

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

23 March 1994 * .

In Case T-8/93,

Michelle Huet, a member of the temporary staff of the Court of Auditors of the European Communities, residing at Bleid (Luxembourg), represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

v

Court of Auditors of the European Communities, represented by Jean-Marie Stenier and Jan Inghelram, members of its Legal Service, acting as Agents, with an address for service at the Court of Auditors, 12 Rue Alcide de Gasperi, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for the annulment of the decisions of the Court of Auditors refusing to grant orphans' pensions for the applicant's children,

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

composed of: A. Kalogeropoulos, President, D. P. M. Barrington and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearings on 14 September 1993 and 12 January 1994,

gives the following

Judgment

Facts and legal background

- 1 The applicant is a member of the temporary staff of the Court of Auditors of the European Communities. She has two children, whose father died before she entered the service of the Communities. It is not disputed that those children are

dependent on her, within the meaning of Article 2 of Annex VII to the Staff Regulations of Officials of the European Communities (hereinafter the 'Staff Regulations').

- 2 The fifth paragraph of Article 37 of the Conditions of Employment of Other Servants of the European Communities (hereinafter the 'Conditions of Employment'), which makes the provisions of the fourth paragraph of Article 80 of the Staff Regulations applicable to such servants, provides that:

'Where the spouse, not being an official or member of the temporary staff, of a member of the temporary staff or of a member of the temporary staff in receipt of a retirement or invalidity pension dies, children dependent on the surviving spouse within the meaning of Article 2 of Annex VII to the Staff Regulations shall be entitled to an orphan's pension fixed in accordance with the fourth paragraph of Article 80 of the Staff Regulations.'

- 3 The Court of Auditors considers that those provisions must be interpreted as not permitting the award of an orphan's pension where the spouse, not being an official or member of the temporary staff, dies before the surviving spouse enters the service of the Communities. It expressed that opinion in paragraph 15.28 of its Annual Report concerning the financial year 1989, as follows:

'The Parliament, Council, Commission and Economic and Social Committee have awarded orphans' pensions, on the basis of Article 80, fourth indent, of the Staff Regulations, to children of officials whose spouse died prior to their recruitment by the Communities. In all cases these pensions took effect as from the day of recruitment. In the Court's opinion, this practice is irregular since the abovementioned provision can only concern situations obtaining subsequent to the appointment of officials. This practice also runs counter to the economic rationale of the Communities' system of pensions, which covers, in return for contributions,

the risks of death or invalidity arising during the period of membership, and not those which were incurred previously under another social security scheme. For this reason, moreover, these orphans should, under normal circumstances, already be in receipt of a pension paid from a national fund, which would therefore duplicate the Community payments. The audit revealed 26 of these cases, the annual budgetary cost of which may be estimated at 4.2 Mio BFR (98 296 ECU).'

- 4 The Committee of Heads of Administration followed a different interpretation of the provision in question in Conclusion 200/91, which was adopted on 27 September 1991 and brought to the attention of the staff of the Court of Auditors during the following month. Paragraph I.1 of that conclusion states that:

'In order to harmonize the interpretation of the provisions of the fourth paragraph of Article 80 of the Staff Regulations, and to avoid creating discrimination, the following situations: — death of the spouse or ex-spouse before the official enters the service (...) must be considered as giving rise to the grant and/or continuation of an orphan's pension, by reason of the *intuitu personae* character of that pension.'

- 5 Paragraph II of the Conclusion provides that:

'By analogy with the family allowances referred to in Article 67(1) of the Staff Regulations, the rule against overlapping benefits in paragraph 2 of that article should be applied to an orphan's pension, where the person in question can claim a pension of like nature paid under another system.'

- 6 By a memorandum of 28 November 1991 the applicant submitted a request, pursuant to Article 90(1) of the Staff Regulations, for a decision that she was entitled to orphans' pensions for her children.

- 7 Having received no reply to that request, the applicant lodged a complaint on 29 April 1992 against the implied decision rejecting it.
- 8 That complaint was rejected by a memorandum of 16 October 1992.

Procedure and forms of order sought by the parties

- 9 Those were the circumstances in which, by application lodged at the Court Registry on 19 January 1993, the applicant brought the present action against the decision refusing to grant an orphan's pension.
- 10 The written procedure was completed on 19 May 1993 when the defendant stated that it did not wish to file a rejoinder.
- 11 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.
- 12 The parties presented oral argument and answered the Court's questions at the hearing on 14 September 1993.
- 13 By order of 19 October 1993, the Court of First Instance ordered the oral procedure to be reopened.

