assimilation of the period of auxiliary employment equivalent to a period of temporary employment subject to the two-fold condition that the person concerned pay to the institution the amounts which he would have had to pay to the Community pension scheme by way of the contribution referred to in Article 83(2) of the Staff Regulations and that he repay to the institution the employer's share of the social security contributions paid to the national pension scheme under Article 70 of the Conditions of Employment of Other Servants.

2. The duty of assistance laid down in Article 24 of the Staff Regulations is concerned with the defence of officials against the acts of third parties and not against the acts of the Administration itself, the review of which is governed by other provisions of the Staff Regulations.

3. Article 39 of the Conditions of Employment of Other Servants, concerning the severance grant, cannot be interpreted as meaning that, apart from payments made in pursuance of Article 42 thereof, no other amounts may be deducted from the grant. Accordingly, that provision does not prevent the grant paid to an auxiliary servant who has become a temporary servant and who leaves the service of the Communities in that capacity from being reduced by both the amount of the contributions which the person concerned would have had to pay to the Community pension scheme if he had been immediately employed as a temporary servant and the amount of the employer's contributions paid by the institution to the national pension scheme.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

30 June 1992 *

In Case T-24/91,

Carlos Gómez González, Angeles Sierra Santisteban, Javier Mir Herrero, residing in Spain, and **Lidón Torrela Ramos,** residing in Belgium, former members of the temporary staff of the Council of the European Communities, represented by

* Language of the case: French.

Georges Vandersanden and Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicants,

v

Council of the European Communities, represented by Moyra Sims, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Xavier Herlin, Director of the Directorate for Legal Affairs at the European Investment Bank, 100, Boulevard Konrad-Adenauer,

defendant,

APPLICATION for the annulment of the decision of the Council of the European Communities of 27 July 1990 to deduct, in the calculation of the applicants' severance grants, both the contributions to the Community pension scheme which they paid as members of the temporary staff and the employer's contribution paid by the Council to the Belgian social security scheme,

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

composed of R. García-Valdecasas, President of the Chamber, R. Schintgen and C. P. Briët, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 15 January 1992,

gives the following

Judgment

The facts of the case

1 The applicants were engaged as members of the auxiliary staff by the General Secretariat of the Council on 16 June 1986 to perform the duties of Spanish-language translators. Their employment continued under successive contracts, the last one ending on 31 March 1989. Subsequently, each of the applicants served under a contract as a member of the temporary staff for the period from 1 April 1989 to 31 July 1990. None of the applicants was appointed as an official on the expiry of that contract.

2 By letters of 24 November 1989 addressed to the Council's pensions service, each of the applicants submitted the following request, in identical terms: 'In accordance with Staff Note No 210/83, I hereby request that my former contract as a member of the auxiliary staff be deemed to have been the equivalent of a contract as a member of the temporary staff for the purpose of acquiring pension rights, in particular according to the criteria set out in paragraph 4 of that note.'

3 By a decision of 27 July 1990, the Director for Personnel and Administration of the General Secretariat of the Council granted the applicants' requests in the following terms:

'Re: Article 39 of the Conditions of Employment

In reply to your request for your contract as a member of the auxiliary staff to be made equivalent to a contract as a member of the temporary staff, I am pleased to inform you that I have decided to grant your request; accordingly, the amounts payable to you will be calculated as from the date on which your contract as a member of the auxiliary staff took effect.

The contributions which you would have paid as a member of the temporary staff and the employer's contribution paid to the ONSS, 6, 75% and 8, 87% respectively of the basic salary received, will be deducted from the net amount payable.'

4 Pursuant to that decision, the Administration calculated the balance of the severance grant payable to the applicants. The method of calculation was set out in a letter sent on 30 July by the competent principal administrator in the Directorate for Personnel and Administration of the General Secretariat of the Council to the Head of the unit dealing with 'pensions and relations with former officials' at the Commission, and was in the following terms:

'On the footing of the basic (auxiliary) salary actually paid, the following amounts must be calculated:

1. the personal contribution of 6, 75% provided for in Article 41 of the Conditions of Employment;

2. the employer's contribution paid to the national social security, in this case 8, 87% for the Belgian social security.

