

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)  
27 November 1991 \*

In Case T-21/90,

**Günter Generlich**, a former official of the Commission of the European Communities, resident in Brussels, represented by Marcel Slusny and Olivier Slusny, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 Avenue Marie Thérèse,

applicant,

v

**Commission of the European Communities**, represented by J. Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of R. Hayder, civil servant on secondment to the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION or the annulment of the Commission's decision of 1 August 1989 calculating the applicant's entitlement to a retirement pension in so far as the amount of that pension was calculated by reference to the basic salary for Grade B 2, Step 8, or for an order that the Commission make good the damage which the applicant claims to have suffered as a result of that decision,

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

composed of: B. Vesterdorf, President, A. Saggio and C. Yeraris, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 18 September 1991

\* Language of the case: French.

gives the following

## Judgment

### Facts and procedure

- 1 The applicant, who was born 28 May 1925, took up his duties with the Commission of the European Communities on 6 January 1959 as accountant clerk. Reclassified as from 1 January 1962 in Grade C 1, he advanced to Grade B 3, then B 2, in which on 1 December 1981, he reached Step 8.
- 2 On 24 January 1986 the applicant requested the application to himself of a measure terminating his service pursuant to Council Regulation (ECSC, EEC, EURATOM) No 3518/85 of 12 December 1985 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Spain and Portugal (Official Journal 1985 L 335, p. 56, hereinafter referred to as 'the regulation').
- 3 By decision of 3 March 1986 he was promoted to Grade B 1, Step 4, with effect as from 1 February 1986, with seniority in his grade as from 1 July 1984. The applicant was consequently able to advance on 1 July 1986 to Step 5 of that grade.
- 4 By letter of 25 June 1986 the applicant was advised that his request had been favourably received and he terminated his service on 1 October 1986.
- 5 From that date he began to receive the monthly allowance provided for in Article 4(1) of the regulation. It was paid to him at the rate of 70% of the basic salary for Grade B 1, Step 5, in accordance with his grading on 30 September 1986.

- 6 The applicant continued to receive the monthly allowance until 1 March 1989 when he became 'eligible for the maximum retirement pension'. This meant that under Article 4(2) of the regulation entitlement to the allowance ceased. On 1 March 1989 the applicant had 35 years of pensionable service to be taken into account in calculating his pension, including the 'further years' service' which he had acquired during the period for which he had been entitled to the allowance, in accordance with Article 4(7) of the regulation.
  
- 7 By decision of 1 August 1989, notified on the same day, the applicant was granted a retirement pension as from 1 March 1989. At the same time he was served with a notice fixing his entitlement to that pension which disclosed that the amount of the pension which he was to receive was calculated on the basis of the salary for Grade B 2, Step 8.
  
- 8 On 4 October 1989 the applicant submitted a complaint pursuant to Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations') against the decision of 1 August 1989, requesting that it be withdrawn and replaced by another decision calculating his entitlement to the pension not on the basis of the salary for Grade B 2, Step 8, but on the basis of the salary for Grade B 1, which he considered he had held for more than a year at the time of his retirement.
  
- 9 In support of his complaint the applicant argued on the one hand that the method of calculation applied infringed Article 77 of the Staff Regulations and Article 4(7) of the regulation and, on the other hand, that the administration had failed in its duty to have regard for his interests.
  
- 10 By decision of the Commission adopted on 22 January 1990 and notified to the applicant by memorandum from the Director-General of Personnel and Administration on 30 January 1990, the complaint was rejected. The decision rejecting it

states that the applicant, on the date on which he had left the service, did not have in Grade B 1, Step 5 or 4, more than one year's seniority and that, while Article 4(7) of the regulation allows an official benefiting from a measure to terminate his service to acquire further years of pensionable service during the period for which he receives the allowance, it does not enable him to complete the period of one year laid down in the second paragraph of Article 77 of the Staff Regulations.

