paid concurrently with the salary paid out of the budget of a Community institution as a Commission delegate with the European Association for Cooperation.

3. An irregularity affecting retirement pension payments which was not ascertained by the person concerned notwithstanding the high grade he had held and his long period of service, could not have been patently evident within the meaning of Article 85 where conflicting legal opinions were expressed on the question at issue by two Community institutions with departments thoroughly versed in the matter of the calculation and payment of pensions and it has not been shown that, by virtue of his training or his activities, the person concerned had any special knowledge of the question at issue.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
12 July 1990 *

In Case T-111/89,

Robert Scheiber, a former official of the Council of the European Communities, residing in Mauritius, represented by Georges Vandersanden, of the Brussels Bar,

* Language of the case: French.

with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 avenue Guillaume,

applicant,

v

Council of the European Communities, represented by A. Dashwood, Director of its Legal Department, acting as Agent, assisted by Marc Grossman, of the Brussels Bar, with an address for service in Luxembourg at the office of Jörg Käiser, Manager of the Legal Directorate of the European Investment Bank, 100 boulevard Konrad-Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Sean Van Raepenbusch, a member of its Legal Department, acting as Agent, assisted by Claude Verbraeken and Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Building, Kirchberg,

intervener,

APPLICATION for the annulment of the decision of 2 September 1988 whereby the Council decided not to pay the instalments of the applicant's pension which were withheld between 1 November 1983 and 30 June 1986, and to recover the sums paid in that connection between 1 January 1980 and 30 October 1983 and between 1 July 1986 and 19 September 1987,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fourth Chamber)

composed of: D. A. O. Edward, President of Chamber, R. Schintgen and R. García-Valdecasas, Judges,

Registrar: B. Pastor, Administrator

having regard to the written procedure and further to the hearing on 2 May 1990, gives the following

Judgment

The facts giving rise to the action

- 1 The applicant was engaged in 1953 as an official of the Council of the European Coal and Steel Community. He subsequently became an official of the Council of the European Communities, where, after being successively head of department and head of division in charge of relations with African countries south of the Sahara, he was promoted to the rank of director on 1 January 1967.
- 2 The applicant's service was terminated, at his request, under Regulation (Euratom, ECSC, EEC) No 2530/72 of the Council of 4 December 1972 introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of new Member States, and for the termination of service of officials of those Communities (Official Journal, English Special Edition 1972 (1 to 8 December), p. 11, hereinafter referred to as 'Regulation No 2530/72') with effect from 1 January 1974. He was promoted to the honorary rank of Director-General in January 1974.
- 3 On 1 January 1974, the applicant was recruited by the European Association for Cooperation (hereinafter referred to as 'the EAC') to perform the duties of inspector-delegate of the European Development Fund in Madagascar and Djibouti (from 1974 to 1978) and later Commission Delegate in Cameroon and in Equatorial Guinea (until July 1982) and in the Indian Ocean (until 31 July 1987). On 31 July 1987 he resigned from that post. Having regard to the holidays to which he was entitled, his service terminated on 19 September 1987.
- 4 With effect from 1 January 1979, the applicant received a retirement pension from the Council under Article 77 of the Staff Regulations of Officials of the European

Communities (hereinafter referred to as 'the Staff Regulations'). That pension was paid to him by the Commission in accordance with decisions adopted by the Council under the second paragraph of Article 45 of Annex VIII to the Staff Regulations.