Those two amounts must be deducted from the net amount payable under Article 39 of the Conditions of Employment.'

5 In reply, the Head of that unit, in a letter of the same date, confirmed those methods, which, according to him, were intended 'to regularize, in the Community scheme, the period of service completed by a member of the auxiliary staff who has become a member of the temporary staff and whose contract expires while he has the latter status'. He added: 'The severance grant payable to him will include the period on the auxiliary staff adjusted as though it had been completed by the person concerned as a member of the temporary staff, provided that the person concerned pays to the Communities the total of the personal contributions payable

under the Community scheme and the employer's contributions under the national scheme in respect of that period on the auxiliary staff.'

6 The Administration therefore deducted the sum of BFR 639 247 from the net amount of each applicant's severance grant: BFR 1 283 351 for Mr Gómez González, BFR 1 240 387 for Mrs Sierra Santisteban, BFR 1 239 542 for Mr Mir Herrero and BFR 1 240 812 for Mrs Torrella Ramos. The applicants were paid the balance, namely BFR 644 104 for Mr Gómez González, BFR 601 140 for Mrs Sierra Santisteban, BFR 600 295 for Mr Mir Herrero and BFR 601 565 for Mrs Torrella Ramos.

7 By letters dated 3 October 1990 in the case of Mr Gómez González, 4 October 1990 in the case of Mrs Sierra Santisteban, 20 September 1990 in the case of Mr Mir Herrero and 24 October 1990 in the case of Mrs Torrella Ramos, the applicants submitted identically worded complaints against the decision of 27 July 1990, claiming that it adversely affected them

'because it unlawfully reduced their severance grant and other indemnities and benefits to which they considered themselves entitled.

The decision was unlawful because:

— there was no reference in either Article 39 of the Conditions of Employment or Article 12 of Annex VIII to the Staff Regulations to the deductions which the Administration purported to make;

— the Administration was not entitled to withhold sums which have not been appropriated because it would thereby infringe both the principle of good administration and Article 28(1)(a) and (b) of the Financial Regulation of May 1990'.

8 By a memorandum dated 18 January 1991 the complaints were dismissed by the Secretary-General of the Council in the following terms:

'The possibility of assimilating a period of service on the auxiliary staff to a contract as a member of the temporary staff for the purposes of the Community pension scheme, as is the case when a servant has been appointed an official, can be applied only by analogy to a member of the temporary staff who leaves the service of the institution concerned without being appointed an official.

That person cannot be required to subrogate the institution in his pension rights for the period during which he had a contract as a member of the auxiliary staff, and the institution paid the personal contributions to the national social security scheme together with the employer's contributions.

It follows that:

— the institution will not be in a position to recover the pension contributions, as is its practice with regard to officials under Article 11(2) of Annex VIII to the Staff Regulations, following the case-law of the Court;

— the former member of the auxiliary staff will preserve his pension rights in a national scheme which on retirement will be combined with other rights acquired subsequently.'

Procedure

9 In those circumstances, by an application lodged at the Registry of the Court of First Instance on 19 April 1991, the applicants brought these proceedings for the annulment of the decision of 27 July 1990.

10 After lodgement of the statement of defence, the applicants waived their right to lodge a reply. The defendant likewise waived its right to lodge a rejoinder.

11 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to request the parties to produce various documents and opened the oral procedure without any preparatory inquiry.

12 At the hearing on 15 January 1992, the representatives of the parties presented oral argument and gave answers to the questions put by the Court.

13 By order of 7 February 1992, the Court of First Instance re-opened the oral procedure and requested the parties to comment on the effect of the Belgian law of 21 May 1991 establishing in certain respects relations between the Belgian pension schemes and those of institutions governed by public international law.