- 14 Also on that date, the Court put the following question to the institutions of the European Communities:

‘The Court of First Instance wishes to know whether the institutions continue to pay an orphan’s pension, under the fourth paragraph of Article 80 of the Staff Regulations or the fifth paragraph of Article 37 of the Conditions of Employment of Other Servants, until the age-limit specified in Article 2 of Annex VII to the Staff Regulations, where the surviving parent of the children in question leaves the service of the Communities without being entitled to a retirement or invalidity pension.’

- 15 Only the Court of Justice had encountered the problem stated in the question of the Court of First Instance. It replied that:

‘The Court of Justice has only had one case where an orphan’s pension was paid under the fourth paragraph of Article 80 of the Staff Regulations of officials of the European Communities, where the surviving official left the service of the Communities without receiving a retirement or invalidity pension.

That official initially took leave on personal grounds, and then resigned. In that case the Court continued to pay the orphan’s pension for the duration of the official’s leave on personal grounds. When he submitted his resignation, the pension was cancelled.’

- 16 The Commission, although having no precedent, replied that ‘given that it is accepted that Article 80 of the Staff Regulations gives the children of an official or former official a right of their own which they derive directly from the Staff Regulations and which arises from their legal situation as children of an official or former official at the time of the death of their non-official parent, it would be

logical and consistent to continue payment of the orphan's pension if their *causam dans* leaves the service of the Communities without being entitled to a retirement or invalidity pension'.

17 The Council had never had to deal with such a case, but replied that:

'should such a situation arise, the Council is of the opinion that payment of the orphan's pension should not be continued, for the following reasons:

Under the fourth paragraph of Article 80 of the Staff Regulations, the grant of an orphan's pension is linked to the grant of a dependent child allowance in accordance with Article 2 of Annex VII to the Staff Regulations. An official who leaves the service without being entitled to a retirement or invalidity pension loses his entitlement to remuneration, which, under Article 62 of the Staff Regulations, comprises the basic salary, family allowances and other allowances. He also ceases *ipso facto* to receive the orphan's pension.'

18 The parties again presented oral argument at the hearing on 12 January 1994, on the institutions' replies to the questions put by the Court.

19 The applicant claims that the Court should:

- (i) annul the decision refusing to grant orphans' pensions to her children;
- (ii) order the defendant to pay the costs.

20 The defendant contends that the Court should:

- (i) dismiss the action as unfounded;
- (ii) make an appropriate order as to costs.

Substance

21 The applicant puts forward two pleas in law in support of her application. The first plea alleges an infringement of the fourth paragraph of Article 80 of the Staff Regulations and of the fifth paragraph of Article 37 of the Conditions of Employment. The second plea alleges a breach of the principle of non-discrimination.

First plea in law: infringement of the fourth paragraph of Article 80 of the Staff Regulations and the fifth paragraph of Article 37 of the Conditions of Employment

22 The applicant argues that the orphan's pension provided for in the fourth paragraph of Article 80 of the Staff Regulations and the fifth paragraph of Article 37 of the Conditions of Employment can be granted even if the death of the spouse has

occurred before the surviving parent enters the service of the Communities. That interpretation of the provisions in question is shared by the Committee of Heads of Administration, which based its Conclusion 200/91 on that interpretation, and by most of the Community institutions. That argument is based on the view that a 'pension' paid pursuant to those provisions is an allowance of the same type as 'a dependent child allowance', not a pension. Unlike the pensions provided for in the first three paragraphs of Article 80 of the Staff Regulations, which refer to Article 21 of Annex VIII to the Staff Regulations, dealing with pensions, with respect to calculation of those pensions, the pension provided for in the fourth paragraph of that provision refers to twice the dependent child allowance.

- 23 The Court of Auditors, on the other hand, considers that the pension provided for in those provisions can be granted only if the spouse dies after the surviving parent enters the service. This proposition is based on the view that the pension in question is a real pension, the grant of which is dependent on contributions.
- 24 The Court of First Instance notes to begin with that the applicant agrees that the pensions provided for in the first three paragraphs of Article 80 of the Staff Regulations are pensions in the strict sense of the term. Consequently, it must be examined whether, unlike those pensions, the pension provided for in the fourth paragraph of that provision is a pension of the same type as a dependent child allowance, as the applicant claims.
- 25 The Court finds on this point that there are only two factors which distinguish the pensions provided for in the first three paragraphs from that provided for in the fourth paragraph of Article 80 of the Staff Regulations. These are, firstly, the fact that the latter accrues not on the death of the official, but on that of the official's spouse, and, secondly, the fact that the amount of that pension is not calculated in accordance with the provisions of Article 21 of Annex VIII on pensions, but by reference to the amount of the dependent child allowance.