- 5 On 10 October 1983, the applicant asked the Council, for strictly personal reasons, to suspend payment of his pension provisionally with effect from 1 November 1983. On 29 June 1986, he asked for payment of his pension to be resumed with effect from July 1986.
- 6 As a result of the latter application, the Council's Director of Administration and Personnel, Mr Gueben, instructed the Commission to resume payment of the retirement pension with effect from July 1986. He informed the applicant of that fact and called upon the applicant to provide him with details of the earlier request to suspend payment of the pension.
- 7 By letter of 25 June 1987, Mr Gueben informed the Commission's Pensions Department that he had just discovered that Mr Scheiber's name appeared in the detailed list of the Commission's posts as a Commission Delegate, which suggested that he was being paid out of the Commission's budget. He added: 'If you should discover that Mr Scheiber is in fact receiving a salary from the Commission's budget, please cease paying him his retirement pension, in accordance with the second paragraph of Article 40 of Annex VIII to the Staff Regulations'.
- 8 By letter of 10 July 1987 addressed to Mr Gueben, the applicant claimed that the rule against concurrent payments laid down in Article 40 did not apply to his case. He asked that payment of his pension should not be interrupted and that the amounts held in the suspense account be paid to him.
- 9 By letter of 12 November 1987, Mr Gueben informed the Commission's Pensions Department that, after obtaining an opinion from the Council's Legal Department, the Secretariat-General of the Council saw no further objection to the amounts held in the suspense account being paid to Mr Scheiber. He therefore asked the Commission to accede to the applicant's request of 10 July 1987. He informed the applicant of this by letter, also of 12 November 1987, with which he enclosed a

copy of the letter to the Commission's Pensions Department and of the Legal Department's opinion.

- 10 By letter of 2 September 1988, Mr Gueben informed the applicant that the Council had changed its mind following an opinion from the Commission's Financial Controller, an opinion supported by that institution's Legal Department, and that, consequently, he had asked the Commission not to pay out the amounts held in the suspense account in respect of the period from 1 November 1983 to 30 June 1986 and to recover the amounts unduly paid for the periods from 1 January 1981 to 30 October 1983 and from 1 July 1986 to 19 September 1987.
- 11 By letter of 12 October 1988, the applicant submitted a complaint against the decision contained in the letter of 2 September 1988.
- 12 By memorandum of 14 February 1989, the Secretary-General of the Commission rejected that complaint. He stated that until 31 December 1980 the pension paid to Mr Scheiber was in fact due to him because, until that date, his salary as a Commission delegate was paid to him by the EAC. However, with effect from 1 January 1981, the operating expenses of Commission delegations in the ACP countries, including the delegates' salaries, were covered by the general budget of the European Communities, under Chapter 98 of the Commission's Budget, in accordance with the declaration under Article 95 of the Second ACP-EEC Convention signed at Lomé on 31 October 1979 between the African, Caribbean and Pacific States, on the one part, and the European Community and its Member States, of the other part (hereinafter referred to as 'Lomé II'). Since that date, Mr Scheiber's salary had been payable out of that budget. Such a situation was contrary to the second paragraph of Article 40 of Annex VIII to the Staff Regulations and Article 85 of the Staff Regulations and Article 41 of Annex VIII thereto should be applied.

Procedure

- 13 It was in those circumstances that, by an application lodged at the Registry of the Court of Justice on 10 May 1989, the applicant brought this action against the Council for the annulment of the decision of 2 September 1988.

14 By an application lodged at the Registry of the Court of Justice on 13 September 1989, the Commission of the European Communities applied to intervene in the case in support of the defendant's conclusions, in accordance with Article 93(1) and (2) of the Rules of Procedure of the Court of Justice. By order of the Court of Justice of 19 September 1989, the Commission was granted leave to intervene.

15 The written procedure took place entirely before the Court of Justice. By order of 15 November 1989, that court referred the case to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

16 The applicant claims that the Court of First Instance should:

- (i) declare the application admissible and well founded;
- (ii) annul the Council's decision, contained in the letter of 2 September 1988 from Mr Gueben, Director of Personnel and Administration at the Secretariat-General, not to pay out the amounts of the applicant's retirement pension held in the suspense account in respect of the period from 1 November 1983 to 30 June 1986 and to recover the amounts unduly paid for the periods from 1 January 1981 to 30 October 1983 and from 1 July 1986 to 19 September 1987;
- (iii) consequently, order the reimbursement of the amounts deducted from the applicant's pension from 1 December 1988;
- (iv) order the applicant to pay the costs.

17 The defendant contends that the Court should:

- (i) declare the second head of claim inadmissible;
- (ii) declare the application registered at the Court of Justice under serial number 164/89 unfounded and, consequently,

(iii) order the applicant to pay the costs.