14 The defendant lodged its observations on 27 February 1992 and the applicants lodged theirs on 5 March 1992.

15 By a decision of 23 March 1992 the President of the Fourth Chamber declared the oral procedure closed.

16 The applicants claim that the Court of First Instance should:

— annul the decision of 27 July 1990 of the Director of Personnel and Administration of the General Secretariat of the Council;

— order the Council to pay to them the amounts unlawfully deducted, together with interest calculated at 8% per annum since 27 October 1990;

— order the Council to pay the costs.

17 The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the costs.

Substance

18 Staff Note No 210/83 from the General Secretariat of the Council of 29 November 1983 (hereinafter 'Staff Note No 210/83') concerning the 'Pension rights of officials who have held one or more auxiliary contracts before being appointed as temporary staff or officials', provides as follows:

'1. Following the recent decision of the Court of Justice on the nature of temporary staff and auxiliary staff contracts, the Administration has examined the possibility of recognizing certain (former) auxiliary staff contracts as having the

status of a temporary staff contract (judgment of the Court in Joined Cases 225/81 and 241/81 *Toledano Laredo and Garilli* v *Commission* [1983] ECR 347). Such recognition would, for the purposes of acquiring pension rights, serve to make a period of service in the Institutions of the Communities as an auxiliary employee equivalent to a corresponding period of service as a temporary employee.

In the operative part of the aforementioned judgment, the Court ruled that an auxiliary contract may be recognized as having the status of a temporary contract provided both that it was first proven that the posts corresponding to the duties carried out appeared in the establishment plan of the Institution and were available, and that the duties carried out as auxiliary employee were not of a transitory nature, i. e. they were permanent Community public service duties.

2. It should be remembered here that pension rights are acquired:

— in the case of auxiliary staff, by affiliation to a compulsory social security scheme, preferably that of the country to whose scheme they were last affiliated or that of their country of origin (see Article 70(1) of the Conditions of Employment of Other Servants);

— in the case of temporary staff, subsequently appointed as officials of the Community, by taking into account for the purpose of calculating years of pensionable service as provided for in Annex VIII to the Staff Regulations (see Article 40, second paragraph of the Conditions of Employment of Other Servants) the period of service as a temporary employee.

3. This means that should a period of service as an auxiliary employee be made equivalent to a corresponding period of service as a temporary employee, the official would have to undertake to pay to the Communities the contribution provided for in Article 41 of the Conditions of Employment of Other Servants, calculated according to the basic salary corresponding to his grade on the auxiliary staff.

In order to avoid any combining of the Community pension and the national pension for the period of service as auxiliary employee, the official will be requested to apply to the national scheme for reimbursement of the contributions paid during the period of service concerned, or, if he is already drawing a pension under that scheme, the latter must terminate payment of the part due for that period and pay to him the actuarial equivalent of his corresponding acquired rights.'

19 A distinction must be drawn between, on the one hand, the pension scheme applicable to auxiliary staff and, on the other, the pension scheme applicable to temporary staff.

20 Article 70(1), in Title III, 'Auxiliary staff', of the Conditions of Employment of Other Servants (hereinafter 'Conditions of Employment'), provides:

'So that auxiliary staff are insured against sickness, accident, invalidity and death and can build up a retirement pension, they shall be affiliated to a compulsory social security scheme, preferably that of the country to whose scheme they were last affiliated or that of their country of origin.

The institution shall be responsible for the employer's contributions required under the legislation in force where the servant is compulsorily affiliated to such a social security scheme, or for two thirds of the servant's contribution where he remains voluntarily affiliated to the national social security scheme of which he was a member before he entered the service of the Communities or where he voluntarily joins a national social security scheme.'

In practice, an auxiliary employee's personal contributions to the national pension scheme are deducted from his basic salary, while the institution pays the compulsory employer's contributions to the national scheme. In this way the auxiliary employee acquires pension rights in this national scheme which may be combined with other rights acquired subsequently.

