JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
3 April 1990 *

In Case T-135/89

Fred Pfloeschner, an official of the Commission of the European Communities, residing in Brussels, represented by G Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A Schmitt, 62 avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, J Griesmar, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of a memorandum from the Head of the Pensions Department informing the applicant of the 'provisional statement of pension rights' which would be paid to him as from 1 September 1990, in so far as the weighting applicable to the applicant's pension would be 100 if he retired to Switzerland,

THE COURT OF FIRST INSTANCE (Third Chamber)

composed of: A Saggio, President of Chamber, C Yeraris and K Lenaerts, Judges,

Registrar: H Jung

having regard to the written procedure and further to the hearing on 21 February 1990,

gives the following

* Language of the case: French

Judgment

Facts and procedure

1 By application lodged at the Court Registry on 18 September 1989, Fred Pfloeschner brought an action for the annulment of the memorandum from the Head of the Pensions Department containing a 'provisional statement of pension rights' which would be paid to him as from 1 September 1990, in so far as the weighting applicable to the applicant's pension would be 100 if he retired to Switzerland

2 By a document received at the Court Registry on 27 October 1989, the Commission raised an objection of inadmissibility based on Article 91(1) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* to proceedings before the Court of First Instance, and asked that a decision be given on the objection without the substance of the case being considered It also asked that the applicant be ordered to pay the costs

3 The background to the dispute is as follows In 1958 the applicant, a Swiss national, was appointed a Commission official by way of derogation from the nationality clause (Article 28(a) of the Staff Regulations of Officials) On 11 February 1988, the Head of the Pensions Department in the Commission, Mr Caston, sent to Mr Pfloeschner — in response to an oral request from him — a provisional statement of his pension rights as from 1 September 1990, at the age of 62 years and one month, based on the maximum rate That statement showed a net pension of approximately BFR 263 000, calculated by using the weighting of 145 4 then applicable both for pensions payable to persons residing in Switzerland and for the remuneration of officials assigned to work in Switzerland However, on 18 July 1988 that weighting was substantially reduced with respect to pensions by Council Regulation (ECSC, EEC, Euratom) No 2175/88 laying down the weightings applicable in third countries (Official Journal 1988, L 191, p 1), Article 3 of which provides that 'the weighting to be applied to a pension where the recipient has established his residence in a third country shall be 100'

4 Therefore, on 13 September 1988, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against Regulation No 2175/88 — and specifically

against the 'decrease in the future net pension resulting from elimination of the weighting for pensioners who establish their residence in a third country' — claiming that that regulation is unlawful since it infringes the principle of the protection of legitimate expectations and the principle of equal treatment for officials (complaint 190/88) On 22 March 1988, the Commission rejected that complaint on the following grounds: first, when the applicant was recruited the weighting applicable to pensions paid to ex-officials established in a third country was 100; secondly, the legal relationship between officials and the administration is governed by the Staff Regulations; and, finally, the contested regulation adopts the criterion of place of residence and not of nationality The decision also drew the applicant's attention to the fact that any legal action by an official against a regulation relating to matters within the ambit of the Staff Regulations was inadmissible

5 The applicant also sought an amended calculation of his pension rights as at 1 September 1990, following the entry into force of the new rules In reply, Mr Caston sent him, by letter of 16 January 1989, a 'provisional statement of his pension rights subject to definitive determination of [his] rights upon the award of his pension' The new calculation was made by the administration on the basis of Regulation No 2175/88, that is to say using a weighting of 100 It gave a net pension of about BFR 182 000, thus showing a shortfall of more than BFR 81 000 a month in the amount receivable by the applicant Consequently, on 24 February 1989 he lodged a fresh complaint against 'the calculation of his future pension appearing in the [abovementioned] letter' (complaint 91/89): the applicant claimed that the new statement had been based on the abovementioned regulation which he considered to be illegal for the reasons set out in his complaint 190/88

6 Following the implied rejection of that second complaint, arising from the Commission's failure to reply to it within the period prescribed by Article 90(2) of the Staff Regulations, Mr Pfloeschner brought the present action before the Court of Justice on 18 September 1989 with a view to securing annulment of 'the Commission's decision of 16 January 1989 establishing the applicant's pension rights in so far as the weighting applicable to the applicant's pension if he retires to Switzerland is fixed at 100' In addition to the submissions contained in his complaint (breach of the principle of the protection of legitimate expectations and of the principle of equal treatment for officials), the applicant alleges lack of powers on the part of the Council to adopt Regulation No 2175/88, breach of the principle of estoppel and of the principle of good management and proper administration

