

cial compensation subject, beyond the limit of 12 days unused leave, when the official retires.

Accordingly, the administration is not entitled to limit the number of days for which compensation is payable. Nor may it impose additional conditions, of a procedural nature or otherwise, which are liable to undermine the right provided by the Staff Regulations to

compensation for annual leave which an official has been unable to take owing to requirements of service, upon retirement. In particular, the binding requirement of a written statement from the official's superior specifying the requirements of the service which justified the refusal to grant an application for leave submitted by the official in question is unacceptable, since it deprives him of the right to prove, by any means, that his leave was accumulated for reasons relating to the requirements of the service.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
10 July 1992 *

In Case T-66/91,

Francesco Pasetti Bombardella, represented by Albert Wildgen, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 6 Rue Sainte Zithe,

applicant,

v

European Parliament, represented by Jorge Campinos, Jurisconsult, and in the oral procedure by François Vainker, of its Legal Service, acting as Agents, assisted by Hugo Vandenberghe, of the Brussels Bar, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for payment in respect of annual leave not used by the applicant upon his retirement,

* Language of the case: French.

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

composed of: B. Vesterdorf, President of the Chamber, A. Saggio and J. Biancarelli, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 24 June 1992,
gives the following

Judgment

Facts and procedure

- 1 The applicant, a former Director-General and Jurisconsult in the European Parliament, retired on 31 December 1989 after 37 years' service with that institution.

- 2 On 14 March 1990, the Parliament paid him the net sum of BFR 452 599 as compensation for 30 days' leave not taken. On 11 December 1990, the applicant requested a detailed statement of the compensation payable in respect of all his unused annual leave. That statement was sent to him by letter of 14 January 1991. It showed that the balance of unused leave amounted to 56.5 days, of which 34 days represented leave entitlement for 1989, and expressly provided for payment of financial compensation for 30 days unused leave, corresponding to the 'maximum entitlement acquired in 1989, in accordance with a memorandum from the Secretary-General of 8 December 1989, annexed hereto'. Subsequently, the administration informed the applicant by letter of 15 February 1991 that the statement mistakenly referred to the memorandum of 8 December 1989 instead of the memorandum of 1 August 1989, a copy of which had also been sent to him with the statement.

3 The memorandum in accordance with which the abovementioned statement had been drawn up had been sent on 1 August 1989 by the Secretary-General of the Parliament, Mr Vinci, to Mr Pasetti Bombardella, in his capacity as Jurisconsult, to the Directors-General and the Director for data processing and to the Secretaries-General of the political groups of the Parliament. Paragraphs 1, 2, 3 and 5 were worded as follows:

1. Officials and other servants must endeavour to use their leave entitlement in the year in which that entitlement arose and in any event not to carry leave forward in excess of the 12 days which automatically qualify to be carried forward.
 2. Beyond the abovementioned 12 days, leave will be permitted to be carried forward only upon production of an application for leave which has been refused, accompanied by a written statement from the superior of the person concerned indicating the requirements of the service which gave rise to the refusal.
 3. In any event, the total number of days carried forward must not exceed the total holiday entitlement acquired during the past year.
 5. Officials and other servants (including freelance auxiliary staff) shall endeavour to use their holiday entitlement before definitively leaving the service. When definitively leaving the service, which implies that they are not re-engaged within a period of two months, they are entitled to payment in respect of unused leave upon production of a written statement from their superior of the kind referred to in paragraph 2 and subject to the limit laid down in paragraph 3.'
- 4 In the present case, the statement of the applicant's entitlement to financial compensation for unused leave had been prepared on completion of the procedure described below.

On 7 November 1989, the Director of the President's Cabinet had sent a memorandum to the Director-General for personnel, the budget and finance, in the following terms:

'As a result of the performance of the tasks entrusted to him, Mr Francesco Pasetti Bombardella will not be able to use up his leave entitlement before the end of the current year.'

Following that memorandum, on 8 December 1989 the Secretary-General sent a memorandum to the President of the Parliament in which he stated that he understood that 'for overriding requirements of the service' the applicant was unable to use up his leave entitlement. In that memorandum he proposed limiting the financial compensation payable to 30 days unused leave, representing the 'maximum provided for by the rules in force', that is to say by his abovementioned memorandum of 1 August 1989. To that memorandum of 8 December 1989, the Director of the President's Cabinet had added the following handwritten observation: 'I agree with Mr Vinci. When signing the memorandum of 7 November, I did not know that Mr Pasetti was going to retire on 31 December. J. Pons'.

