

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)  
22 November 1990 \*

In Case T-4/90,

**Jean Lestelle**, a former official of the Commission, residing in Senningerberg (Grand Duchy of Luxembourg), represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Fiduciaire Myson SARL, 6-8 rue Origer,

applicant,

v

**Commission of the European Communities**, represented by Joseph Griesmar, Adviser in the Legal Department, acting as Agent, with an address for service in Luxembourg in the office of Guido Berardis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION, on the one hand, for the annulment of the decision to continue, after 22 March 1989, to deduct pension contributions from the allowance which he receives pursuant to Council Regulation (ECSC, EEC, Euratom) No 3518/85 of 12 December 1985 and, secondly, for a declaration that the payment of that contribution under that regulation is an option and not an obligation,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

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

Registrar: H. Jung

having regard to the written procedure and following the hearing on 11 October 1990,

\* Language of the case: French.

gives the following

## Judgment

### Factual background

- 1 The applicant who was born on 9 October 1925 entered the service of the European Coal and Steel Community (hereinafter referred to as the 'ECSC') on 1 June 1956 as an official.
  
- 2 By a memorandum of 30 June 1988 he requested the application of a measure terminating his service under Council Regulation (ECSC, EEC, Euratom) No 3518/85 of 12 December 1985 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Spain and Portugal (Official Journal 1985 L 335, p. 56). His request was granted and his service was terminated on 1 November 1988. As from that date he received the monthly allowance provided for in Article 4 of Regulation No 3518/85, until 31 October 1990, the last day of the month during which he reached the age of 65 years. Thus, in respect of November and December 1988 an allowance equal to 70% of the basic salary for the grade and step which he held at the time of departure was paid to him in accordance with Article 4(1). The salary statements for those two months show amongst other items a deduction in respect of the pension contribution.
  
- 3 By letter of 30 December 1988 the applicant informed the Commission's Pensions Department that in accordance with Article 5 of Regulation No 3518/85 he wished 'to have the special provisions of the Staff Regulations of the European Coal and Steel Community applied to me, that is the payment of an allowance equal to 100% of my salary until October 1990, the date on which I shall reach the age of 65 years and fall within the terms of the ordinary retirement pension scheme'. The amount of his allowance was corrected accordingly.

4 By a memorandum of 25 January 1989 the Head of the Pensions Department sent to the applicant a notice of determination of his rights to the monthly allowance (hereinafter referred to as the 'payment notice'), namely '100% of the last basic salary from 1 November 1988 to 31 October 1990'. That memorandum stated at paragraph C.5 that the applicant would 'continue to contribute to the pension scheme of the European Communities for the period during which the right to the allowance is granted. The contribution is calculated on 100% of salary.'

5 Article 5(1) of Regulation No 3518/85 provides as follows:

'Officials referred to in the last paragraph of Article 2 of Council Regulation (EEC/Euratom/ECSC) No 259/68 and in Article 102(5) of the Staff Regulations, with the exception of those who occupied an established post in Grades A 1 or A 2 under the Staff Regulations of the European Coal and Steel Community before 1 January 1962 and to whom the measures under Article 1 are applied, shall be entitled to ask for their pecuniary claims to be settled in accordance with Article 34 of the Staff Regulations of the European Coal and Steel Community and Article 50 of the Rules and Regulations of the European Coal and Steel Community.'

6 Article 34 of the Staff Regulations of the ECSC (hereinafter referred to as the 'ECSC Staff Regulations' provides as follows:

'... Those officials (having non-active status) shall receive for two years a monthly allowance corresponding to the remuneration provided for in Article 47(1) and for a further two years an allowance equal to one half of that remuneration. On the expiry of four years on non-active status, officials shall receive a proportional pension under the conditions laid down in the pensions scheme.'<sup>1</sup>

Article 50 of the Rules and Regulations of the European Coal and Steel Community provides as follows:

