

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
9 June 1998

Joined Cases T-171/95 and T-191/95

Adriaan Al and Others and Franz Becker and Others
v
Commission of the European Communities

(Officials – Pensions – Weighting – Change of capital – Retroactive effect –
Regulation (ECSC, EC, Euratom) No 3161/94 – Action for annulment –
Admissibility – Act adversely affecting an official)

Full text in French II - 803

Application for: first, annulment of the applicants' pension slips for December 1994, in so far as those pension slips apply Council Regulation (ECSC, EC, Euratom) No 3161/94 of 19 December 1994 adapting, as from 1 July 1994, the remuneration and pensions of officials and other servants of the European Communities and the weightings applying to that remuneration and those pensions (OJ 1994 L 335, p. 1) and, second, reinstatement in full of the applicants' pension rights weighted, with effect from 3 October 1990, by reference to the cost of living in Berlin, plus interest for late payment at the rate of 10% per annum.

Decision: Application dismissed.

Abstract of the Judgment

The applicants are retired Commission officials residing in Germany.

Under the second paragraph of Article 82(1) of the Staff Regulations of Officials of the European Communities (Staff Regulations), retirement pensions are to be weighted at the rate fixed for the country where the recipient proves he has his residence.

Annex XI to the Staff Regulations provides that national weightings are to be determined on the basis of the cost of living in the capital of each Member State.

Furthermore, Article 3(1) of Annex XI to the Staff Regulations provides as follows:

‘With effect from 1 July and pursuant to Article 65(3) of the Staff Regulations, the Council, acting on the Commission proposal ..., shall take a decision before the end of each year adjusting remunerations.’

Following the reunification of Germany Berlin became the capital of that Member State in October 1990.

In Case T-64/92 *Chavane de Dalmassy and Others v Commission* [1994] ECR-SC II-723 and Case T-536/93 *Benzler v Commission* [1994] ECR-SC II-777 the Court of First Instance held that Article 6(2) of, first, Council Regulation (ECSC, EEC, Euratom) No 3834/91 of 19 December 1991 adapting, with effect from 1 July 1991, the remuneration and pensions of officials and other servants of the European Communities and the weightings affecting that remuneration and those pensions (OJ 1991 L 361, p. 13, rectification OJ 1992 L 10, p. 56) and, secondly, Council Regulation (EEC, Euratom, ECSC) No 3761/92 of 21 December 1992 adapting, with effect from 1 July 1992, the remuneration and pensions of officials and other servants of the European Communities and the weightings affecting that remuneration and those pensions (OJ 1992 L 383, p. 1), were illegal in so far as they fixed a provisional weighting for Germany on the basis of the cost of living in Bonn. The Court considered that those articles infringed the principle laid down in Annex XI to the Staff Regulations that the weighting for each Member State should be fixed by reference to the cost of living in its capital, since Berlin had been the capital of Germany since 3 October 1990. The Court therefore annulled a pension slip and pay slips drawn up on the basis of those regulations.

Following the delivery of those judgments the Commission submitted two draft regulations to the Council in December 1994. The first proposal related to the annual adjustment of remuneration provided for in Annex XI to the Staff Regulations (SEC(94) 2024 final) and the second (SEC(94) 2085 final) to the amendment of a proposal of 10 September 1991 (SEC(91) 1612 final) intended to replace with retroactive effect the provisional weightings for Germany that had been in force since 1990 (second amended proposal).

To date the Council has not adopted a regulation amending, with retroactive effect to October 1990, the weighting for Germany on the basis of the second amended proposal.

On 19 December 1994 the Council adopted Regulation (ECSC, EC, Euratom) No 3161/94 adapting, as from 1 July 1994, the remuneration and pensions of officials and other servants of the European Communities and the weightings applying to that remuneration and those pensions (OJ 1994 L 335, p. 1). Article 6(1) of that regulation provides, with effect from 1 July 1994, for a general weighting for Germany based for the first time on Berlin and also for special weightings for Bonn, Karlsruhe and Munich.

When the applicants' summary pension slips for December 1994, relating to the period 1 July 1994 to 31 December 1994, were drawn up the Commission applied Regulation No 3161/94.