- 26 It should be noted at the outset that the fourth paragraph of Article 80 does not create any link between payment of the dependent child allowance and payment of the pension it makes provision for, but merely defines the amount of that pension by reference to the amount of that allowance.
- 27 The Court finds that the fact that the method of calculation of the pensions provided for in the fourth paragraph of Article 80 differs from that provided for in the other paragraphs is of no significance since the difference is the direct consequence of the fact that the pension in question accrues on the death not of the official, but of the official's spouse. If the pension provided for in the fourth paragraph is not calculated by reference to Article 21 of Annex VIII, which deals with survivors' pensions, that is in fact precisely because the pension is payable to the orphan not by virtue of the death of the official, but by virtue of the death of the official's spouse, which cannot give rise to payment of a survivor's pension under the Community rules.
- 28 Consequently, the only relevant difference between the pensions provided for in the first three paragraphs of Article 80 and the pension provided for in the fourth paragraph of that article is the event which gives rise to the orphan's pension: the death of the official or the death of the official's spouse. While that difference may indeed result from the fact that the pensions paid by reason of the death of an official pursue a different aim from the latter pension, the former being intended to insure that the orphans are maintained on the basis of the contributions paid by the official before his death, the latter being intended to help a widowed official to bear the additional cost resulting from the widowed state, it is nevertheless the case that the latter aim can equally well be pursued by payment of a pension to the children as by payment of an additional family allowance to the surviving parent. Thus the difference neither supports nor invalidates the applicant's argument.
- 29 The Court considers that the 'orphan's pension' provided for in the fourth paragraph of Article 80 of the Staff Regulations is a real pension, for the following reasons.

- 30 Firstly, the position of the fourth paragraph of Article 80 within the Staff Regulations shows that the intention of the draftsmen was to give the pension provided for in that paragraph the status of a pension, not that of an additional dependent child allowance. If that were not the case, the provision would not have been included in Article 80, which relates solely to pensions and is part of Chapter 3 of Title V of the Staff Regulations, entitled 'Pensions', not of Chapter 1 of Title V, entitled 'Remuneration and Expenses', where the provisions on family allowances are to be found.
- 31 Secondly, it follows from the wording of the provision, as the Commission stated in its reply to a question put by the Court, that the person entitled to the pension provided for in the fourth paragraph of Article 80 of the Staff Regulations is the orphan himself, as in the case with the pensions provided for in the first three paragraphs, not the surviving parent, as would have been the case if the benefit concerned had been an additional dependent child allowance, which in accordance with Article 62 of the Staff Regulations forms part of the official's remuneration. Moreover, it should be pointed out in this respect that, in addition to the orphan's pension received by the child of 'twice the amount of dependent child allowance' (fourth paragraph of Article 80), the surviving parent receives as part of his remuneration the normal amount of dependent child allowance.
- 32 It follows that the fourth paragraph of Article 80 of the Staff Regulations does not give the official an additional dependent child allowance, but grants orphans a pension.
- 33 The nature of the Community pension scheme is that in return for contributions it covers the risks of death and invalidity arising during the period of membership.
- 34 Consequently, the pension provided for in the fourth paragraph of Article 80 of the Staff Regulations can be paid only if the death of the official's spouse occurs

after the official's entry into the service, that being the point in time from which he is a member of the Community pension scheme.