'In calculating the retirement pension rights of an official permitted to retire following a period of non-active status under Article 34 of the Staff Regulations, the number of actual years service completed by that official until the time he is

<sup>1</sup> — Unofficial translation.

awarded a pension shall be doubled. The total number of reckonable years' service for the calculation of such an official's pension may not however be greater than 30 or greater than the number of years' service which he could have completed if he had remained in service until the age of 65.<sup>1</sup>

- 7 By letter of 22 March 1989, the applicant, relying on Article 4(7) of Regulation No 3518/85, informed the Commission as follows:

'I do not wish to increase my pension rights beyond the level at which they were established on 1 November 1988, the date on which my service terminated. Consequently I request you to cease my payments by way of contributions to the pensions scheme and to carry out the appropriate rectifications.'

- 8 Article 4(7) of Regulation No 3518/85 provides as follows:

'During the period for which he is entitled to receive the allowance, the former official shall continue to acquire further rights to retirement pension based on the salary attaching to his grade and step, provided that the contribution provided for in the Staff Regulations by reference to that salary is paid during that period and provided that the total pension does not exceed the maximum specified in the second paragraph of Article 77 of the Staff Regulations. For the purposes of Article 5 of Annex VIII to the Staff Regulations and Article 108 of the former Rules and Regulations of the European Coal and Steel Community, such period shall be considered to be a period of service.'

- 9 Since the Commission continued each month to deduct the pension contribution, the applicant, by memorandum of 24 April 1989 requested the Commission to regard the request contained in his letter of 22 March 1989 as a complaint within the meaning of Article 90 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as the 'Staff Regulations').

1 — Unofficial translation.

- 10 By a decision of 24 October 1989, which was notified to the applicant in a letter of 30 October 1989, the Commission rejected that complaint on the ground, *inter alia*, that the 'period during which the monthly allowance is paid is considered to be a period of service and gives rise to the payment of pension contributions'.

### Procedure

- 11 In those circumstances, by an application lodged at the Registry of the Court of First Instance on 29 January 1990, the applicant brought this action for the annulment of the decision to continue, after 22 March 1989, to deduct contributions to the pension scheme.

- 12 The written procedure followed a normal course. On hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry.

- 13 The hearing took place on 11 October 1990. The representatives of the parties presented their arguments and replied to the questions asked by the Court.

- 14 The applicant claims that the Court should:

- (1) declare the application admissible and well founded;
- (2) consequently,

annul:

- (i) the decision to continue, after 22 March 1989, to deduct pension contributions from the termination of service allowance which he receives pursuant to Council Regulation No 3518/85 of 12 December 1985;
- (ii) as far as may be necessary, the express rejection on 30 October 1989 of the complaint lodged under Article 90(2) of the Staff Regulations by a memorandum of 24 April 1989, registered at the Secretariat-General of the Commission on 26 April 1989 under No 138/89;

hold:

that under Article 4(7) of the aforementioned Regulation No 3518/85 the payment of contributions to the pension scheme constitutes an option and not an obligation as regards former officials to whom that regulation applies;

- (3) order the defendant to pay the costs, including the costs necessarily incurred for the purposes of the procedure and in particular the costs of an address for service, travelling expenses, subsistence and lawyers' fees.

15 The defendant contends that the Court should:

- (i) dismiss the application as inadmissible, and, in any event, as unfounded;
- (ii) make an appropriate order as to costs.

### **Admissibility**

16 The defendant contends that the application is inadmissible on the ground that the initial act adversely affecting the applicant, namely the salary statement for

November 1988, which showed, among other items, the deduction from the applicant's allowance by way of pension scheme contribution was not the subject of a complaint within the period of three months provided for in the Staff Regulations. It appears from a telephone conversation between the applicant and a representative of the administration on 23 December 1988 that by that date at the latest he was aware of the items listed on that salary statement. Between that date and 29 March 1989, the date of receipt of his request of 22 March 1989, subsequently converted into a complaint, more than three months expired. According to the defendant, the payment notice of 25 January 1989, as well as the administration's decision to continue after 22 March 1989, to deduct pension contributions constitute confirmatory acts against which no action lies.