- 5 After disclosure to him, on 14 January 1991, at his request, of the abovementioned detailed statement of his entitlement to compensation, which imposed a limit of 30 days unused leave, on 20 February 1991 the applicant sent a letter to the Secretary-General requesting payment for all the leave not taken before he left the Parliament. He claimed, essentially, that only the requirements of the service had prevented him from using up his annual leave and that the administration was not entitled to nullify the rights acquired by him when he retired. By letter of 10 May 1991 to the Secretary-General, the applicant stated that his earlier letter of 20 February 1991 should be regarded as a complaint within the meaning of Article 92 of the Staff Regulations of Officials of the European Community.
- 6 Following the judgment of the Court of First Instance in Case T-139/89 (*Virgili-Schettini v Parliament* [1990] ECR II-535, summary publication), the appropriate department issued an expenditure order on 3 June 1999 including an instruction to

pay the applicant the gross sum of BFR 497 974 as compensation for 26.5 days' leave not taken. On 6 September 1991, the Financial Controller refused to approve that order. The reasons for his refusal were, first, that the payment order did not conform with the internal rules on the implementation of the Parliament's budget and, secondly, that it infringed the principle of sound financial management.

- 7 On 3 June 1991, the Director-General for personnel, budget and finance sent a communication to the staff stating that 'The Staff Regulations impose no limit on the right to carry forward unused leave or, upon leaving the service definitively, to obtain payment in respect thereof. However, beyond the twelve days which may automatically be carried forward, they allow such a carry-forward only if the leave concerned could not be taken because of the requirements of the service'. In that regard, the communication stated that 'Leave may no longer be carried forward merely on the basis of a statement as to the requirements of the service: it will be necessary to produce several unsuccessful applications for leave spread over the year, accompanied by specific reasons'.

- 8 In the absence of an express response to his abovementioned complaint, the applicant, by application lodged at the Registry of the Court of First Instance on 17 September 1991, sought the annulment of the statement of his entitlement to compensation drawn up on 14 January 1991, referred to above. The written procedure followed its normal course. The Court put certain questions to the defendant institution in order to determine the date on which the contested decision was disclosed to the applicant for the first time. In response to the question concerning possible disclosure of a pay slip, the Parliament stated that the payment of financial compensation for 30 days unused leave was made in March 1990 and that 'according to the information available (to it), that transfer was not accompanied by any document' other than the following communication, appearing on the transfer form: 'Emoluments 90/03 value date 14.3.1990'. As regards the date of the first disclosure to the applicant of the statement of his unused leave, the Parliament stated that it had 'no precise information regarding the date of dispatch thereof'. It added that 'it probably took place in the last quarter of 1990'. Upon hearing the views of the Judge-Rapporteur, the Court of First Instance decided, pursuant to Article 53 of its Rules of Procedure, to open the oral procedure without any preparatory inquiry. The parties presented oral argument on 24 June 1992.

Forms of order sought

9 The applicant claims that the Court of First Instance should:

- (i) order the Parliament to pay him compensation for 26.5 days to which he was entitled as at 31 December 1989, the date of his retirement, and interest on that sum from that date;
- (ii) order the Parliament to pay the costs.

The defendant contends that the Court of First Instance should:

- (i) declare the action unfounded;
- (ii) order the applicant to pay the costs.

Pleas in law and arguments of the parties

10 In support of his application, the applicant alleges infringement of the second paragraph of Article 4 of Annex V to the Staff Regulations, according to which 'where an official at the time of leaving the service has not used up all his annual leave, he shall be paid compensation equal to one-thirtieth of his monthly remuneration at the time of leaving the service for each day's leave due to him'. He claims that, by limiting to 30 days the financial compensation for his unused leave, the contested decision is in breach of the relevant provisions of the Staff Regulations, as interpreted in particular by the judgment of the Court of First Instance in Case T-139/89, cited above.