21 Pursuant to Article 41 of Title II, 'Temporary staff', of the Conditions of Employment, a member of the temporary staff, on the other hand, is subject to the Community pension scheme. That article provides: 'As regards the funding of the social security scheme provided for in sections B and C, the provisions of Article 83 of the Staff Regulations and Articles 36 and 38 of Annex VIII thereto shall apply by analogy.'

Pursuant to Article 83(2) of the Staff Regulations of Officials of the European Communities (hereinafter the 'Staff Regulations'), the contribution payable by an official — to whom a temporary servant is assimilated in this respect — was, at the material time, fixed at 6, 75% of his basic salary.

Article 36 of Annex VIII to the Staff Regulations provides: 'Salaries shall in all cases be subject to deduction of the contribution to the pension scheme provided for in Articles 77 to 84 of the Staff Regulations.'

Article 38 of that Annex provides: 'Contributions properly deducted shall not be refunded. Contributions wrongly deducted shall not confer the right to receive a pension; they shall be reimbursed without interest at the request of the official or of those entitled under him.'

22 Pursuant to Article 39 of the Conditions of Employment, on leaving the service a temporary servant is to be entitled to a severance grant calculated in accordance with Article 12 of Annex VIII to the Staff Regulations. This grant is to be reduced by the amounts paid in pursuance of Article 42, these being the payments which the institution, where appropriate, has made at the servant's request in order to create or keep up his pension entitlement in his country of origin.

23 In support of their application for annulment, the applicants make four submissions: the first two concern the unlawfulness of the deduction of social security contributions from their severance grants in breach, they maintain, of Article 38 of Annex VIII to the Staff Regulations and of the principle of equal treatment; the third alleges an infringement of the duty to provide assistance incumbent on the

Administration, and the fourth an infringement of Article 39 of the Conditions of Employment as regards the severance grant.

The first two submissions: infringement of Article 38 of Annex VIII to the Staff Regulations and infringement of the principle of equal treatment

Arguments of the parties

24 In support of their first submission, the applicants put forward three arguments.

First, they maintain that the social security contributions paid by the Council to the Belgian social security scheme were wrongly deducted from their remuneration, on the ground that the Administration had incorrectly conferred on them the status of members of the auxiliary staff.

25 Secondly, they submit that the employer's contributions paid to the Belgian social security scheme also constitute a payment wrongly made for which they cannot be liable.

26 Thirdly, they submit that, even if they were required under Article 83(2) of the Staff Regulations, to pay the contribution of 6.75% to the Community pension scheme, that amount would have to be set off against the employee's social security contributions paid by them to the Belgian national scheme. To the extent to which those contributions are higher than the contribution to the Community scheme, not only is it unnecessary to deduct the 6.75%, but it is also necessary, pursuant to Article 38 of Annex VIII to the Staff Regulations, to reimburse to them the difference.

27 The defendant disputes the relevance of the first argument. Acceptance by the applicants of contracts as members of the auxiliary staff offered to them from 1986 to 1989 now precludes them from calling in question their administrative

situation. The Council adds that, in accordance with both Staff Note No 210/83 and the applicants' express requests, the period of service as a member of the auxiliary staff was made equivalent to a corresponding period of service as a member of the temporary staff for the sole purpose of 'acquiring pension rights'. The legal effects of the decision of 27 July 1990 are restricted therefore to the calculation of the pension, since the applicants obtained no retroactive change in their administrative situation. In those circumstances, Article 38 of Annex VIII to the Staff Regulations, which is applicable only to officials and members of the temporary staff, does not apply to the applicants, who continued to be subject to Article 70 of the Conditions of Employment, pursuant to which they had to pay the employee's contribution provided for in the Belgian scheme in order to build up a retirement pension.

28 As to the second argument, the defendant points out that, pursuant to Article 70 of the Conditions of Employment, the Council assumed responsibility for the employer's contributions to the Belgian social security scheme. Owing to the fact that it was not possible for the Council to recover those contributions, since the applicants were not appointed officials after their auxiliary staff contracts had been assimilated to temporary staff contracts, the Council was unable to be subrogated to their rights against the national pension fund; it therefore decided by analogy to deduct the corresponding amounts from their severance grants. Thus the Council also avoided discrimination in relation to former members of the auxiliary staff subsequently appointed as officials who, unlike the applicants, did not retain their pension rights in the national scheme.

