

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
1 October 1992 *

In Case T-70/91,

Jacques Moretto, an official of the Commission of the European Communities, residing in Aumetz (France), represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

v

Commission of the European Communities, represented by Gianluigi Valsesia, Principal Legal Adviser, and Ana Maria Alves Vieira, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 13 December 1990 refusing to transfer pension rights acquired under the Luxembourg national scheme to the Community pension scheme,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: B. Vesterdorf, President, A. Saggio and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator

having regard to the written procedure and further to the hearing on 14 May 1992,

gives the following

* Language of the case: French.

Judgment

Legal background and facts of the case

1 Article 11(2) of Annex VIII to the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') provides that an official who enters the service of the Communities is to be entitled 'on becoming established' to pay to the Communities the actuarial equivalent of retirement pension rights acquired by him so that they may be taken into account in the Community pension scheme.

2 The rules for the exercise of this right were laid down in general provisions for giving effect to Article 11(2) (hereinafter 'the general provisions') adopted by the Commission of the European Communities (hereinafter 'the Commission') in 1969 and subsequently amended on a number of occasions. In the present case the Commission gives the following account of the way in which the wording of those provisions has developed:

'In the version which came into force on 1 July 1969, and was published in *Staff Courier* No 77 of 29 July 1969, Article 1(2) and (3) of those provisions read as follows:

"On pain of losing the right to do so, a request must be made in writing within six months from the date of notification of the official's establishment.

In the case of an official established before the entry into force of these provisions that period shall start to run from the date on which they enter into force."

However, the words "on pain of losing the right to do so" in the first version of the general provisions were deleted from the text of a new version adopted on 4 February 1972. This was done so that officials could plead causes beyond their control.

A new version of the general provisions for giving effect to Article 11(2) was finally adopted in 1977 (and published in the *Staff Courier* of 19 October 1977); it remains in force today. Article 1 is worded as follows:

“An official who enters the service of the Communities after leaving the service of a government administration or of a national or international organization or of an undertaking shall have the right, on becoming established with that Community, to pay to it either:

- the actuarial equivalent of retirement pension rights acquired by him ...; or
- the sums repaid to him ...;

The request must be made within a period of six months from

- (i) the date of notification of establishment of the official,
- (ii) the date on which transfer becomes possible,
- (iii) the date of entry into force of the provisions in question, whichever is the most recent.”

The introduction of a third starting date, namely the date on which transfer becomes possible, was justified by the fact that rights become transferable only following the conclusion of agreements with the competent national authorities or the adoption of appropriate national legislation. It therefore seemed fair to make it possible for the official concerned to consider whether it was in his interest to request the transfer of his rights after examining the agreement or legislative provision.’

3 The applicant, who is of French nationality and mother tongue, entered the service of the Commission on 1 October 1986. He became established on 1 July 1987 and was transferred from Brussels to Luxembourg on 1 March 1989. Before entering the service of the Commission he had been employed by various undertakings established in the Grand Duchy of Luxembourg and for several years had contributed to the Luxembourg pension scheme.

4 In pursuance of Articles 1 and 24(1) of the Luxembourg Law of 22 December 1989, which was designed to coordinate the pension schemes and amend various provisions in matters of social security (*Mémorial*, 1989, p. 1704), and came into force on 1 January 1990, a fresh period of one year began to run from the date on which the law came into force, during which 'all persons established with an international organization' who had previously contributed to a Luxembourg pension scheme could request that their contributions be transferred to that organization's scheme.

5 On 29 March 1990 the Commission published a communication in French in a special inter-institutional issue of *Administrative Information*. In that communication the Commission announced the opening of a 'new period of one year from 1 January to 31 December 1990' for applications, under the new Luxembourg law, for pension rights acquired under a Luxembourg scheme to be transferred to the Community scheme. The communication also stated:

(The submission of a request does not entail an obligation to transfer pension rights at that stage. The final decision rests with the official concerned when he is notified of the proposed annual contribution to be credited to him.)

In pursuance of the general provisions for giving effect to Article 11(2) of Annex VIII to the Staff Regulations, which were published in the special inter-institutional issue of the *Staff Courier* of 19 October 1977, the attention of officials is drawn to the existence of a

LIMITATION PERIOD OF SIX MONTHS FROM 1 APRIL 1990 TO 30 SEPTEMBER 1990

After receiving the questionnaire, the Staff Administration will submit appropriate proposals to the officials concerned for their agreement.

- 6 It was also stated that the translation of the communication into the eight other Community languages would be published later. That in fact was done on 29 June 1990.