18 The intervener contends that the Court should:

(i) declare the application to be unfounded;

(ii) order the applicant to bear his own costs in accordance with Article 70 of the Rules of Procedure of the Court of Justice of the European Communities.

19 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry.

20 The Hearing took place on 2 May 1990. The parties' representatives submitted oral argument and replied to questions put by the Court. The applicant's representative merely applied for the annulment of the contested decision. At the Court's request, the Commission's representative submitted a copy of Chapter 98 of the Commission's operating appropriations and statement of expenditure contained in the general budget of the European Communities for the 1989 financial year.

Substance of the case

21 The applicant seeks, first, the annulment of the Council's decision contained in the letter sent to him on 2 September 1988 by the Director of Personnel and Administration in so far as it calls upon the Commission not to pay out to the applicant the arrears of his pension held in the suspense account in respect of the period from 1 November 1983 to 30 June 1986. Secondly, he seeks the annulment of the same decision of the Council in so far as it calls upon the Commission to recover the amounts unduly paid from 1 January 1981 to 31 October 1983 and from 1 July 1986 to 19 September 1987.

- 22 In that respect the applicant puts forward seven pleas in law: first, the absence of any change in his legal position *vis-à-vis* the EAC; secondly, the autonomy of the EAC *vis-à-vis* the Community; thirdly, the unlawfulness and failure to give notice of the assignment of the debt; fourthly, the lawfulness by virtue of Regulation No 2530/72, of the concurrent payments; fifthly, breach of the principle of the protection of legitimate expectations; sixthly, breach of the principle of good management and sound administration, and, seventhly, incorrect application of Article 85 of the Staff Regulations.
- 23 In support of his first two pleas in law, the applicant claims that the fact that his salary became payable out of the general budget of the Communities with effect from 1 January 1981 did not change the legal position in which he had been since 1 January 1974, the date on which he entered the service of the EAC, which is a separate legal person and which, since that date, has been his sole employer.
- 24 In support of its decision the Council refers to the provisions of the second paragraph of Article 40 of Annex VIII to the Staff Regulations, according to which 'a retirement . . . pension shall not be paid concurrently with the salary payable by an institution of the three European Communities . . . '.
- 25 On the basis of the provisions of Point 1 of Annex XXXI to the Second Lomé Convention concerning Article 95 of the Convention, according to which 'the Community gives an undertaking that the operating costs of the Commission delegations in the ACP States, which were previously charged to the budget of the European Development Fund, shall be covered, from the date of entry into force of this Convention, by the general budget of the European Communities', the Council contends that the salary paid to the applicant by the EAC is covered by the Commission and that, consequently, the pension granted to him by the Council may not be paid concurrently with that salary.
- 26 It is common ground that since the 1981 financial year, the General Budget of the European Communities contains, in Chapter 98, entitled 'European Association for Cooperation', an appropriation intended to cover the remuneration and the

various allowances paid to the staff employed by the EAC headquarters and the operating costs proper of that headquarters, the division between staff costs and operating costs being made in the budget itself.

- 27 Although it is true that, in affirmation of the EAC's institutional independence *vis-à-vis* the Commission, it has been consistently held that the Commission may not be regarded as the employer of EAC staff (see, most recently, the judgment of the Court of Justice in Case 286/83 *Alexis and Others v Commission* [1989] ECR 2445 and the judgment of the Court of First Instance in Case T-62/89 *Pinto Teixeira v Commission* [1990] ECR II-121), it is also true that the remuneration and allowances of the EAC headquarters staff are covered by an appropriation included in the Commission's estimates of expenditure among the operating appropriations of that institution.
- 28 Since the rule prohibiting the concurrent payment of a pension and a salary which is contained in Article 40 of Annex VIII to the Staff Regulations finds its justification in the need to protect the Community's resources, it must be applied whenever a pension paid by one of the institutions is concurrent with the payment of a salary that is also covered by an institution of the European Communities. For the rule against concurrent payment to be applicable, it is sufficient that the salary paid by an institution of the European Communities should be financed entirely from the appropriations contained in the estimates of expenditure of one of the institutions mentioned in the general budget of the European Communities. The existence of an employment relationship between the official being paid and the institution bearing the cost entailed by his remuneration is not an essential condition in that respect for the application of the second paragraph of Article 40 of the Staff Regulations.
- 29 In this case, it is common ground between the parties that, between 1 January 1981 and 19 September 1987, the Commission covered the entire cost of the applicant's salary as a delegate in an ACP country.
- 30 It follows that the first two pleas, based on the legal position of the applicant in his relations with the EAC, must be rejected.