29 With regard to the third argument, the defendant again refutes the allegation that the contributions to the national scheme were wrongly deducted, and points to the binding nature of Article 70 of the Conditions of Employment. It then refers to Articles 2 and 3 of Annex VIII to the Staff Regulations, under which a retirement pension is payable only where the servant concerned has paid his share of the pension contribution in respect of the relevant periods of service. It goes on to point out that the severance grant is simply the refund of the employee's and employer's contributions to the pension scheme, so that the arrears of contributions must be the responsibility of the recipient of such a grant. The other former members of the auxiliary staff who went on to be appointed officials had to undertake, pursuant to paragraph 3, first subparagraph, of Staff Note No 210/83, to pay to the Communities the contribution provided for in Article 41 of the Conditions of Employment. In the present case, the sole purpose of allowing the applicants to be

assimilated to members of the temporary staff was to enable them to receive a higher severance grant (approximately BFR 600 000 instead of approximately BFR 400 000). In consideration of that benefit, they are obliged to pay the requisite contributions. Finally, the Council points out that the applicants retain their pension rights in the national scheme, since the contribution of 6, 75% enables them to acquire rights in the Community scheme and has nothing to do with the contribution to the national scheme.

30 In support of their second submission alleging an infringement of the principle of equal treatment, the applicants submit that, following the error — later described by them as a fault — by the Administration in wrongly conferring on them the status of auxiliary servants, their salaries were subject to two sets of contributions, one for the national social security scheme and one for the Community scheme, unlike the other members of the temporary staff who were immediately affiliated to the Community scheme.

31 The defendant replies that the general principle of equal treatment applies only to persons in identical or comparable situations, which was not true of this case. First, the status of auxiliary servant was not wrongly conferred on the applicants, since they were treated as equivalent to temporary servants solely for the purpose of the calculation of their pension rights. Secondly, should the applicants be exempted from contributing to the Community pension scheme, that would amount to reverse discrimination against the other temporary servants who correctly paid their contributions to the Community scheme. Furthermore, unlike temporary servants, the applicants retain rights in the national pension scheme.

The Court's appraisal

32 At the outset the Court notes that, following the questions put to the parties regarding the effect of the Belgian Law of 21 May 1991 establishing in certain respects relations between Belgian pension schemes and those of institutions governed by public international law, the parties agreed that that law had no relevance to this case, since the applicants were unable to request that the amount of the retirement pension corresponding to the period of service in issue be paid to the Council.

33 The applicants are essentially claiming, it will be recalled, that the Council, in granting their request for assimilation 'for the purpose of acquiring pension rights', retroactively conferred full temporary staff status on them. They challenge the Council's right to confer a hybrid status on a temporary servant for a specific period of his employment. By reclassifying *ex post facto* the auxiliary staff contracts as temporary staff contracts the Council did no more than alter the legal framework of the applicants' status in order to remedy the error made concerning the classification of their status for the period completed under an auxiliary staff contract. It is therefore the Council's responsibility to make known to the competent Belgian social security authority that the applicants' status was wrongly classified and to press for their mistaken affiliation to the national scheme to be rectified, thus enabling the contributions paid by itself and its servants to be recovered. It is for the Council, if necessary, to bear the consequences of the failure to recover contributions retained by the Belgian pension scheme.

34 As to that, it must be observed that, in their letters of 24 November 1989, the applicants merely requested that their former auxiliary staff contracts be assimilated to temporary staff contracts 'for the purpose of acquiring pension rights'. The Council granted that request with a view only to the payment of the severance grant provided for in Article 39 of the Conditions of Employment. The letter of 27 July 1990 is in fact clearly headed: 'Re: Article 39 of the Conditions of Employment'. Furthermore, the complaint lodged against the decision in that letter expressly states that it is only the 'part of the decision' relating to the deduction of the Community contribution and the employer's and employee's contributions paid by the Council which 'adversely affects' the applicants and which, therefore, they challenge.

