

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)  
11 March 1993 \*

In Case T-87/91,

**Michael Boessen**, a former official of the Economic and Social Committee, residing in Lanaken (Belgium), represented by Ch. M. E. M. Paulussen, of the Maas-tricht Bar, with an address for service in Luxembourg at the chambers of M. Loesch, 8 Rue Zitthe,

applicant,

v

**Economic and Social Committee of the European Communities**, represented by Bermejo Garde, Legal Adviser, acting as Agent, assisted by D. Lagasse and G. Tassin, of the Brussels Bar, with an address for service in Luxembourg at the office of R. Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the decision of the Economic and Social Committee of 5 September 1991 refusing to recalculate the amount of the applicant's invalidity pension,

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

composed of: J. Biancarelli, President, B. Vesterdorf and R. García-Valdecasas, Judges,

Registrar: J. Palacio González, Administrator,

\* Language of the case: Dutch.

having regard to the written procedure and further to the hearing on 21 January 1993,

gives the following

## Judgment

### Facts and legal framework

- 1 The applicant, Michael Boessen, was an official of the Economic and Social Committee ('the ESC') from 1 December 1971 to 31 January 1981. Since 1 February 1981 he has received an invalidity pension which was granted to him by decision No 144/81 A adopted on 20 January 1981 by the defendant. At the beginning of February 1981 the applicant received decision No 157/81 A, also dated 20 January 1981, which included a detailed calculation of his pension.
- 2 The Staff Regulations of Officials of the European Communities provide *inter alia* in the first paragraph of Article 77 that 'an official who has completed at least ten years' service shall be entitled to a retirement pension'.

The second paragraph of Article 77 provides that 'the maximum retirement pension shall be 70% of the final basic salary carried by the last grade in which the official was classified for at least one year. It shall be payable to an official who has completed 35 years' service reckoned in accordance with Article 3 of Annex VIII. Where the number of years of service is less than 35, the above maximum shall be reduced proportionately'.

Pursuant to the fourth paragraph of Article 77 'the amount of the retirement pension must not be less than 4% of the minimum subsistence figure per year of service'.

The first paragraph of Article 78 of the Staff Regulations provides that ‘an official shall be entitled, in the manner provided for in Articles 13 to 16 of Annex VIII, to an invalidity pension in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket’.

The third paragraph of Article 78 lays down that ‘where the invalidity is due to some other cause, the invalidity pension shall be equal to the retirement pension to which the official would have been entitled at the age of 65 years if he had remained in the service until that age’.

Finally, under the fifth paragraph of Article 78 ‘the invalidity pension shall not be less than 120% of the minimum subsistence figure’.

3 It appears from Decision No 157/81 of 20 January 1981 that, by applying the third paragraph of Article 78 in conjunction with the second paragraph of Article 77 of the Staff Regulations, and Article 5 of Annex VIII, the applicant’s invalidity pension was set at 70%, that is the maximum provided for under the second paragraph of Article 77. Calculated on the basis of the last grade in which the applicant was classified for at least one year, that amount was less than 120% of the ‘minimum subsistence figure’, that percentage being the minimum invalidity pension pursuant to the fifth paragraph of Article 78. Consequently the pension was set at 120% of the ‘minimum subsistence figure’.

4 The decision of 20 January 1981 laying down the entitlement to an invalidity pension gave rise over the years to certain amending decisions, firstly, to adjust the pension to changes in pay and, secondly, in connection with granting various allowances.

5 In 1991 the applicant raised the question with the ESC whether his pension had been properly calculated. In particular, he contended that it ought to have been

calculated on the basis of the fourth paragraph of Article 77 of the Staff Regulations, under which the amount of the retirement pension must not be less than 4% of the minimum subsistence figure per year of service, which would entitle him to a pension equal to 135% of the minimum subsistence figure.

6 On 13 February 1991 the applicant lodged a request with the ESC seeking correction of the method of calculating his pension as described above. After receiving a negative response on 27 February 1991, he submitted a complaint under Article 90(2) of the Staff Regulations. When the complaint was rejected on 5 September 1991, the applicant brought the present action on 2 December 1991.

7 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. The parties made their submissions to the Court at the hearing of 21 January 1993.