The applicant states that it is undisputed that he was prevented by requirements of the service from using up his annual leave before retiring. He relies on the memorandum from the Director of the Cabinet of the President of the Parliament of 7 November 1989, which states that, because of the performance of the tasks entrusted to him, Mr Pasetti Bombardella would not be in a position to use up his leave entitlement before the end of 1989. He observes that the Director of the Cabinet was competent to agree to his leave being carried forward 'since the administration and the Secretary-General regard him ... both in the Parliament and in the other institutions, as the *alter ego* of the President. In fact, the reply is given by him and not by the President'. He also claims that the Secretary-General recognized, in his memorandum of 8 December 1989 to the President, following the memorandum from the Director of the Cabinet, referred to above, that Mr Pasetti Bombardella 'was unable because of overriding requirements of the service to use up his leave'. The fact that at that time the Director of the Cabinet had not been informed of the imminent retirement of the official concerned has no bearing on the requirements of the service which justified his leave being carried forward. Similarly, with regard to the allegedly belated authorization for the abovementioned carry-forward of leave, the applicant points out that the requirements of the service may be appraised by the administration at any time, as the Court of First Instance held in paragraph 26 of its judgment in Case T-139/89, cited above.

At the hearing, the applicant also stated that a Jurisconsult not operating within the normal hierarchical framework cannot be required to prove a specific refusal by his superior, because of requirements of the service, to agree to leave. Accordingly, the abovementioned memorandum from the Director of the Cabinet of the President of the Parliament constitutes sufficient proof.

- 12 The applicant also asks the Court of First Instance to treat certain allegations made by the defendant as 'injurious to his reputation' and to have them removed from the file. He refers to the following observations:

— in paragraph 25 of the defence: 'Without even having regard to the principles of loyalty and trust which must govern administrative relationships';

- in paragraph 29: ‘In short, by way of overall conclusion, the defendant relies, in support of its arguments, upon the general maxim “nemo auditur propriam turpitudinem allegans”’;
- and also certain allegations made by the internal controller.

13 The Parliament, for its part, contends that it follows clearly from Article 4 of Annex V to the Staff Regulations, which limits to twelve days the unused holiday which may be carried forward for reasons not attributable to the requirements of the service, in conjunction with Article 57 of the Staff Regulations, which lays down the number of days annual leave available, that the principle that annual leave should be used up within the year in question, subject to twelve days being carried forward, constitutes both a right and an obligation attaching to each official. According to the Parliament, it is only if an official, after submitting an application for leave in due time, is refused leave because of requirements of the service and against his will, that the Staff Regulations provide for the payment of financial compensation upon retirement. In that regard paragraph 2 of the memorandum of 1 August 1988 lays down the procedure to be followed with a view to obtaining permission to carry leave forward.

14 In the present case, the Parliament considers that that procedure was not followed. It contends, essentially, that the decision of 7 November 1989, on which the applicant bases his claim for financial compensation of 56.5 days unused leave, was not adopted in accordance with the prescribed conditions. In support of that argument, it puts forward four pleas in defence, referring respectively to the lack of authority of the author of the memorandum, the freedom of action enjoyed by the applicant, his duty to inform the President’s Chef de Cabinet of his imminent retirement and the serious financial consequences arising from his request for leave to be carried forward and, finally, the belatedness of that request.

15 First, the Parliament contends that, in the absence of any delegation of powers, the President’s Chef de Cabinet was not entitled to authorize the carrying forward of unused leave. It contends that the applicant was under the direct authority of the President and that the administrative situation applicable to officials *hors cadre* applied to him, as decided by the Bureau of the Parliament at its meeting of 10 September 1985.

In that regard, the Parliament observes that, in practice, it was the President who, in 1987 and 1988, approved applications for unused leave to be carried forward. Moreover, in implementation of a memorandum from the Director-General for personnel of 6 February 1986, indicating that a monthly summary of mission expenses incurred by the applicant must be initialled, for information, by the President, the latter affixed his signature to the monthly accounts of missions undertaken by the applicant in 1988 and 1989. It is thus apparent, in the Parliament's view, that the President's Chef de Cabinet was never involved in decisions authorizing either the carrying forward of leave or mission orders before his memorandum of 7 November 1989. Moreover, the practice followed was for the President's Chef de Cabinet, when notifying a decision adopted by the latter, to indicate in his own handwriting at the foot of the page 'Agreed by the President' and to sign. In those circumstances, the Parliament considers that the applicant, who could not have been unaware of the Chef de Cabinet's lack of authority in that regard, cannot rely on the memorandum of 7 November 1989, mentioned above.