- 17 Nevertheless, the defendant concedes that the payment notice of 25 January 1989 rests, as regards the determination of pecuniary rights, on a different basis from the salary statement of November 1988; the compulsory nature of the contribution apparent from that notice does not constitute, it is alleged, a new item in relation to those appearing on earlier salary statements. According to the defendant, the criticism directed against the contested decision could have been made on receipt of the November salary statement, inasmuch as it is based on Article 4(7) of Regulation No 3518/85 and mentions the non-compulsory nature of the pension scheme contribution. That provision was used as the basis for deducting the contribution both before and after the payment notice of 25 January 1989 was drawn up, since the provisions of the ECSC scheme did not become applicable until afterwards.
- 18 The applicant replies that the payment notice of 25 January 1989 does not constitute a measure confirming the November 1988 salary statement, since the latter determined his pecuniary rights not under Article 34 of the ECSC Staff Regulations, but under Article 4(1) of Regulation No 3518/85.
- 19 He points out that the application relates to the essential question whether the contribution to the pension scheme is optional or compulsory. If it is optional, as he maintains, he is free to choose the date on which he stops paying it, in this case 22 March 1989.

- 20 At the hearing the applicant added that in his view the act adversely affecting him was the Commission's decision not to terminate the pension scheme deduction after 22 March 1989, a decision which was given concrete form by the dispatch around 15 April 1989 of the salary statement for April 1989. The complaint lodged on 24 April 1989 cannot therefore be out of time.
- 21 Article 91(2) of the Staff Regulations provides that an appeal to the Court of Justice lies only if the appointing authority has previously had a complaint submitted to it within the period prescribed in Article 90(2) of the Staff Regulations. That period is three months and, in the case of an individual decision such as that at issue, runs from the date on which the addressee is notified of the decision and, in any event, at the latest, on the day on which the person concerned had knowledge of it.
- 22 In order to assess the objection of inadmissibility raised by the defendant, it is therefore necessary to determine, on the one hand, the act adversely affecting the applicant and the date on which the applicant had knowledge of it and, on the other hand, the date on which the applicant lodged a complaint.
- 23 As regards the act adversely affecting the applicant, it is necessary to ascertain which of the three measures in question, namely the salary statement for November 1988, the notice of 25 January 1989 and the decision to continue, after 22 March 1989, the deduction at issue, constituted the act from which time ran pursuant to Article 90(2) of the Staff Regulations.
- 24 The Court of Justice has consistently held (judgments in Case 24/69 *Nebe v Commission* [1970] ECR 145, in Case 33/72 *Gunella v Commission* [1973] ECR 475, in Case 54/77 *Herpels v Commission* [1978] ECR 585 and in Case 23/80 *Grasselli v Commission* [1980] ECR 3709) that an act cannot be regarded as merely confirmatory of previous acts if it amends the previous act or contains a new factor as compared with the previous act.

- 25 In the present case the applicant is essentially asserting that the pension contribution is optional and that he may at any time ask for payment to be stopped. Examination of the documents before the Court shows that the payment notice of 25 January 1989 is the first document clearly disclosing the Commission's opinion that the contribution is compulsory. The earlier salary statements do not manifest that opinion. All that may be inferred from them is that the deduction was made. But that deduction would also have been made in a situation where, the contributions being optional, the applicant had not requested that the payments be stopped. Therefore the payment notice of 25 January 1989 contains a new factor as compared with the earlier salary statements.
- 26 On the other hand, the administration's implicit decision to continue the deduction after 22 March 1989 introduces no new factor into the discussion and does not alter the previous act. Accordingly, that decision is simply confirmatory of the payment notice. It may be added in that respect that in any event Mr Lestelle's complaint could not be directed against that implicit decision since, as regards the content of the complaint, the letter of 24 April 1989 referred to the letter of 22 March 1989 which necessarily antedated the Commission's decision not to accede to the request made therein.
- 27 It follows that the act from which the period for lodging a complaint ran is the payment notice of 25 January 1989.
- 28 It is common ground that that notice was sent by post from Brussels to Mr Lestelle's home address in Senningerberg (Grand Duchy of Luxembourg) so that the applicant could not have had knowledge of it earlier than 26 January 1989.
- 29 As regards the date on which the complaint was lodged it appears from the documents before the Court that Mr Lestelle handed the registered letter containing the complaint to the post office on 24 April 1989 and that that letter was registered at the Secretariat-General of the Commission on 26 April 1989.