- 11 It was in these circumstances that, by application lodged at the Registry of the Court of First Instance on 20 April 1990, the applicant brought the present action for the annulment of the decision of 1 August 1989 or for an order to make good the damage which he claims to have suffered as a result.
- 12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry and, at the same time, to request the institutions of the European Communities to explain their administrative practice as regards the further rights to retirement pension provided for by the regulations concerning termination of service.
- 13 By letters of 18 July, 2 August, 20 August and 9 September 1991, the Council, the Court of Auditors, the Court of Justice and the Parliament, respectively, submitted their replies. The Court of Justice and the Court of Auditors replied that they had not had the occasion, thus far, to adopt any administrative practice in the matter, while the Council and the Parliament follow diametrically opposed administrative practices, the former following the approach adopted by the Commission and the latter that sought by the applicant.

#### **Forms of order sought by the parties**

- 14 In his application, the applicant claims that the Court of first Instance should:
  - (i) annul the Commission's decision of 1 August 1989 inasmuch as it refuses him the benefit of Article 77 of the Staff Regulations and Article 4(7) of the regulation;

- (ii) declare that the Commission has committed a fault consisting of a breach of its duty to have regard for the interests of officials and of failure to respect legitimate expectations by not ensuring that the applicant was informed that, in the Commission's opinion, he would be entitled only to the pension of an official in Grade B 2 and not that of an official in Grade B 1;
- (iii) consequently, order the Commission to pay him damages equal to the difference between the amount of the pension which would have been paid to him had it been calculated by reference to his classification in Grade B 1 and that which the Commission awarded on the basis of his classification in Grade B 2, the amount of that difference being BFR 50 000, the applicant reserving the right to adjust that amount in the course of the proceedings;
- (iv) order the Commission to pay interest at the rate of 8% as from 1 March 1989;
- (v) order the Commission to pay the costs.

15 In his reply, the applicant reformulates his claims to the effect that the Court should:

- (i) annul the Commission's decision of 1 August 1989 inasmuch as it refuses him the benefit of Article 77 of the Staff Regulations and Article 4(7) of the regulation;
- (ii) in the event of abovementioned decision being annulled, apply Article 176 of the EEC Treaty;

- (iii) in that case, order the Commission to pay him the arrears due to him on the monthly amount of his pension and, in future, the said amount as calculated by the Commission in its defence (page 11, right column of the last indent);
- (iv) declare that the Commission has committed a fault consisting of a breach of its duty to have regard for the interests of officials and failure to respect legitimate expectations by not recognizing the right of the applicant to have his pension calculated on the basis of the salary for Grade B 1, Step 5;
- (v) consequently, order the Commission to pay him damages equal to the difference between the amount of the pension which would have been paid to him had it been calculated by reference to his classification in Grade B 1, Step 5, and that which the Commission awarded on the basis of Grade B 2, Step 8, the amount of that difference being BFR 1, the applicant reserving the right to adjust that amount in the course of the proceedings;
- (vi) order the Commission to pay interest at the rate of 8% as from 1 March 1989 on the amounts to be awarded to him;
- (vii) order the Commission to pay the costs.

16 At the hearing, the applicant's representative explained that the heads of claim under 4 and 5 in his reply covered the situation of the Commission's decision not being annulled.

17 The defendant contends that the Court should:

- (i) dismiss the application;

(ii) make an appropriate order as to costs.

### Substance

18 In support of his claim for annulment the applicant relies first on a plea in law based on infringement of Article 77 of the Staff Regulations and of Article 4(7) of the regulation. In support of his claim for damages, he relies on a second plea, based on breach of the duty to have regard for the interests of officials and of the principle of the protection of legitimate expectations.

19 Before the arguments put forward by the parties are presented, the provisions which constitute the legal background to the present dispute should be recalled.

20 The Staff Regulations, Chapter 3 of which governs the pension scheme for officials, provides (second paragraph of Article 77) 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 thirty-five years’ service reckoned in accordance with Article 3 of Annex VIII. Where the number of years of service is less than thirty-five, the above maximum shall be reduced proportionately’.

21 Article 1 of the regulation authorizes the Community institutions to adopt measures terminating the service of officials who have reached the age of 55 ‘in the interests of the service and taking account of requirements arising from the accession of Spain and Portugal to the European Communities’.

22 Furthermore, Article 4(1) and (7) provide as follows:

- ‘1. A former official affected by the measure provided for in Article 1 shall be entitled to a monthly allowance equal to 70% of the basic salary for the grade and step held at the time of departure, determined by reference to the table set out in Article 66 of the Staff Regulations in force on the first day of the month for which the allowance is payable.
  