31 In support of his third plea the applicant claims that the fact that, from 1981, the functioning of the EAC was covered by the budget of the Communities constitutes, in regard to him, an assignment of a debt which is not provided for in the legislation and which, moreover, may also not be relied on as against him because he was not given prior notice of it. Therefore, the purely formal change which took place in the financing of the EAC can have no effect on his acquired rights.

32 The defendant contends that there was no assignment of a debt, since the EAC continued to owe its staff their salaries. On the other hand, it is true that the Commission covered the financial cost of those salaries by means of a subsidy.

33 The intervener supplements the defendant's arguments, contending that its undertaking to cover the remuneration of EAC staff from 1 January 1981 may not be regarded as an assignment of debts but as a perfectly lawful undertaking for the benefit of a third party.

34 In that regard, it should be borne in mind that the contested decision of 2 September 1988 does not refer to the salary paid to the applicant by the EAC since 1 January 1981 but to the pension paid to him since that date on behalf of the Council. The rule against concurrent payments contained in the second paragraph of Article 40 of Annex VIII to the Staff Regulations prohibits, where there are concurrent payments, not payment of the salary but payment of the pension. It is therefore not necessary to consider the arguments concerning the legal machinery for the payment of the salary.

35 Consequently, the third plea in law must be also rejected.

36 In his fourth plea in law, the applicant refers to the provisions of Regulation No 2530/72, cited above, from which he concludes that concurrent payment is lawful. He claims that Article 3(4) of that regulation, which limits the concurrent payment of the termination-of-service allowance and of income accruing after termination to the total remuneration last received, does not apply to him by virtue of Article 5(3) of that regulation. According to the applicant, those provisions, which authorize concurrent payment in the case of termination of service, must be

regarded as of equal standing with the rule against concurrent payments in Article 40 of Annex VIII to the Staff Regulations. He concludes that there is no legal obstacle to his retirement pension being paid concurrently with his salary as a Commission delegate.

37 The defendant, supported by the intervener, replies that the only rule against concurrent payments applicable in this case is the general rule laid down for pensions in Article 40 of Annex VIII to the Staff Regulations.

38 In that regard, it is sufficient to note that the provisions of Regulation No 2530/72 contain no exception to rule against concurrent payments laid down in the second paragraph of Article 40 of Annex VIII to the Staff Regulations, which thus remains the only rule applicable in this case.

39 The reference to that regulation is therefore irrelevant, so that this plea must also be rejected.

40 It follows from all the foregoing considerations that the Council correctly applied the provisions of the second paragraph of Article 40 of Annex VIII to the Staff Regulations by declaring them applicable to the applicant's retirement pension with effect from 1 January 1981.

41 It is none the less necessary to consider the last three pleas in law, alleging, respectively, a breach of the principle of the protection of legitimate expectations, a breach of the principle of good management and sound administration and incorrect application of Article 85 of the Staff Regulations, relied on by the applicant as grounds for opposing the reimbursement of arrears of pension already paid and for obtaining the release of the amounts withheld.