- 30 That sequence of events indicates that the period of three months for lodging a complaint provided for in the Staff Regulations was observed by the applicant. Accordingly, the application is admissible.

### Substance

- 31 In support of his claim for the annulment of the Commission's decision to continue, after 22 March 1989, to deduct the pension contribution and of the rejection of his complaint, the applicant relies on two pleas in law based respectively on an alleged infringement of Article 4(7) of Regulation No 3518/85 and an alleged factual error on the part of the administration.

#### *The first plea based on an infringement of Article 4(7) of Regulation No 3518/85*

- 32 In support of the first plea in law the applicant contends that by stating in the first sentence 'provided that the contribution . . . is paid', Article 4(7) of Regulation No 3518/85 unequivocally establishes the optional nature of the contribution. He also refers in that connection to the other language versions of that provision.
- 33 The applicant expounds his assertion by contending that, contrary to the Commission's opinion, the period during which he is paid the allowance to which he is entitled cannot be treated as a period of actual service. Nor can that allowance be treated as remuneration given that the measures provided for in Regulation No 3518/85 concern termination of service. Since that regulation lays down special measures, it derogates from the ordinary provisions also in so far as the pension scheme is concerned.
- 34 The defendant invokes the compulsory nature of the contributions to the pension scheme which is a regulated, distributive scheme, not a capitalized scheme, based on the idea of collective solidarity and not a private insurance scheme in which each member is free to determine the amount and frequency of his contributions. There is not necessarily any correlation between the obligation to make contri-

butions of a given amount and the right to a pension of an amount corresponding to the contributions paid. The defendant cites the example of a serving official who must continue to make contributions to the pension scheme even if he has completed the maximum number of 35 years of pensionable service under Article 77 of the Staff Regulations.

35 Moreover, the applicant, whose service has been terminated by a measure pursuant to Regulation No 3518/85, is in the same position as a person having non-active status under Article 34 of the ECSC Staff Regulations. He receives an allowance as if he were on non-active status, that allowance being subject to a compulsory deduction in favour of the pension scheme under Article 95 of the Rules and Regulations of the ECSC under the terms of which 'any official having non-active status and receiving the allowance provided for in Article 34 or 42 of the Staff Regulations shall continue to pay into the pension scheme the deduction' in issue.

36 Finally, the defendant points out that there is a similarity in wording as between Article 4(7) of Regulation No 3518/85 and the corresponding provisions of earlier regulations on termination of service, on the one hand, and Article 3 of Annex VIII to the Staff Regulations, on the other, from which other provisions cited all borrowed the phrase 'provided that'. The defendant maintains that the abovementioned Article 3 envisages only situations in which the contribution in question is compulsory, and from that it deduces that the applicant's argument that it is optional must be rejected.

37 In order to interpret the proviso at issue, and thus to assess whether the pension contribution is optional or compulsory, it should be remembered that during the relevant period the applicant, at his express request and in accordance with Article 5(1) of Regulation No 3518/85, received the allowance provided for in Article 34 of the ECSC Staff Regulations which may be claimed by officials having non-active status. Under Article 95 of the Rules and Regulations of the ECSC, an official in receipt of the allowance provided for in Article 34 of the ECSC Staff Regulations is to continue to make contributions to the pension scheme.