### Forms of order sought by the parties

8 The applicant claims that the Court should:

- annul the ESC's decision of 5 September 1991 rejecting the complaint submitted by letter of 6 May 1991;
- find that the defendant must, pursuant to Article 41 of Annex VIII to the Staff Regulations, recalculate the applicant's pension with retrospective effect;
- order the defendant to pay the applicant by way of invalidity pension 4% of the minimum subsistence figure for each year of service, that is a total of 33.75 x 4% = 135% of the minimum subsistence figure;

— order the defendant to pay the costs.

9 In his reply the applicant states that the recalculation of his pension should take effect from 1 February 1981 and that interest to be fixed by the Court is also payable. He adds that, should his claim for annulment be found inadmissible, the action should be interpreted as including a claim for compensation. He therefore asks that the ESC be ordered pay him compensation equal to the amount to which he would have been entitled by way of recalculated pension as from 1 February 1981, together with interest to be fixed by the Court.

10 The defendant claims that the Court should:

— principally, declare the action inadmissible;

— alternatively, dismiss the action as unfounded;

— make an appropriate order as to costs.

11 Against the plea of inadmissibility raised by the defendant, the applicant claims that the action should be ruled admissible.

### Arguments of the parties

12 The defendant, in support of its main argument that the action is inadmissible, contends that the act which could have been regarded by the applicant as adversely affecting him within the meaning of Articles 90 and 91 of the Staff Regulations is not the decision in the letter of 5 September 1991 from the Secretary-General of the ESC, but Decision No 157/81 A laying down the method of calculating his pension which, according to the defendant, was never subsequently amended.

- 13 Referring to the judgment of the Court of Justice in Case 214/85 *Dandolo v Commission* [1987] ECR 2163, according to which ‘an act of a Community institution can be withdrawn only by an act of the same institution which either expressly repeals the earlier decision or contains a new decision taking its place’ (paragraph 13), the defendant points out that, with regard to the method of calculating the applicant’s pension, the original Decision No 157/81 A of 20 January 1981 was never amended. In this connection the defendant states that the three decisions notified to the applicant at a later stage and entitled ‘Wijzigingsbesluit’ (amending decision) amended the applicant’s pension entitlement only in that they recognized, for each of his three children in turn, his right to the education allowance provided for under Article 3 of Annex VII of the Staff Regulations.
- 14 Regarding the time-limit for bringing an action, the defendant refers to the case-law of the Court of Justice concerning actions relating to the calculation of officials’ pay, according to which ‘the sending of the monthly salary statement has the effect of starting the time for appeal running, where it clearly shows the decision taken’ (see Case 1/76 *Wack v Commission* [1976] ECR 1017, paragraph 5, and Case 159/86 *Canterers v Commission* [1988] ECR 4859, paragraph 6). Consequently, according to the defendant, the time-limits for lodging a complaint and bringing an action must be calculated as from the notification of Decision No 157/81 A of 20 January 1981, which clearly showed the method used to calculate the applicant’s pension.
- 15 In reply to the applicant’s argument that the defendant did not, in the decision of 20 January 1981, state its position with regard to applying the fourth paragraph of Article 77 of the Staff Regulations, the defendant states that it had already ruled, in Decision No 157/81 A, implicitly but clearly, that that provision did not apply to the calculation of the applicant’s entitlement to invalidity pension. In this connection the defendant stresses that Decision No 157/81 A states in paragraph 5 that the minimum pension is equal to ‘120% of the basic salary D 4/1’, that is the amount specified in the fifth paragraph of Article 78 of the Staff Regulations. According to the defendant, the decision in question therefore, indirectly but necessarily, precluded the application of the fourth paragraph of Article 77 of the Staff Regulations. Consequently the defendant, referring to the judgment of the Court of Justice in Cases 118/82 to 123/82 *Celant v Commission* [1983] ECR 2995, argues that it is clearly that decision which constituted notification of the final calculation of the applicant’s pension entitlement and started time running for bringing an action. It concludes therefore that the action is out of time.