35 It must be concluded that by its complaint the applicants did not seek a general review and reclassification of their status. It follows that the decision to reject their complaint concerns only the effects of the substitution of the Community pension scheme for the Belgian pension scheme as regards the calculation of the rights mentioned in Article 39 of the Conditions of Employment.

36 Since the subject-matter of the application to the Court is defined by that of the prior administrative procedure, it cannot, in this case, be extended to the more general question of the legality of the classification of the applicants' status.

37 In granting the applicants' request that their period of employment as auxiliary servants be made equivalent to a period of employment completed as temporary servants so as to enable them to receive the severance grant, the Council made that assimilation subject to a twofold condition: first, the applicants had to discharge the obligation to pay to the Council the contributions which they would have had to pay as temporary servants and, secondly, they had to reimburse to the Council the amount of the employer's share of social security contributions which the Council had paid to the Belgian pension scheme. It is necessary, therefore, to examine the lawfulness of that twofold condition to which the impugned decision makes assimilation subject.

38 As to the first condition, concerning the payment of the contribution to the Community pension scheme, it should be pointed out that, because the Community pension scheme was substituted for the Belgian pension scheme, the applicants were asked by the Council to regularize their position by paying to the Community pension scheme the 6.75% contribution provided for in Article 83(2) of the Staff Regulations, which represents the one-third share paid by officials and temporary staff towards the financing of the Community pension scheme.

39 That amount is, as a general rule, repaid in full, in accordance with Article 12(b) of Annex VIII to the Staff Regulations, at the same time as the proportionate severance grant mentioned in Article 12(c). It should also be noted that the payment of the contribution to the Community pension scheme has the effect of increasing the proportionate severance grant as a result of extension of the period of service taken into account in calculating it, the grant being calculated on the basis of one and a half months for each year of service of the final basic salary subject to deductions.

40 Without disputing their obligation to contribute to the Community pension scheme, the applicants claim, in substance, to be entitled to set off the employee's contributions which they have already paid to the Belgian pension scheme against the amounts which they are required to pay to the Community pension scheme, and that the Council must refund to them the difference between the amount of social security contributions which they have actually paid under the Belgian pension scheme and the smaller amount of the social security contributions which they have to pay under the Community pension scheme.

41 The Court considers that the applicants' claim of set-off against the Council must be analysed as a claim for an indemnity against the employee's social security contributions not refunded by the Belgian pension scheme; the Council is to compensate them by paying to them an amount equivalent to those contributions. In order for the applicants to be able to claim compensation for the damage allegedly suffered, they must demonstrate a service-related fault committed by the institution, real and quantifiable loss and a causal link between the fault and the alleged damage (see judgment of the Court of First Instance in Case T-20/89 *Moritz* v *Commission* [1990] ECR II-769, paragraph 19).

42 In the present case, however, it has not been established that the Council committed a fault entitling the applicants to compensation by affiliating the applicants while they were serving members of its auxiliary staff to the national pension scheme in accordance with Article 70 of the Conditions of Employment. The applicants therefore have no existing and payable claim for compensation, against the Council which they would be entitled to set off against the obligation imposed upon them by the Staff Regulations to pay the contribution to the Community pension scheme.

43 It follows that the applicants are wrong to dispute the deduction made from their severance payment, corresponding to the amount that they would have had to pay to the Community pension scheme by way of the contribution referred to in Article 83(2) of the Staff Regulations. The first and second submissions of the applicants must therefore be rejected in so far as they concern that part of the impugned decision.

44 As to the second condition attached to that decision, namely reimbursement to the Council of the employer's contribution retained by the Belgian pension scheme, the applicants sought the benefit of assimilation by express reference to Staff Note No 210/83. That note, intended for 'officials who have held one or more auxiliary contracts before being appointed as temporary staff or officials', is not intended for temporary staff who, like the applicants, leave the service of the institution without being appointed officials.