42 Article 85 of the Staff Regulations provides that 'any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it'.

- 43 Since the applicant denies that he was aware of the fact of the overpayment and the administration has not shown, as it was required to do, that he was so aware, the circumstances in which the payment was made must be examined in order to determine whether the overpayment was patently evident (see the judgments of the Court of Justice in Case 71/72 *Kuhl v Council* [1973] ECR 705 and Case 142/78 *Exner v Commission* [1979] ECR 3125).
- 44 The defendant and the intervener contend, on the basis of two judgments of the Court of Justice (Case 252/78 *Broe v Commission* [1979] ECR 2393 and Case 310/87 *Stempels v Commission* [1979] ECR 43), that the fact that payment was undue must have been so obvious to the applicant, who has a good knowledge of budgetary technique, that he could not fail to have been aware of it; they contend that he committed an error that could not have escaped the notice of an official exercising ordinary care.
- 45 Pointing to the fact that the regularity of the payments made until 1 January 1981 had never been contested and that he was not notified of the fact that the EAC's staff costs were charged to the general budget of the Communities as from 1981, the applicant submits that he could not have been aware that the payments the reimbursement of which is claimed had become overpayments as from 1 January 1981. He adds that, in any event, that fact was not patently evident, as is demonstrated by the Council's and Commission's failure, over a period of nearly eight years, to discover it.
- 46 It should be noted firstly that there is nothing in the documents before the Court to show that, by virtue of his training or his activities, the applicant had any special knowledge of the question at issue, namely the calculation and payment of pensions of former officials of the European Communities.
- 47 It is also apparent from the documents before the Court that the overpayment at issue is far from patently evident. Even after becoming aware that the applicant's salary as a delegate was paid concurrently with his retirement pension, the administration, which moreover took nearly eight years to discover that fact 'by chance', continued to pay the applicant's pension and expressly informed him by letter of

12 November 1987 that, as a result of an opinion of the Council's Legal Department, it saw no objection to paying him the amounts which had been withheld and continuing to pay him his pension.

48 It was only as a result of another opinion from the Commission's Financial Control Department, an opinion supported by its Legal Department, that the Council changed its attitude and adopted the contested decision.

49 In the light of the conflicting legal opinions from two Community institutions with departments thoroughly versed in the matter, the applicant cannot be criticized, notwithstanding the high grade he had held in the Council and his long period of service, for not having ascertained the overpayment at issue.

50 It follows from all the foregoing that the irregularity which affected the pension payments made by the administration could not have been patently evident to the applicant.

51 Consequently, and without there being any need to consider the other two pleas put forward by the applicant, the administration is not entitled to claim from the applicant the reimbursement of the amounts unduly paid, that is to say, both the amounts that he actually received in respect of the periods from 1 January 1981 to 31 October 1983 and 1 July 1986 to 19 September 1987 and the amounts withheld during the period from 1 November 1983 to 30 June 1986, the latter of which must be regarded as constituting an integral part of his property.

52 The decision of 2 September 1988 must therefore be annulled.

Costs

53 Under Article 69(3) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the Court of First Instance by virtue of the third paragraph of

Article 11 of the Council Decision of 24 October 1988, cited above, the Court may order that the parties bear their own costs in whole or in part where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

54 In this case, it was only at the hearing on 2 May 1990 that the applicant, in reply to a question put to him by the Court, abandoned his claim for reimbursement by the defendant of the amounts deducted from his pension as from 1 December 1988. Moreover, he has failed in his pleas in law on the principal issue, namely whether the concurrent payment of his retirement pension and his salary as a delegate is permissible. He should therefore bear one-third of his own costs and the remaining two-thirds should be paid by the defendant and the intervener.

55 Furthermore, Article 70 of the aforementioned Rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities. The defendant and the intervener are therefore to bear their own costs, the intervener to pay in addition the costs caused by its intervention.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

- (1) Annuls the Council's decision, contained in the letter of 2 September 1988 from the Director of Personnel and Administration at the Secretariat-General not to pay the amounts of the applicant's retirement pension which were withheld between 1 November 1983 and 30 June 1986, and to recover the sums paid between 1 January 1981 and 31 October 1983 and between 1 July 1986 and 19 September 1987 to which he was not entitled;**

- (2) Orders the defendant and intervener to pay two-thirds of the applicant's costs;
- (3) Orders the defendant and intervener to pay their own costs and orders the intervener to pay in addition the costs caused by its intervention.

Edward

Schintgen

Garcia-Valdecasas

Delivered in open court in Luxembourg on 12 July 1990.

H. Jung
Registrar

D. A. O. Edward
President of Fourth Chamber