- 7 On 19 November 1990 the applicant submitted an application for his pension rights to be transferred. The application was submitted on a form in Italian taken from the special issue of *Administrative Information* of 29 June 1990. In a covering note dated 9 October 1990 which was enclosed the applicant stated, *inter alia*: 'My application is late partly due to postal problems following my transfer from Brussels to Luxembourg on 1 March 1990'. In the present proceedings the applicant explained that he had not been aware of the communication which appeared in the special issue of *Administrative Information* of 29 March 1990 and that it was only following the publication of 29 June 1990 that he had learnt of the new time limit for submitting a request for the transfer of the pension rights acquired in the Luxembourg scheme.

- 8 By letter of 13 December 1990, which the applicant received on 4 January 1991, the administration answered the request as follows:

'On 9 October 1990 you expressed an interest in the possible transfer of your national pension rights to the European Communities.

However, the general provisions for giving effect to the abovementioned article stipulate that the request must be made, in writing, within a period of six months from

(i) the date of notification of establishment of the official,

(ii) the date on which transfer becomes possible,

(iii) the date of entry into force of the provisions in question,

whichever is the most recent.

In your case the request should have been made before 30 September 1990, the deadline laid down in *Administrative Information* of 29 March 1990.

I therefore regret to have to inform you that I am no longer able to consider your request for the application of Article 11(2) of Annex VIII to the Staff Regulations'.

9 On 4 April 1991 the applicant submitted a complaint against the decision rejecting his request. The Commission did not reply to the complaint within the period of four months laid down in Article 90(2), second subparagraph, of the Staff Regulations.

Procedure and forms of order sought by the parties

- 10 By application lodged at the Registry of the Court of First Instance on 3 October 1991, the applicant sought the annulment of the Commission's decision of 13 December 1990.
- 11 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry.
- 12 The written procedure followed the normal course and ended on 17 February 1992.
- 13 The applicant claims that the Court should:
- annul the Commission's decision refusing his request that the pension rights acquired by him in the Luxembourg national scheme be transferred to the Community scheme;
 - order the Commission to pay the costs.

The defendant claims that the Court should:

- dismiss the application as unfounded;
- make an appropriate order as to costs.

Substance

14 In support of his application, the applicant relies on three submissions. The first is based on the breach of Articles 25 and 110 of the Staff Regulations and the principles governing internal directives; the second is based on the breach of Article 11(2) of Annex VIII to the Staff Regulations and the general provisions for giving effect thereto; and the third is based on the breach of the principles of equal treatment and proper administration and of the duty to provide for the welfare of officials.

15 The Court considers that it is appropriate to examine first the submission based on the alleged breach of Article 11(2) of Annex VIII to the Staff Regulations and the general provisions for giving effect thereto.

Arguments of the parties

16 The applicant disputes the defendant's right to fix a 'time limit' in the contested communication. In this context he refers to the fact that the Commission decided in 1972 to delete the words 'on pain of losing the right to do so' from the general provisions. He also refers to the Opinion of Advocate General Lenz in Case 124/87 *Gritzmann-Martignoni v Commission* [1988] ECR 3491 at p. 3499, point 29.

17 According to the applicant, since Article 11(2) of Annex VIII to the Staff Regulations does not itself provide for a limitation period, the principle of a limitation period was laid down without any legal basis by the head of the 'Pensions and relations with former staff' unit. Here again the applicant refers to the Opinion of Advocate-General Lenz in the *Gritzmann-Martignoni* case.

18 The Commission replies that the deletion of the words 'limitation period' in 1972 does not prevent the general provisions from laying down a time limit which must be observed by the officials concerned when they apply for the pension rights

acquired in various national schemes to be transferred to the Community scheme. It justifies the setting of such a time-limit in the following terms.

Article 11(2) of Annex VIII 'therefore recognizes an official's right to pay to the Community the actuarial equivalent of his rights to a national pension on becoming established.

A literal interpretation of that provision would require an official to decide whether or not to transfer his rights on the actual date of being established or even on the date of notification of establishment.

The inflexibility of such a requirement led the Commission to introduce in its general provisions a time limit (of six months) in order to give officials a proper opportunity to consider the matter, but without straying from the spirit of Article 11(2).

...

Apart from the justification expressed above, it should be added that the setting of a time limit for submitting a request for pension rights to be transferred also meets other considerations;

- the purpose of Article 11(2) lies in the possibility of ensuring continuity in the sphere of pensions between national and Community pension schemes and this can only be understood as an immediate transition;
- secondly, the setting of a time limit makes it possible to avoid speculation and the discrimination which might result ...

— finally, reasons connected with good management require a maximum of foreseeability for the processing of files. Up to now the competent Community services have dealt with almost 7 000 requests for the transfer of national pension rights. It is difficult to see why the administration should be faced at any time with overdue requests which would prevent the normal course of its administrative activity’.

19 The Commission submits that the Court of Justice found in the *Gritzmann-Martignoni* case that there was justification for imposing such a time-limit.

20 The Commission states that the fixing of the period from 1 April to 30 September 1990 was consistent with the general provisions at issue. It adds that exceptions can be allowed only in cases of *force majeure* arising from circumstances not attributable to the official. No such circumstances were adduced by the applicant.