7 The Commission lodged an objection of inadmissibility against the application as a whole It also contended that the three new submissions referred to in the preceding paragraph were inadmissible since they did not correspond to any head of claim in the complaint

8 By order of 15 November 1989, the Court of Justice assigned 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 The applicant lodged observations to the effect that the objections of inadmissibility should be dismissed Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided, pursuant to Article 91(3) of the Rules of Procedure, to open the oral procedure without any preparatory inquiry

Admissibility

9 The Commission, referring to the nature of the contested measure, objects that the entire application is inadmissible It relies in particular on the judgment of 10 December 1969 in Case 32/68 *Grasselli* v *Commission* [1969] ECR 505, in which the Court declared inadmissible an action brought against an 'explanatory table' of the applicant's contingent pension rights and contends that the letter at issue merely provides administrative information concerning the administration's intention in due course to calculate the applicant's pecuniary entitlements, in accordance with certain detailed rules, in the event of his retirement: that letter was not therefore in the nature of a 'decision' intended to produce legal effects Thus, since — in the defendant's contention — it is not an act adversely affecting the official concerned, the memorandum from the Head of Department cannot be the subject of an action The Commission states in particular that the applicant cannot rely on the judgment of 1 February 1979 in Case 17/78 *Deshormes* v *Commission* [1979] ECR 189, paragraphs 9 to 13, in which the Court held that an official in active employment has a 'legitimate, present, vested interest' in challenging by legal proceedings the basis of the future calculation of his pension rights The defendant contends in that regard that, by contrast with the position in *Deshormes*, the measure at issue in these proceedings does not rank as a decision in so far as it is neither a decision adopted *ex proprio motu* nor an express decision rejecting a request within the meaning of Article 90(1), but was communicated to the applicant in response to a mere request for information In support of its view, the Commission states that in any event Article 40 of Annex VIII to the Staff

Regulations precludes the adoption of a decision calculating in advance the pension rights of an official who has not yet retired

10 The applicant claims, on the contrary, that the letter signed by the Head of Department, Mr Caston, does adversely affect him: having come from 'a duly informed and competent authority' it is not 'mere "information"' as in *Grasselli* but is in the nature of an 'individual decision' affecting him, precisely because it shows that the weighting applicable to the pension which he would receive in the event of his retirement on 1 September 1990 would be reduced to 100 by application of Regulation No 2175/88 Arguing by analogy with salary statements — which are regarded as acts adversely affecting an official where they show a change which is open to challenge — Mr Pfloeschner considers that the letter at issue, in so far as it deprives him of an adjustment to which he was previously entitled according to a first provisional statement prepared one year earlier by the Head of the same department, 'contains the elements of an individual decision adversely affecting him', by contrast with the measure attacked in *Grasselli*, where the official, furthermore, had an option available to him as to the basis on which his pension rights were to be calculated He also relies on the allegedly 'decisional' nature of the contested letter and claims that *Deshormes* is applicable to his case, irrespective of whether or not a prior request, within the meaning of Article 90(1) of the Staff Regulations, was submitted It is thus not necessary, in the applicant's view, that the administration should have rejected such a request for the applicant to be entitled to challenge by legal proceedings the amount of the pension rights to be determined in the near future Mr Pfloeschner nevertheless claims that, in the present case, the oral request for 'an amended calculation of his pension rights as at 1 September 1990, following the entry into force of the new rules' made by him to Mr Caston must be regarded as a request within the meaning of the abovementioned provision

11 It must be pointed out in the first place that, according to Article 91(1) of the Staff Regulations, any dispute between the Communities and any person to whom the Staff Regulations apply regarding the legality of an act adversely affecting that person may be brought before the Court of Justice The Court has consistently held that the concept of an act adversely affecting an official covers any act capable of directly affecting a given legal situation (judgments of 1 July 1964 in Case 26/63 *Pistoj* v *Commission* [1964] ECR 341, and in Case 78/63 *Huber* v *Commission* [1964] ECR 367, of 6 February 1973 in Case 56/72 *Goeth-Van der Schueren* v *Commission* [1973] ECR 181, paragraphs 8 to 10, and of 11 July 1974 in Joined Cases 177/73 and 5/74 *Reinarz* v *Commission* [1974] ECR 819) It is therefore necessary to examine the substantive features of the contested measure in order to determine its legal nature