45 In the first place, when it allowed the period of service completed by the applicants as auxiliary staff to be made equivalent to a corresponding period completed as temporary staff for the sole purpose of calculating their pension rights, the Council extended the application of Staff Note No 210/83 to a situation which does not come within its scope.

46 In its memorandum of 18 January 1991 rejecting the four complaints submitted against the decision of 27 July 1990, the Council makes it clear that it agreed to extend the benefit of assimilation which forms the subject-matter of Staff Note No 210/83 by analogy to temporary staff leaving its service without being appointed officials. The Council observes that it was also by analogy that it made the benefit of that assimilation subject to the condition that it could recover from the temporary staff a sum equivalent to the employer's contribution paid by the Council to the Belgian pension scheme.

47 Under paragraph 3 of Staff Note No 210/83, the institution makes assimilation conditional upon the official's applying to the national scheme for reimbursement of the contributions paid during the period of service concerned 'in order to avoid any combining of the Community pension and the national pension'. As regards a temporary servant who leaves the service, there is no provision entitling him to apply for transfer to the Community pension scheme the rights acquired under a national pension scheme. Therefore, the defendant was not in a position to make

assimilation conditional upon an undertaking from the applicants to apply to the national pension scheme for reimbursement of the contributions paid.

48 Furthermore, the applicants cannot avail themselves of the option reserved for officials in Article 11(2) of Annex VIII to the Staff Regulations to pay to the Communities either the actuarial equivalent of the pension rights acquired or the sums repaid to them, at the date of their leaving, from the pension fund to which they belonged before entering the service of the Communities.

49 In the absence of subrogation, could the Council lawfully make assimilation conditional upon the applicants' compensating it for the employer's contributions retained by the Belgian pension scheme by requiring them to pay an equivalent amount to the Council?

50 The Court finds that this manner of proceeding by the Council was intended, *inter alia*, to avoid discrimination between temporary staff who leave the Council after being appointed officials and temporary staff who leave without being appointed officials. An official who leaves the Council and subrogates it to his rights via-à-vis the pension fund to which he formerly belonged does not preserve any entitlement whatsoever in the national pension scheme, whereas a member of the temporary staff in the applicants' position who leaves the institution retains his rights in the national pension scheme, since he is unable to consent to any such subrogation by the institution to his rights.

51 In requesting the applicants to reimburse the employer's share of the social security contributions paid to the Belgian pension scheme, the defendant was concerned to ensure that they did not obtain a double advantage. That approach cannot be regarded as contrary either to the rules of the Staff Regulations or to the principle of equal treatment for officials. Furthermore, the Council cannot be required, in

respect of the same period of service completed by a servant, to contribute to both the national pension scheme and the Community pension scheme.

52 The Court therefore considers that, the Council did not act in breach of any provision of the Staff Regulations, in recovering from the applicants the employer's contributions which it paid to the Belgian pension scheme. In so doing it did not err, since the amount recovered did not constitute an incorrect payment, and it did not infringe the principle of equal treatment for officials and servants.

53 The applicants' first and second submissions must therefore also be rejected in so far as they concern that part of the impugned decision.

54 It follows from the foregoing that the first and second submissions must be rejected.

The third submission: infringement of Article 24 of the Staff Regulations

Arguments of the parties

55 With their argument that the Council was wrong to pay social security contributions to the Belgian pension scheme, the applicants submit that, once their position under the Staff Regulations had been regularized by the decision of 27 July 1990, it was for the defendant to take steps to recover from the competent authorities the amounts paid in error. In any event, even if it was for the applicants to take such action, the Administration was under an obligation to provide its assistance to enable them to secure a satisfactory outcome.