38 Article 4(7) of Regulation No 3518/85 does not envisage any derogation from the obligation to pay contributions to the pension scheme incumbent on the recipient of an allowance under Article 34 of the ECSC Staff Regulations. Whilst reaffirming the continuation of the obligation to pay contributions during the period in which the allowance is paid, the provision seeks to give to the recipient of the allowance the assurance that the payment of the contribution is such as to secure for him new pension rights, so long as he has not yet completed the number of years of pensionable service conferring entitlement to the maximum amount of retirement pension provided for in Article 77 of the Staff Regulations. Although it is true, therefore, that the provisions of Article 4(7) of Regulation No 3518/85 are without relevance and cannot be invoked by the recipient of an allowance under Article 34 of the ECSC Staff Regulations who fulfils the conditions for the maximum pension entitlement, the person concerned nevertheless remains subject to the general obligation to make contributions imposed on him by Article 95 of the Rules and Regulations of the ECSC.

39 That interpretation is corroborated by the fact that the provisions of Article 4(7) and Article 5(1) of Regulation No 3518/85 are analogous, on the one hand, to the provisions of Article 5(7) and Article 7(1) of Regulation No 259/68 instituting special measures temporarily applicable to officials of the Commission, adopted by the Council on 29 February 1968 (Official Journal, English Special Edition 1968 (I), p. 30), and, on the other hand, to the provisions of Article 3(7) and Article 5(1) of Regulation (Euratom, ECSC, EEC) No 2530/72 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, adopted by the Council on 4 December 1972 (Official Journal, English Special Edition 1972 (1-8 December, p. 11)). During the period of application of those regulations no official of the Communities could yet have completed the number of years of pensionable service conferring entitlement to the maximum amount of the retirement pension; it follows that the optional nature of the contribution in such a case could not have arisen at that time, either in fact or, consequently, in law.

40 It follows from all the foregoing considerations that in the present case the payment of contributions to the pension scheme was an obligation for the applicant. The first plea in law must therefore be rejected.

*The second plea based on a factual error committed by the administration*

- 41 In support of this plea the applicant contends that the administration erred in stating that on 1 November 1988 the applicant had not acquired the maximum pension rights possible for him. The applicant points out that the Director of Personnel and Administration, by asserting in his reply to the complaint of 30 October 1989 that the applicant was obliged to make contributions to the pension scheme just like a serving official, in so far as he had not completed the number of years of pensionable service conferring on him entitlement to the maximum retirement pension, is by implication acknowledging that it is not obligatory for former officials who have completed that number of years to make contributions. On the date of termination of his service, 31 October 1988, the applicant had completed the maximum number of reckonable years for the award of the retirement pension.
- 42 The defendant does not deny its mistake which it describes as an error of law. However, it maintains that the plea is otiose for, even it were well founded, which is not the case, it would not be such as to entail the annulment of the decision expressly rejecting the complaint which alone contains that error, given that the decision is also expressly based on other grounds which are sufficient in themselves to justify the decision to reject the complaint.
- 43 Pension scheme contributions are compulsory in all cases, even where the official in question has completed the number of years of pensionable service prescribed by Article 77 of the Staff Regulations for entitlement to the maximum amount of the retirement pension.
- 44 Accordingly, the fact that the Director of Personnel and Administration erred in the reasons he gave in his reply to the applicant's complaint is irrelevant, since the rejection decision was in any event justified. The second plea in law should therefore also be rejected.
- 45 On the basis of all the foregoing considerations the application must be rejected.

**Costs**

- 46 Under Article 69(2) 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 establishing a Court of First Instance of the European Communities, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, Article 70 of those Rules provides that, in proceedings brought by servants of the Communities, institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

- (1) Dismisses the application;**
- (2) Orders the parties to bear their own costs.**

Schintgen

Edward

García-Valdecasas

Delivered in open court in Luxembourg on 22 November 1990.

H. Jung  
Registrar

R. Schintgen  
President