7. During the period for which he is entitled to receive the allowance, the former official shall continue to acquire further rights to retirement pension based on the salary attaching to grade and step, provided that the contribution provided for in the Staff Regulations by reference to that salary is paid during that period and provided that the total pension does not exceed the maximum specified in the second paragraph of Article 77 of the Staff Regulations. For the purposes of Article 5 of Annex VIII to the Staff Regulations and Article 108 of the former Rules and Regulations of the European Coal and Steel Community, such period shall be considered to be a period of service.’

*The first plea in law: infringement of Article 77 of the Staff Regulations and Article 4(7) of the regulation*

23 The applicant, after setting out in the ‘Facts’ part of his application the facts giving rise to the dispute, merely puts forward this plea in law without developing it, but reserves the right to submit his observations in fact and in law in greater detail in the reply.

24 The defendant, in its defence, observes that such an elliptic reference to the provisions, unaccompanied by even a minimum of argument, does not meet the requirements of Article 38(1)(c) of the Rules of Procedure of the Court of Justice, according to which the application must state ‘the grounds on which the application is based’. Consequently, the defendant requests that the first plea in

law be declared inadmissible, having regard to the fact that it was deprived of the chance to examine the substance of the plea in the defence and was thus partially prevented from effectively defending its interests. In support of its request, the defendant refers to the judgments of the Court of Justice in Joined Cases 46/59 and 47/59 (*Meroni v High Authority* [1962] ECR 411) and in Case 74/74 (*CNTA v Commission* [1975] ECR 533).

- 25 The applicant, in his reply, maintains that he has presented in his complaint and his application the facts of the case and the pleas in law separately, in a manner which left no doubt as to the import of his argument. The appointing authority, in rejecting his complaint by means of a detailed decision, did not have the least doubt as to the subject-matter of the dispute and the import of the argument set out in his complaint, which was taken up again in the first plea in law relied upon in support of the application.
- 26 The applicant then goes on to develop the first plea. In the first place, he observes that the problem in the present case arises from the fact that, like all officials benefiting from a measure concerning termination of service, he found himself in a position midway between that of active employment, a status provided for in Article 35(a) of the Staff Regulations, and that of an official receiving a retirement pension. Whilst it is true that the maximum amount of the retirement pension, as provided for under the second paragraph of Article 77 of the Staff Regulations, is fixed at 70% of the basic salary for the grade in which the official was classified for at least one year, the duration of that classification should be increased in accordance with Article 4(7) of the regulation. According to that provision, the former official continues to acquire further rights to retirement pension based on the salary attaching to his grade and step, provided that, if during that period for which he is entitled to receive the allowance, the contribution provided for in the Staff Regulations by reference to that salary is paid, such period is to be considered to be a period of service. Secondly, the applicant submits that the Community legislature made reference, in Article 4 of the regulation, to the existence of a correlation between the acquisition of further years of service and the payment of contributions to the pensions scheme. Thirdly, he considers that, having regard to the conflicting interpretations given by the institutions in similar

cases, the interpretation given by the Commission to an ambiguous text entails a breach of a superior rule of law.

27 The defendant, in its rejoinder, returns to the question of the admissibility of the first plea in law. It admits that it had no difficulty in understanding the argument advanced by the applicant in his complaint, an argument which was implicitly taken up again in the present proceedings and according to which the duration of his classification in Grade B 1 should be calculated by reference to the period during which he received the allowance on termination of service. Nevertheless, it contends that the failure to discuss, at the stage of the application, the pleas in law set out in the decision rejecting the complaint, has placed it at a 'relative disadvantage', in that it has been able to take a position on the applicant's argument only in the last pleading.

28 As to the substance of the plea, the defendant puts forward several arguments in support of its contention that the period during which the allowance is paid enables the recipient to acquire further years of service for the purpose of calculating his retirement pension, but cannot be regarded as a period of service for the purposes of completing the minimum period of one year required by the second paragraph of Article 77 of the Staff Regulations for the last grade and step to be taken into account.