- 16 This is why the defendant, although denying that Decision No 157/81 A does not state sufficient grounds in that it does not specify the provisions of the Staff Regulations on which it is based, argues that, even were it accepted that insufficient grounds were given, this could have entailed annulment of the decision only if an action against the decision had been brought within the time-limit laid down by the Staff Regulations. On the other hand, the defendant submits that whether the decision states sufficient grounds or not can have no bearing on its legal assessment and its effect.
- 17 Relying on the interpretation of Article 41 of Annex VIII of the Staff Regulations in the judgment of the Court of Justice in Case 23/80 *Grasselli v Commission* [1980] ECR 3709, the defendant argues that in the present case the applicant intended to bring about a new fact quite artificially by asking the defendant to apply to him a provision of the Staff Regulations which the original decision laying down the method of calculating his pension, that is the decision of 20 January 1981, had already necessarily precluded.
- 18 According to the defendant, the only allegedly new matter on which the applicant relies in support of his complaint is an interpretation of the third paragraph of Article 78 which he could just as well have raised when the time-limit for bringing an action against the decision of 20 January 1981 was running. The defendant concludes that it was not informed of any new fact which would justify considering its replies to the applicant's steps as new decisions taken following a reassessment of the situation.
- 19 As for the applicant's supposed poor health at the time when he was notified of the decision of 20 January 1981, the defendant points out that this relates only to Decision No 157/81 A and not to the amending decisions No 452/83 A of

24 November 1983 and No 376/86 A of 30 October 1986, against which he likewise did not lodge a complaint.

- 20 In reply to the defendant's objection of inadmissibility, the applicant observes that the opportunity provided for in Article 41 of Annex VIII to the Staff Regulations to recalculate pensions at any time is not a mere discretion of the administration, but creates a right for the administration, which may act on its own initiative, and also a right for the official, who may ask for this to be done. The institution must therefore exercise its powers in the light of the general principles of sound administration, equity and justice recognized in the Member States.
- 21 The applicant concludes from the case-law cited by the defendant (*Wack and Canters*) that the Court of Justice does not consider that an action can be brought against 'implicit' decisions taken *on the administration's own initiative* and therefore that the time-limit for bringing an action does not start to run until the person concerned has been clearly informed, by personal notification, that a decision concerning him has been taken under a particular provision of the Staff Regulations. However, according to the applicant, Decision No 157/81 A in no way shows that the defendant took a decision as to whether the fourth paragraph of Article 77 of the Staff Regulations applied.
- 22 According to the applicant, the detailed breakdown in Decision No 157/81 A does not show that in 1981 the ESC decided not to apply the fourth paragraph of Article 77 of the Staff Regulations; however, the fact that such non-application was not indicated, as it was implicit and on the administration's own initiative, does not necessarily mean that the defendant refused him the entitlement in question, and therefore it cannot be treated as a decision adversely affecting him.
- 23 The applicant adds that, under the second paragraph of Article 25 of the Staff Regulations, in so far as Decision No 157/81 A contained an unfavourable decision and therefore adversely affected him, it ought to have been not only communicated to him in writing, but should also have stated the grounds on which it was based. In

the applicant's opinion, only then could Decision No 157/81 A have been regarded as a decision 'adversely affecting' him and against which he ought to have brought an action as from 1981. However, since the decision makes no reference whatever to the application or otherwise of the fourth paragraph of Article 77 in conjunction with the third paragraph of Article 78, the decision cannot be regarded as the decision adversely affecting him.

- 24 Finally, the applicant points out that at the time when the invalidity pension was granted to him, in 1981, his state of health was such that he was unable, within a time-limit of three months, to decide whether to submit a complaint and, as the case may be, bring an action.

### *Findings of the Court*

- 25 The Court observes, firstly, that the first paragraph of Article 41 of Annex VIII to the Staff Regulations provides that 'the amount of pension may at any time be calculated afresh if there has been error or omission of any kind'.
- 26 As appears from the *Grasselli* judgment cited above, for a correct interpretation of that provision in order to determine the conditions in which officials may seek the recalculation of their pension, regard must be had to the system laid down by the Staff Regulations governing disputes and the underlying requirements of that system.
- 27 The Staff Regulations make general provision in Articles 90 and 91 for the rights of action of members of the staff against administrative acts adversely affecting them. Those provisions make it clear that the system for the settlement of disputes thereby established is based in its entirety on the requirement that exercise of the right of action is permitted only subject to strict observance of the time-limits which have been laid down.