- 16 Secondly, the Parliament contends that the applicant enjoyed considerable independence in organizing his activities, enabling him to delegate his powers, with a view to using up his leave, to one or more members of the department working under his authority who were qualified to have such powers delegated to them.
- 17 Thirdly, the Parliament contends that when the abovementioned memorandum of 7 November 1989 was submitted, the applicant should, in view of the principles of loyalty and trust which must govern administrative relationships, as highlighted in the judgment of the Court in Joined Cases 175/86 and 209/86 *M. v Council* [1988] ECR 1891, paragraph 21, have informed the President's Chef de Cabinet of his forthcoming retirement as from 1 January 1990 and of the financial consequences of the abovementioned memorandum of 7 November 1989, involving a likely budgetary expenditure of around BFR 1 055 000. It considers that that information might have led to reconsideration of the assessment made concerning the requirements of the service justifying the carrying forward of unused leave.
- 18 Fourthly, the Parliament criticizes the applicant for having lodged a request for 56.5 days to be carried forward, when only about 30 working days remained before his retirement. It is apparent from the rationale of Article 4 of Annex V to the Staff

Regulations, from the rules of sound administration and from the principles of loyalty and trust referred to above that such requests must be made in sufficient time to enable the competent authority to refuse them. In that respect, the applicant's argument based on the judgment in Case T-139/89, cited above, is irrelevant in so far as it relates to the proof of justification by requirements of the service and not the date of the application for recognition of such justification. In those circumstances, the Parliament considers that the principle *nemo auditur* laid down by the Court of Justice in its judgment in Case 90/71 *Bernardi v Parliament* [1972] ECR 603, paragraph 10, means that the memorandum of 7 November 1989 cannot produce legal effects.

- 19 Moreover, it should be noted that, in response to a question put by the Court at the hearing concerning the reason for which the Parliament, whilst contesting before the Court the applicant's entitlement to compensation for 56.5 days' leave, on the ground that the procedural conditions laid down in paragraph 2 of the memorandum of 1 August 1989 had not been fulfilled by the applicant, nevertheless granted him partial financial compensation for 30 days, the Parliament stated that the subject-matter of the present dispute is the 26.5 days for which compensation has not yet been paid but that, depending on the judgment to be given in these proceedings, it may be prompted to consider whether it would be appropriate to recover, as unduly paid, the financial compensation already paid to the applicant.

Legal assessment

- 20 The Court finds, first, that the applicant's claim that certain allegations made by the defendant should be deleted from the record on the ground that they are 'injurious to his reputation' is unfounded. That request by the applicant refers to the Parliament's reliance, in its pleas in law, on certain arguments based on legal principles, such as those of loyalty and trust in administrative relationships or *nemo auditur* which the applicant has been able to counter by legal and factual arguments, both in his written observations and at the hearing. Furthermore, the applicant does not indicate precisely which other allegations are, in his opinion, injurious or defamatory to him. In those circumstances, the above claim cannot be upheld.

- 21 As regards the administration's refusal to pay financial compensation beyond the limit of 30 days for leave not taken by the applicant when he retired, it is for this Court, in the exercise of its unlimited jurisdiction, to establish whether or not to uphold the applicant's claim that the Parliament should be ordered to pay compensation for his unused leave in its entirety.
- 22 In that regard, it must first be observed that the first paragraph of Article 4 to Annex V of the Staff Regulations provides that 'Where an official, for reasons other than the requirements of the service, has not used up all his annual leave before the end of the current calendar year, the amount of leave which may be carried over to the following year shall not exceed 12 days'. According to the second paragraph of that article, where an official at the time of leaving the service has not used up all his annual leave, he is to be paid compensation equal to one thirtieth of his monthly remuneration at the time of leaving the service for each day's leave due to him.
- 23 It must therefore be stated that the abovementioned provisions of the Staff Regulations clearly provide, without limitation, for the payment of compensation for all annual leave which it has not been possible to take because of requirements of the service. That justification, by reference to the requirements of the service, for the accumulation of unused annual leave is the only condition to which the abovementioned provisions of Annex V to the Staff Regulations, combined with Article 57 of the Staff Regulations determining the length of the annual leave to which officials are entitled, make entitlement to financial compensation subject, beyond the limit of 12 days unused leave, when the official retires.
- 24 In those circumstances, the administration is not entitled to limit to 30 days the compensation for leave which it was not possible to take because of requirements of the service, a fact which the defendant, moreover, recognized at the hearing. Nor may it impose additional conditions, of a procedural nature or otherwise, which are liable to undermine the right provided by the Staff Regulations to compensation for annual leave which an official has been unable to take owing to requirements of service, upon retirement.