These pension slips were notified to the applicants between 30 December 1994 and 1 February 1995.

The applicants considered that the Commission should have applied to these pension slips the weighting for Berlin with retroactive effect to 3 October 1990 rather than to 1 July 1994, and submitted complaints against the pension slips between 12 March 1995 and 26 April 1995. Their complaints were expressly rejected by decisions adopted on 26 July 1995.

Admissibility

The heads of claim relating to the reinstatement of the applicants' pension rights in their entirety and interest for late payment

In proceedings brought under Article 91 of the Staff Regulations it is not for the Court to make declarations of principle or to issue directions to Community institutions. First, the Community judicature manifestly has no jurisdiction to issue directions to Community institutions. Second, where a measure is annulled, the institution concerned is required by Article 176 of the EC Treaty to take the necessary measures to comply with the judgment. An application to the Court for reinstatement of the applicants' pensions rights in their entirety is therefore inadmissible (paragraphs 37 and 38).

See: T-94/92 *X v Commission* [1994] ECR-SC II-481, para. 33; T-583/93 *P v Commission* [1995] ECR-SC II-433, para. 17

Since the head of claim relating to interest for late payment is closely linked to the preceding head of claim, it must likewise be declared inadmissible (paragraph 39).

Claims for the annulment of the pension slips for December 1994

An administrative complaint and the legal action which follows it must both be directed against an 'act adversely affecting' the applicant within the meaning of Article 90(2) and Article 91(1) of the Staff Regulations, and the act having adverse

effect is that which directly and immediately affects the applicant's legal situation (paragraph 40).

See: 204/85 *Stroghili v Court of Auditors* [1987] ECR 389, para. 6; T-14/91 *Weyrich v Commission* [1991] ECR II-235, para. 35

In the present case the applicants maintain that their pension slips for December 1994, relating to the period 1 July 1994 to 31 December 1994, are acts having adverse effect in so far as they represent the first application of Regulation No 3161/94, which, since it has retroactive effect only to 1 July 1994, deprived them of arrears in respect of the period 3 October 1990 to 30 June 1994 (paragraph 41).

However, the contested pension slips contain no decision, not even an implied decision, concerning pension rights in respect of that period. Regulation No 3161/94, on which the slips are based, was adopted solely on the basis of the Commission's proposal for a regulation for the period subsequent to 30 June 1994. It does not incorporate the Commission's second amended proposal for a regulation, irrespective of the precise date on which that proposal was submitted to the Council. Moreover, it follows from a letter from the Secretary-General of the Council of 25 January 1995 concerning, in particular, the second amended proposal that the question of the retroactive effect of the weighting fixed by reference to the cost of living in Berlin for the period 1990 to 1994 was still under discussion within the Council after Regulation No 3161/94 had been adopted (paragraph 42).

The applicants have not put forward the slightest evidence that the Council was under an obligation to adopt a position in Regulation No 3161/94 itself on the application to the period between October 1990 and 30 June 1994 of a weighting based on the cost of living in Berlin. In particular, the mere fact that the

Commission's second amended proposal, like Regulation No 3161/64, was based on Articles 64 and 82 of the Staff Regulations, did not place the Council under such an obligation. Regulation No 3161/94 cannot therefore be regarded as incorporating an implied rejection of the Commission's second amended proposal. When that regulation was adopted there was nothing to prevent the Council from subsequently adopting the regulation desired by the applicants (paragraph 43).

Consequently, the applicants' arguments in respect of the provisional nature of the regulations preceding Regulation No 3161/94 and, accordingly, the pension slips based thereon are inoperative (paragraph 44).

Last, the applicants' argument that they would be unable to bring an action for failure to act should the Council fail to adopt the relevant regulation must also be rejected. An action for failure to act cannot be replaced by an action for annulment directed against a measure which has actually been adopted, since that measure was not required to deal with the matter in issue (paragraph 45).

It follows that the applicants have challenged pension slips which do not adversely affect them, since they do not include a position on the question of the retroactive application to the period beginning in October 1990 of the weighting fixed by reference to the cost of living in Berlin (paragraph 46).

The claims for annulment must therefore be declared inadmissible (paragraph 47).

Operative part:

The applications are dismissed as inadmissible.