29 The Commission's arguments may be summarized as follows. First, it should be noted that the applicant, after terminating his service on 1 October 1986, no longer held any administrative status of those provided for in Article 35 of the Staff Regulations and was no longer an official. The applicant had become, as Article 4 of the regulation repeatedly states, a 'former official', and therefore his classification in Grade B 1 was interrupted when he left the service. Secondly, the general rule laid down by Article 4(7) of the regulation does indeed make it possible to acquire further pension rights, but that general rule is subject to the restriction laid down in the second paragraph of Article 77 of the Staff Regulations according to which the allowance may not exceed 70% of the salary for the last grade held as an official (and not as a former official) for at least one year before termination of service. In those circumstances, the general rule does not allow the period from 1 October 1986 to 1 March 1989, during which the

applicant received the allowance, to be taken into account for the purposes of completing that minimum period of one year. Thirdly, the period of eligibility for the allowance may not be regarded as a period of service except for the purposes of Article 5 of Annex VIII to the Staff Regulations and Article 108 of the former Rules and Regulations of the ECSC. Fourthly, regard must be had to the fact that no provision of the Staff Regulations establishes a correlation between the amount of the contribution to the pensions scheme, on the one hand, and the amount of the pension, on the other. Whilst the acquisition of further rights to pension is subject to the payment of the contribution by the person affected by a measure terminating his service, it is only for the purpose of increasing the years of pensionable service and has nothing to do with any principle of correlation between the amounts of the contribution and of the pension. Finally, the defendant observes that the applicant had failed to specify the superior rule of law which he considers to have been infringed in the present case and which, in any event, cannot be a supposed principle of correlation between the amount of the contributions paid and that of the pension.

- 30 As to the admissibility of the first plea in law put forward by the defendant, the Court of First Instance points out that, according to the first paragraph of Article 19 of the Protocol on the Statute of the Court of Justice of the EEC and Article 38(1)(c) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* in the present case in relation to the written procedure, the application must state, *inter alia*, the subject-matter of the dispute and the grounds on which the application is based.
- 31 In the case of an application for annulment, the requirements of the abovementioned provisions are satisfied if the application contains a precise statement of the facts and the pleas in law which, on the one hand, enables the Court of First Instance to exercise judicial review of the legality of the Community measure in question and, on the other hand, does not deprive the defendant of the opportunity to defend its interests effectively.
- 32 In the present case, whilst it is true that the first plea in law is stated very tersely, the application contains, in the 'Facts' part, sufficient material specifying and elu-

cidating the substance of the infringement of Article 77 of the Staff Regulations and Article 4(7) of the regulation which is expressly pleaded in the application. Furthermore, the applicant was entitled to develop that plea and to set out any relevant further explanation in the reply, which is exactly what he did (see the judgment of the Court of Justice in Case 74/74 *CNTA*, above, paragraph 4).

- 33 That being so, the alleged defects in the application have not been such as to hinder the Court of First Instance in its judicial review or to prevent the Commission from defending its interests effectively, having regard to the fact that the Commission, as, moreover, it has itself acknowledged, was already, at the stage of the complaint, in a position to take cognizance of and refute the applicant's arguments on the method of calculation of the amount of his pension. Thus, no breach of the *audi alteram partem* principle could have resulted from the fact that the defendant chose to submit its arguments only in its rejoinder.
- 34 It follows from all the foregoing considerations that the defendant's submissions on the admissibility of the first plea in law must be rejected.
- 35 As to whether that plea in law is well founded, it should be emphasized that the legal question which arises in the present case concerns the construction which should be placed on the concept 'further rights to retirement pension' in Article 4(7) of the regulation. The defendant contends that that concept concerns exclusively the years of service taken into account in calculating the pension, so that the 'further rights to pension' are synonymous with 'further years of service'. On the other hand, the applicant claims that the period during which he is eligible for the allowance enables him not only to acquire further years but also to complete the period of one year during which the official has to have been classified in his last grade and step in order for the pension to be calculated on the basis of the salary attaching to them.
- 36 The Court of First Instance notes that, according to Article 77 of the Staff Regulations, the amount of the retirement pension is determined by two main factors, namely the number of years of pensionable service acquired by the official and the

basic salary attaching to his last grade and step. Nevertheless, those two factors are taken into consideration only within certain temporal limits. On the one hand, no more than 35 years' service may be taken into account and, on the other, classification in the last grade and step for one year is required for the basic salary attaching to them to be taken into consideration in calculating the pension. Finally, the maximum amount of the pension determined by those two factors is fixed by the Staff Regulations at 70% of the last basic salary used in calculating the pension.