25 In the present case, the Court considers that the conditions relied on before it by the Parliament, to which the memorandum of 1 August 1989 (paragraph 2) makes the carrying over of annual leave subject, undermine the rights laid down in the first and second paragraphs of Article 4 of Annex V to the Staff Regulations. In fact, the binding and exclusive requirement, as laid down in the abovementioned memorandum of 1 August 1989, of a written statement from the official's superior specifying the requirements of the service which justified the refusal to grant an application for leave submitted by an official is unacceptable since it deprives officials of the right to prove, by any means, that their leave was accumulated for reasons attributable to the requirements of the service.

26 The impropriety of such restrictive conditions has been expressly recognized in the case-law. In its judgment in Case T-139/89 *Virgili-Schettini v Parliament*, cited above, the Court stated, at paragraph 26, that 'nowhere do the relevant provisions specify how and when proof of grounds attributable to the requirements of the service must be produced. Similarly, no provision requires prior authorization or any similar procedure'. On appeal, that judgment was confirmed by the Court, which stated 'although the institutions may, within the framework of the power of internal organization vested in them, establish an internal procedure relating to leave, such a procedure cannot deprive an employee of the right to prove by any means that his leave accumulated for reasons relating to the requirements of the service' (judgment of the Court of Justice in Case C-348/90 P *Parliament v Virgili-Schettini* [1991] ECR I-5211, paragraph 11).

27 It follows that, in the present case, the right to financial compensation for the 56.5 days of unused leave is conditional only upon the existence of requirements of the service which prevented the applicant from taking the annual leave due to him.

28 It is clear from the documents before the Court that the requirements of the service which prevented the applicant from using up his annual leave before retirement have not at any time been contested by the defendant, as the latter, moreover,

expressly confirmed at the hearing. It follows that the condition for entitlement to the payment of financial compensation is fulfilled as regards the 56.5 days annual leave not taken before the applicant's retirement, without its being necessary to verify whether prior authorization was given by his superior in 1989 for that leave to be carried over. The Parliament cannot rely on the alleged absence of such prior authorization to justify its refusal to pay compensation for the leave not taken by the applicant on grounds attributable to the requirements of the service when it admits that such grounds indeed existed in the present case.

29 This Court has unlimited jurisdiction in the present case and it is therefore necessary to amend the decision of 14 January 1991 to the extent to which it encroaches upon the applicant's rights, as they have just been specified, and to order the Parliament to pay him financial compensation for the 26.5 days of unused leave, for which compensation has not yet been paid and to which he was entitled upon retirement.

30 As regards the applicant's claim for the award of default interest, the Court observes that, as regards determining whether there was a delay and whether such delay was unjustified, account must be taken of the fact that the institutions must have a reasonable period, depending on the circumstances of the particular case and the complexity of the matter, in order to draw up their decisions (see the judgments of the Court of First Instance in Case T-16/89 *Herkenrath and Others v Commission* [1992] ECR II-275, paragraph 38, and Joined Cases T-17/89, T-21/89 and T-25/89 *Brazzelli Lualdi and Others v Commission* [1992] ECR II-293, paragraph 37).

31 In the present case, it is appropriate to order the Parliament to pay default interest at the rate of 8% per year, as from 14 March 1990, on which date the defendant institution, acting within a reasonable time, paid partial compensation for the leave which the applicant had not taken by the time he retired on 31 December 1989.

Costs

32 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they are applied for in the opposite party's pleadings. Since the defendant has failed in its submissions, it should be ordered to pay the costs in their entirety.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- 1. Annuls the decision of the European Parliament of 14 January 1991 in so far as it limits to 30 days the payment of compensation for the annual leave not used up by the applicant before leaving the service;**
- 2. Orders the European Parliament to pay the applicant compensation corresponding to 26.5 days of leave not taken and not yet compensated for, the amount to be determined in accordance with the second paragraph of Article 4 of Annex V to the Staff Regulations, together with interest for late payment at the rate of 8% per annum from 14 March 1990;**
- 3. Orders the European Parliament to pay the costs in their entirety.**

Vesterdorf

Saggio

Biancarelli

Delivered in open court in Luxembourg on 10 July 1992.

H. Jung

B. Vesterdorf

Registrar

President

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