Legal assessment

21 Firstly, it should be observed that — as the applicant concedes — the Commission was entitled to adopt general provisions for giving effect to Article 11(2) of Annex VIII to the Staff Regulations. By interpreting the phrase ‘on becoming established’ in Article 11(2) of Annex VIII in such a way as to allow the officials concerned a certain period for consideration, as from their establishment, before requesting the transfer of their rights and by setting that period at six months the Commission in no way exceeded the limits of its power under the Staff Regulations to adopt measures for giving effect thereto. The period allowed is reasonable and gives sufficient time to consider the matter except where the official concerned is in an exceptional situation the causes of which are not attributable to him.

- 22 In order to fill the gaps where Article 11 of Annex VIII to the Staff Regulations does not apply because the laws of a Member State make no express provision for the pension rights acquired in the national scheme to be transferred to the Community scheme, or where the laws of a Member State, in amending the national scheme, open a new period for submitting a request for the transfer of rights, the general provisions provide that the period of six months within which the request to the Community administration must be made is to be calculated from 'the date on which transfer becomes possible'. The Court cannot criticize that interpretation, which is in no way restrictive and which is consistent with the purpose of the relevant provision of the Staff Regulations.
- 23 Secondly, in the abovementioned communication published in the special inter-institutional issue of *Administrative Information* of 29 March 1990, the Commission drew officials' attention to the existence of a 'limitation period of six months'.
- 24 With regard to the actual nature of the time limit fixed by the general provisions, the Court observes, firstly, that in the *Gritzmann-Martignoni* judgment, in which the Court of Justice had to rule on the application of the general provisions in their 1977 version, which is still in force, it expressly left open the question 'whether or not the period laid down by the implementing provisions for giving effect to Article 11(2) is to be regarded as being in the nature of a limitation period' (paragraph 11). In the present case the administration fixed a 'limitation period' in the abovementioned communication even though, on the one hand, the general provisions pursuant to which the communication was adopted do not provide for any such period and, on the other, the Commission itself in 1972 deleted all previous references to a 'limitation period' in the general provisions. Moreover, the Commission explained, both in its written statements to the Court and at the hearing, that in spite of the straightforward time limit laid down in the general provisions, it had no objection to making allowances for causes beyond the control of the official concerned, which cannot be the case where the limitation period is such that the official concerned can be excused only in the event of *force majeure*.
- 25 It is unnecessary to rule on the question whether the Commission could introduce a 'limitation period' in the general provisions because in any case its services were

not entitled to do as they did in the communication of 29 March 1990 and lay down conditions for the application of the rules in question which were stricter than permitted by the legal basis constituted by the general provisions.

26 The Commission's decision of 13 December 1990 rejecting the applicant's request was taken pursuant to the abovementioned rules and after the contested communication, and relied expressly and exclusively on the existence of a 'deadline' for which, as stated in paragraph 25, there was no basis in law. The Commission therefore considered itself bound by the 'limitation period' without ascertaining whether causes beyond the applicant's control might have justified the failure to observe the period of six months. It follows that that decision is mistaken in law.

27 Furthermore the Court must consider, of its own motion if necessary, the issue of failure to comply with the obligation laid down in Article 25 of the Staff Regulations to state the reasons for decisions (see, most recently, the judgment of the Court of First Instance in Case T-54/90 *Speybrouck v Parliament* [1992] ECR II-33, paragraph 89).

28 The Court finds in that respect that although the covering letter accompanying the request of 9 October 1990 explained that 'My application is late partly due to postal problems following my transfer from Brussels to Luxembourg on 1 March 1990', the decision of 13 December 1990 refers only to the alleged 'deadline' without addressing the question whether in the applicant's case there were any particular reasons which might have excused his delay in submitting his request, as he claimed.

29 The Court therefore finds that, as the Commission rejected the excuse given by the applicant in the covering letter of 9 October 1990 for the fact that his request was late and as it stated no reasons other than the existence of a limitation period, the Commission failed to fulfil its obligation under the second paragraph of Article 25 of the Staff Regulations to state the grounds on which its decision was based and that the decision is therefore vitiated for lack of adequate reasoning.

- 30 Since the decision is mistaken in law and does not state sufficient grounds either, the Commission infringed essential procedural requirements and also the general provisions in question in such a way as to affect the legality of the decision of 13 December 1990. Accordingly the decision must be annulled and it is unnecessary to examine the other submissions in the application.

Costs

- 31 Pursuant to Article 87(2) of the Rules of Procedure of the Court of first Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has failed in its submissions, it must be ordered to pay all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls the Commission's decision of 13 December 1990;**
2. **Orders the Commission to pay all the costs.**

Vesterdorf

Saggio

Biancarelli

Delivered in open court in Luxembourg on 1 October 1992.

H. Jung

B. Vesterdorf

Registrar

President