37 Those rules of principle are amended by Article 4(7) of the regulation only in so far as that provision allows officials affected by a measure concerning termination of service to acquire 'further rights to pension'. Nevertheless, it should be noted that, while that specific provision expressly allows the acquisition of further rights to pension, it does not distinguish between the two main factors, as defined above, which determine the calculation of the retirement pension. It follows that the period during which an official affected by a measure of voluntary termination of service receives the allowance provided for in the regulation and continues to contribute to the pension scheme may be taken into consideration both for the purpose of increasing the number of years of pensionable service which he has acquired and for the purpose of completing the year during which he must have been classified in his last grade and step for his pension to be calculated on the basis of the salary attaching to them.

38 Whilst the last sentence of Article 4(7) of the regulation expressly mentions that the period during which there is eligibility for the allowance is to be considered a period of service for the purposes of Article 5 of Annex VIII to the Staff Regulations, this is due to the exceptional nature of the advantage granted by that provision to officials having less than 35 years of pensionable service at the age of 60. The legislature was careful not to leave any doubt as to the application of that exceptional provision in the case of a measure of termination of service. Consequently, the defendant is wrong to base an argument *a contrario* on it in contending that the period during which the allowance is paid makes it possible, as a rule, only for further years' of service to be acquired and, exceptionally, for the benefit of Article 5 of Annex VIII to the Staff Regulations to be obtained.

- 39 It should be added that, contrary to the defendant's argument, although the seniority of the applicant in grade and step ceased to increase upon the termination of his service, the fixed period of one year referred to in the second paragraph of Article 77 of the Staff Regulations none the less continued to run. Article 4(7) of the regulation is concerned not with the award of a promotion but with the acquisition of further rights to pension.
- 40 At this point in the reasoning of the Court, it should be observed that the interpretation given above to the provisions in question is in accordance with the aims of the regulation which, in the interests of the service and in order to take account of the requirement arising from the accession of new Member States, grants certain pension advantages in order to encourage officials to request the application of measures concerning termination of their service.
- 41 Having regard to the foregoing considerations, the first plea in law must be declared to be well founded and the contested measure must be annulled in so far as it calculates the applicant's entitlement to pension by reference to the basic salary for Grade B 2, Step 8.
- 42 In view of the annulment of the act contested by the applicant, it is for the defendant to take the necessary measures to comply with this judgment in accordance with Article 176 of the EEC Treaty and calculate anew the applicant's entitlement to a retirement pension in the light of the interpretation of Article 4(7) of the regulation given above.
- 43 Furthermore, the Commission is ordered to pay to the applicant the arrears which will arise from the fresh calculation of his entitlement to pension, together with default interest at the rate of 8% as claimed by him, as from the date on which each payment fell due.

*The second plea: breach of the duty to have regard for the interests of officials and breach of the principle of the protection of legitimate expectations*

- 44 Since the measure contested by the applicant has been annulled and the Commission has been ordered to pay to him the arrears which will arise from the fresh calculation of his entitlement to pension, together with default interest, the applicant's claim for damages has become devoid of purpose, as he acknowledges in his reply (paragraph 24.2). Consequently, there is no need to give a decision on that claim on the basis of an examination of the second plea in law.

### **Costs**

- 45 Under 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 pleading. Since the Commission has failed in its pleas, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- 1. Annuls the Commission's decision of 1 August 1989 calculating the applicant's entitlement to retirement pension in so far as the amount of that pension was calculated by reference to the basic salary for Grade B 2, Step 8;**
- 2. Orders the Commission to make a fresh calculation of the applicant's entitlement to pension and to pay to him the arrears arising therefrom, together with default interest thereon at the rate of 8% per annum as from the date on which each payment fell due;**
- 3. Declares that there is no need to give a decision on the remaining heads of claim;**

**4. Orders the Commission to pay the costs.**

Vesterdorf

Saggio

Yeraris

Delivered in open court in Luxembourg on 27 November 1991.

H. Jung

Registrar

A. Saggio

President