56 The defendant again refutes the allegation that the contributions in issue were paid in error and that the applicants' position under the Staff Regulations was 'regularized', so that there were in fact no amounts paid in error to recover. In any event, Article 24 of the Staff Regulations is not applicable in this case in the absence of any acts committed by third parties against the applicants, since the steps to be taken by the applicants were the result of an alleged failure on the part of the Council itself.

The Court's appraisal

57 The Court declares that, as explained above, the Council, in paying the social security contributions provided for by the Belgian social security scheme, merely applied the relevant statutory provision, namely Article 70 of the Conditions of Employment, so that the question of recovering incorrectly paid amounts does not arise. It follows that the Administration can be under no obligation, pursuant to Article 24 of the Staff Regulations, to take steps or bring proceedings for that purpose.

58 Moreover, consistent case-law has established that the duty to provide assistance laid down in Article 24 of the Staff Regulations is concerned with the defence of officials against the acts of third parties and not against acts of the institution itself, the review of which is governed by other provisions of the Staff Regulations (see judgments of the Court in Case 178/80 *Bellardi-Ricci* v *Commission* [1981] ECR 3187; Case 98/81 *Munk* v *Commission* [1982] ECR 1155 and Case 191/81 *Plug* v *Commission* [1982] ECR 4229). In this case, the applicants are relying precisely on an alleged fault on the part of the Administration, namely the incorrect payment of social security contributions to the national pension scheme, in order to seek the application of Article 24 of the Staff Regulations in their favour.

59 It follows from the foregoing that the applicants' third submission must also be rejected.

The fourth submission: infringement of Article 39 of the Conditions of Employment

Arguments of the parties

60 The applicants first of all contend that the Administration has failed to base its decision on a statutory provision and to provide a statement of the grounds on which it is based in accordance with Article 25 of the Staff Regulations. Secondly, they argue that, in the words of Article 39 of the Conditions of Employment, the severance grant can be reduced only by the amounts paid, at the servant's express request, in pursuance of Article 42 of the Conditions of Employment.

61 The defendant replies that although Article 39 of the Conditions of Employment requires the severance grant to be reduced by the amounts paid in pursuance of Article 42, it does not preclude the deduction of other amounts from the grant. As the present case is exceptional, the Council had to look for a practical solution in order to ensure that the applicants did not receive unjustified benefits. Furthermore, the solution adopted does justice to the very purpose of the severance grant, which is solely to repay the employee's and employer's contributions paid to the pension scheme.

The Court's appraisal

62 With regard to the argument based on the infringement of the obligation laid down in Article 25 of the Staff Regulations, to provide a statement of reasons, the Court considers that the reasons stated for the impugned decision provided the applicants with sufficient details to allow them to ascertain whether or not the decision was well-founded and also to enable the Court to review that decision. That argument must therefore be rejected.

63 With regard to the argument based on the infringement of Article 39 of the Conditions of Employment, the Court finds that, contrary to the applicants' assertion, that article does not provide that, no amounts may be deducted other than deductions made in pursuance of Article 42.

64 As explained above, the defendant was actually a creditor of the applicants, first in respect of the contributions which they would have had to pay during their period of service if they had been engaged as members of the temporary staff, and secondly in respect of the employer's contributions paid by the Council to the Belgian pension scheme during the same period.

65 There was no provision either in the Staff Regulations or elsewhere to prevent the Administration from setting off the two debts in question against the debts which it owed to the applicants, each of which was certain, payable and for a fixed amount.

66 Consequently, the Council acted in accordance with the applicable provisions when it deducted the debt owed to it from the severance grant payable to the applicants, with the result that the fourth submission must also be rejected.

67 It follows from all the foregoing considerations that the applicants' application must be declared unfounded.

Costs

68 Pursuant to 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 these have been asked for in the successful party's pleadings. However, pursuant to Article 88 of those Rules, the costs incurred by the institutions in proceedings brought by officials of the Communities are to be borne by those institutions.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application.

2. Orders the parties to bear their own costs.

García-Valdecasas Schintgen Briët

Delivered in open court in Luxembourg on 30 June 1992.

H. Jung R. García-Valdecasas

Registrar President