- 35 That interpretation of the fourth paragraph of Article 80 of the Staff Regulations is supported by the wording of the Danish, English, German, Greek, Portuguese and Spanish versions of that provision, in that they refer to the death of the spouse either in the present indicative or in a subjunctive tense expressing the future. By so doing those language versions indicate that the official had to be in the service of the Communities at the time of his spouse's death in order for his children to be able to draw the pension referred to in that provision. While the Dutch, French and Italian versions of the provision admittedly use the past tense when referring to the death of the spouse, it must be noted that the Dutch and French versions also use the past tense in the first and third paragraphs of Article 80 to refer to a hypothetical case (death of the official or person entitled to a retirement or invalidity pension) which cannot come about until after the entry into service of the person concerned, while the Italian version uses expressions corresponding to a present or future tense. Consequently, the applicant cannot rely on those language versions to support her argument.
- 36 In view of the fact that the provision which applies to the applicant is not the fourth paragraph of Article 80 of the Staff Regulations but the fifth paragraph of Article 37 of the Conditions of Employment, it should be examined whether the differences of context and wording between those provisions are such as to justify different conclusions for officials and for members of temporary staff.
- 37 Article 37 is in Title II of the Conditions of Employment, which deals with temporary staff, and in that title it is part of Chapter 6, 'Social Security Benefits', Section B, 'Insurance against invalidity and death' — which confirms that it relates to pensions covering members against risks — whereas had it related to a pension of the same type as a dependent child allowance, it would have appeared in Chapter 5, 'Remuneration and Expenses', in which is to be found Article 21 concerning family allowances which form part of remuneration. Consequently, the place where that provision appears in the Conditions of Employment confirms that the Court's interpretation of the fourth paragraph of Article 80 of the Staff Regulations is also valid for that provision.

- 38 With reference to the wording of Article 37, the Court notes that, like the fourth paragraph of Article 80 of the Staff Regulations, the fifth paragraph of Article 37 uses the past tense in the French text, while the first paragraph of that provision uses the present tense, whereas the first paragraph of Article 80 of the Staff Regulations uses the past tense.
- 39 In view of the fact that the third paragraph of Article 37 uses the past tense to refer to a hypothetical case which cannot come about until after the entry into service of the person concerned and in view of the identical purpose of the first, second, third and fifth paragraphs of Article 37 and the first four paragraphs of Article 80 of the Staff Regulations, those provisions should not be given a different interpretation, especially since the applicant has not mentioned the differences of drafting or put forward any reason for interpreting the provisions differently.
- 40 It follows that, since the applicant was not a member of the Community pension scheme at the time of the death of her spouse because he died before she entered the service of the Communities, her children cannot receive the orphan's pension provided for in the fourth paragraph of Article 80 of the Staff Regulations and the fifth paragraph of Article 37 of the Conditions of Employment.
- 41 The applicant cannot claim that that interpretation of the fourth paragraph of Article 80 of the Staff Regulations and the fifth paragraph of Article 37 of the Conditions of Employment is inequitable in principle. While it is true that it is unfavourable for her, it is also true that it is favourable for other officials or members of temporary staff, such as those who have to leave the service of the Community without being entitled to a retirement or invalidity pension and whose children, on this interpretation, keep their orphans' pensions until they reach the age defined in Article 2 of Annex VII to the Staff Regulations, even though the surviving parent no longer receives dependent child allowance.
- 42 It follows that the first plea in law must be rejected.

Second plea in law: breach of the principle of non-discrimination

- 43 The applicant maintains that she is the victim of discrimination both in comparison with officials of the other institutions who receive the pension provided for in the fourth paragraph of Article 80 of the Staff Regulations even though their spouse died before they entered the service of the Communities, and also in comparison with officials whose spouse dies after they have entered the service of the Communities.
- 44 The Court considers firstly that the applicant cannot rely, in support of her claim that she is the victim of discrimination, on the fact that other officials are benefiting from an illegality. It follows in fact from the reasons for which the Court has rejected the first plea in law that the fourth paragraph of Article 80 of the Staff Regulations and the fifth paragraph of Article 37 of the Conditions of Employment preclude payment of a pension under those provisions to the children of officials or members of temporary staff whose spouse died before they entered the service of the Communities.
- 45 Secondly, the applicant cannot claim to be the victim of discrimination in comparison with officials and members of temporary staff whose spouse died after they entered the service of the Communities. The principle of non-discrimination requires that differences in treatment between different categories of officials or temporary staff must be justified on the basis of objective and reasonable criteria and that the difference must be proportionate to the aim pursued by the differential treatment.
- 46 In this respect it suffices to note that the criterion for the different treatment is objective in that it is based on the date of the spouse's death and the date when the official or temporary staff member enters the service of the Communities, that that

criterion is reasonable in that it is based on the fact that the benefit in question is a pension, and that the difference in treatment is proportionate to the legitimate aim pursued, namely that the risks covered by the Community pension scheme should in principle be balanced by contributions to that scheme.

47 The plea in law must thus be rejected.

48 It follows that the application fails.

Costs

49 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1) Dismisses the application;

2) Orders the parties to bear their own costs.

Kalogeropoulos

Barrington

Lenaerts

Delivered in open court in Luxembourg on 23 March 1994.

H. Jung

A. Kalogeropoulos

Registrar

President