12 The letter dated 16 January 1989 sent to the applicant by the Head of the Pensions Department of the Commission's Directorate-General for Personnel and Administration displays numerous features conducive to the conclusion that it is not decisional in character. The first paragraph of the letter clearly states that it is intended to provide the official with a 'provisional statement of the pension rights payable [to him] as from 1 September 1990'. In view of the use of the word 'provisional', which relates to the statement, that is to say to the actual content of the letter in its entirety, it seems clear that the administration sought, at the very commencement of the letter, to stress that it was not a definitive position but merely gave information as to the future amount of the pension. That analysis is confirmed by the second paragraph of the letter, in which it is stated that the statement provided was 'prepared on the basis of the Staff Regulations as at present in force, subject to definitive determination [of the applicant's rights] upon [his] being awarded a pension'. It is thus quite plain that the staff who wrote the letter were anxious to make it unequivocally clear that the information communicated to him in the previous paragraph could in no circumstances be interpreted as constituting a position taken by the administration, that is to say a measure constituting a decision which, as such, could be proceeded against through administrative channels and before the Court.

13 It must also be emphasized that the contested letter appears manifestly to have been based on an established standard form, so as not to give the addressee the impression that it could in fact constitute a decision. The appropriateness of the use of the term standard form is confirmed by the fact that the letter of 16 January 1989 (annex 6 to the application) uses exactly the same terms as the letter sent to the applicant on 11 November 1988 (annex 3 to the application): both letters have the same structure and use exactly the same terminology.

14 It is thus apparent from an analysis of the letter at issue that it contains only administrative information. It must be borne in mind that the Court has consistently held that purely explanatory measures and statements provided for information are not capable of determining rights which the applicants would derive from a given legal situation (judgments of 10 December 1969 in *Grasselli*, *supra*, paragraph 5, of 28 May 1970 in Joined Cases 19 and 20, 25 and 30/69 *Richez-Parise* v *Commission* [1970] ECR 325, paragraph 19, of 9 July 1970 in Case 23/69 *Fiehn* v *Commission* [1970] ECR 547, paragraph 11, and of 1 February 1979 in *Deshormes*, *supra*, paragraphs 23 and 24).

15 Consequently, by virtue of those principles, it must be considered that the letter of 16 January 1989 is not an act adversely affecting an official and therefore not an act against which an action can be brought

16 In support of his application, the applicant also claims that the letter must in any event be regarded as a decision adopted by the Commission in response to his request for 'an amended calculation of his pension rights as at 1 September 1990, following the entry into force of the new rules' The applicant states that he made that request by telephone to the Head of the Pensions Division That argument cannot be accepted It is difficult to classify a request made by telephone, manifestly intended merely to secure information — in a sphere, moreover, where requests for information are made very frequently — as a formal request for a decision by the Commission within the meaning of Article 90(1) of the Staff Regulations: both the means used (the telephone) and the subject on which information was requested were such as to lead the Commission to consider that the official was seeking information, not a decision

17 In that regard, it must be emphasized that Article 90(1) of the Staff Regulations provides for a pre-litigation procedure designed to prompt the administration to adopt a position constituting a decision That procedure was laid down not only in the interests of the administration — which must, without any doubt, be placed in a position where it can identify the substance of the official's request and, if necessary, accede to it, thus avoiding further stages in the pre-litigation procedure and then proceedings before the Court — but also in the interests of the official The official must be in a position to deduce from the purport of the measure adopted by the administration whether it constitutes a decision or merely information

18 It follows from the foregoing that the contested measure cannot be regarded as an act adversely affecting the applicant

19 Consequently, it is unnecessary to consider the other arguments advanced by the Commission in support of its contention that the application is inadmissible

20 It follows that the application must be declared inadmissible

Costs

21 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they are asked for in the successful party's pleadings However, Article 70 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 (Third Chamber)

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the parties to bear their own costs

Delivered in open court in Luxembourg on 3 April 1990

Saggio Yeraris Lenaerts

H Jung
Registrar

A Saggio
President