- 28 It also follows from the *Grasselli* judgment that any official who seeks to have his pension recalculated where there has been error or omission of any kind may, if it is true, avail himself of the first paragraph of Article 41 of Annex VIII to the Staff Regulations by requesting such recalculation by means of a complaint and, if necessary, by way of an action, but for his complaint and his action to be admitted under Articles 90 and 91 of the Staff Regulations he must exercise his right of action within the periods laid down by those articles, starting from the time of the occurrence of a new fact such as to justify a recalculation of his pension or from the time when he actually became aware of the existence of such a fact.
- 29 In the present case the Court finds, firstly, that by Decision No 157/81 A, the ESC notified the applicant in writing of its decision fixing the rate and the amount of the invalidity pension granted to him, and described the method by which the rate had been fixed. Part A, paragraph 3, and Part B, paragraphs 4 and 5, of the decision clearly refer to the provisions on the basis of which the applicant's pension entitlement was calculated, namely the third and fifth paragraphs of Article 78 of the Staff Regulations, this being the only article applying to invalidity pensions.
- 30 Secondly, the Court finds that the calculation of the pension rate was not disputed by the applicant until 1991 and that the rate has not been amended since the ESC's original decision of 20 January 1981.
- 31 Therefore the Court finds that it is indeed the original Decision No 157/81 A of 20 January 1981 which must be regarded as the act adversely affecting the applicant and that the time-limits for lodging a complaint and bringing an action began to run when the applicant was notified of that decision in February 1981. The mere fact that the administration did not, in the same decision, refuse to apply another provision, the application of which was neither requested nor even discussed at the time, cannot lead to the time-limits for bringing an action starting to run again where, as the Court has found, neither the legal basis nor the method of calculating the applicant's pension entitlement were subsequently amended.

- 32 Under these circumstances, only the existence of a new fact could start time running again.
- 33 However, the Court finds that the new fact on which the applicant relies consists in reality solely in that the applicant relied in 1991 on a new interpretation of the various aforementioned paragraphs of Articles 77 and 78 of the Staff Regulations, by asking the ESC to apply the fourth paragraph of Article 77 concerning retirement pensions and not the fifth paragraph of Article 78 concerning invalidity pensions, in order to calculate the rate of his invalidity pension. This cannot be a new fact since it is solely based on a different interpretation of a rule of law and not on any change in the factual context of the applicant's situation.
- 34 Finally, with regard to the applicant's state of health which allegedly prevented him from submitting a complaint and bringing an action in good time, it is sufficient to observe that the applicant's allegations on this point are not supported by any prima facie evidence enabling the merits thereof to be assessed.
- 35 It follows that the applicant's claims for annulment are inadmissible.
- 36 So far as concerns the claims for damages, it is sufficient to observe that, quite apart from the fact that they were not preceded by a request or a complaint, as provided for in the Staff Regulations, they were only raised at the reply stage, which means that, under Article 48(2) of the Rules of Procedure of the Court, they are inadmissible. It should be added that that provision cannot be interpreted as authorizing the applicant to present new claims to a Community court and thus to alter the subject-matter of the action (see, most recently, the judgment of the Court of First Instance in Case T-28/90 *SA Asia Motor France and Others v Commission* [1992] ECR II-2285).

37 It follows that the action must be dismissed as inadmissible.

38 However, in the circumstances of the present case the Court considers it appropriate to observe that the action is not only inadmissible but also manifestly unfounded.

39 In substance the applicant has claimed that it follows from the terms and the general scheme of Articles 77 and 78 of the Staff Regulations that his invalidity pension cannot be less than two minimum levels provided for by the Staff Regulations, firstly, by the fourth paragraph of Article 77 which provides that the amount must not be less than 4% of the minimum subsistence figure per year of service and, secondly, the fifth paragraph of Article 78 which provides that it cannot be less than 120% of the minimum subsistence figure, it being understood that the minimum amount paid to the applicant must be the one which is most favourable to him.

40 However, the applicant's proposed interpretation of those provisions cannot be accepted. It is clear from their wording and their general scheme that the fifth paragraph of Article 78 applies for calculating the entitlement to invalidity pension only, while the fourth paragraph of Article 77 applies for calculating the entitlement to retirement pension only. Therefore, contrary to the applicant's arguments, the administration did not make a mistake in law by adopting Decision No 157/81 A or commit a service-related fault.

## Costs

41 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 88 provides that, in proceedings between the Communities and their servants, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the action as inadmissible;**
2. **Orders the parties to bear their own costs.**

Biancarelli

Vesterdorf

García-Valdecasas

Delivered in open court in Luxembourg on 11 March 1993.

H. Jung

J. Biancarelli

Registrar

President