JUDGMENT OF THE COURT (FIRST CHAMBER)
19 JANUARY 1984 [1]

Maurice André and Others v Commission and Council of the European Communities

(Official — Revision of salary scales)

Joined Cases 219 to 228, 230 to 235, 237, 238 and 240 to 242/80

Officials — Remuneration — New method of adjustment — Incorporation of weightings into the salary scales — Rectification of distortions resulting from such incorporation — Council Regulation No 160/80 — Objection of illegality — Dismissal

In Joined Cases 219 to 228, 230 to 235, 237, 238 and 240 to 242/80,

MAURICE ANDRÉ AND OTHERS, officials of the Commission of the European Communities, represented by M.-A. Pierson and J. L. Hirsch, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of J. Welter, 11 B Avenue de la Porte-Neuve,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Raymond Baeyens, acting as Agent, assisted by Robert Andersen, of the Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

and

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Carbery, assisted by R. O. Dalcq and M. Grossmann, of the Brussels Bar, with an address for service in Luxembourg at the office of H. J. Pabbruwe, Director of the Legal Affairs Department of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendants,

1 — Language of the Case: French.

APPLICATION for the annulment of Council Regulation No 160/80 of 21 January 1980 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities (Official Journal L 20, p. 1) and Council Regulation No 161/80 of 21 January 1980 adjusting the remuneration of pensions of officials and other servants of the European Communities and the weighting applied thereto (Official Journal L 20, p. 5) and for the annulment of the calculation of salaries effected pursuant to those regulations,

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: S. Rozès
Registrar: A. W. H. Meij, Legal Secretary

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

1. Article 65 (1) of the Staff Regulations provides that the Council is each year to review the remuneration of the officials and other servants of the Communities and to determine any adjustment thereof.

Article 64 of the Staff Regulations provides that the remuneration should be weighted in accordance with the living conditions in the various places of employment. Article 65 (2) provides that in the event of a substantial change in the cost of living, the Council is

to decide, within two months, what adjustment should be made to the weightings.

At its meeting on 29 June 1976 the Council adopted a new method for adjusting the remuneration of officials and other servants of the Communities.

It appears from the file that the adoption of that new method of adjustment was intended, *inter alia*, to incorporate the weighting, which amounted at the time to 148.7 as regards Belgium and Luxembourg, into the basic salary scales. Without concomitant measures such incorporation would have involved a reduction in net remuneration since the basic salaries as increased are also the basis for the Community tax and other mandatory deductions.

To remedy that situation the staff representatives in the course of meetings with the Council preceding the adoption of the new method had proposed to weight the portions of remuneration liable to tax and other deductions not only with the new weighting to be decided but also with the weighting incorporated. Moreover, they had drawn attention to the risk of distortion arising from the incorporation of weightings if the least advantageous situation, for example that of an unmarried official not receiving any of the various allowances, were taken as a basis. Nevertheless the Council took a different course to avoid a reduction in net remuneration without providing for adjustment of the portions liable to Community tax along with the increase in basic salaries.

The new method of adjustment adopted on 29 June 1976 provided that the Council was to decide on remuneration adjustments in net terms and that the net rate thus fixed was to be incorporated, in accordance with the following method, in the salary scales given in Article 66 of the Staff Regulations and in Article 63 of the Conditions of Employment of Other Servants:

"The rate of adjustment decided shall be applied to the amount of the net salary for each step of each grade of official and for each class in every group of other servants.

The new scale in gross terms shall be drawn up by calculating for each step or class the gross amount which, after deduction of tax and compulsory contributions, gives the new net amount referred to above.

This conversion of net amounts into gross amounts shall be based on the situation of an unmarried official who does not receive the various allowances.

The incorporation of the net rate into the salary scale shall result in the weighting for Belgium and Luxembourg being fixed at 100 % and the weightings for other countries of employment being adjusted on the basis of the ratio between the cost-of-living indices in these countries and the cost-of-living index in Brussels, expressed in each case by joint indices."

In consequence the new method provides that:

Allowance is to be made within the framework of the subsequent annual review for any interim adjustment of remuneration decided pursuant to Article 65 (2) of the Staff Regulations and made by adjusting the relevant weightings;

The current weighting for Belgium and Luxembourg is to be incorporated into the salary scales in accordance with the aforesaid conditions; the weighting for Belgium and Luxembourg thus becomes 100 % and the weightings for the other countries of employment are to be adjusted accordingly.

There is also a review clause "with a view in particular to determining possible further improvements and rectifying any distortions."

The weightings were incorporated into the salary scales for the first time by Council Regulation No 3177/76 of 21 December 1976 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (Official Journal L 359, p. 1). That regulation reduced the weighting for Belgium and Luxembourg, fixed at 157.8 from 1 July 1976, to 100 with effect from 1 January 1977 at the same time as new scales were introduced with effect from the same date.

2. Those measures caused distortion in the remuneration of officials to the advantage of those receiving allowances on their taxable income or an expatriation allowance or both. In view of such distortions and in order to avoid their repetition in future the Council introduced by Regulation No 2859/77 of 19 December 1977 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (Official Journal L 330, p. 1) an amendment to Regulation No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (Official Journal, English Special Edition 1968 (I) p. 37). The amendment subjected the amounts liable to Community tax, for the period from 1 July 1977 to 30 June 1978, to a weighting of 106.084.

Subsequently, by a decision dated 26 June 1978 the Council amended the method of adjustment adopted on 29 June 1976 and introduced a formula for correcting the amounts liable for tax as provided in the aforesaid Regulation No 260/68 of the Council.

Although the Council thus avoided a repetition of the distortion which appeared in applying Regulation No 3177/76 in the period from 1 January to 30 June 1977, nevertheless since subsequent adjustments of remuneration were based on the scale adopted in that regulation, the distortion to which that led was repeated from year to year.

Since it was found that unintended increases in remuneration resulted from the manner in which the 157.8 weighting was incorporated in the basic salary

scales, as decided in December 1976, with effect from 1 January 1977, the Council determined to put an end to that situation and on 21 January 1980 adopted Regulation No 160/80 amending the Staff Regulations (Official Journal L 20, p. 1). That regulation lays down a new table of gross monthly salaries and abolishes the distortions in question. It entered into force on 27 January 1980 with effect from 1 July 1979. It provides however that no part of the salaries paid between 1 July 1979 and the date on which the regulation entered into force should be required to be repaid. On the other hand it lays down a transitional scheme for the benefit of officials who might suffer a loss of income on application of the new scale. So long as the new scale would involve them in a loss of income the regulation provides that they are to continue to enjoy the benefit of the former scheme.

Except for certain special cases the reduction in basic salaries resulting from the adjustment of the scale were reabsorbed following the adjustment made on the same day by Council Regulation No 161/80 effecting the annual adjustment of remuneration on the basis of the revised scales (Official Journal L 20, p. 5) which also applied as from 1 July 1979.

3. The complaints made by the applicants under Article 90 (2) of the Staff Regulations were rejected by a decision of the Commission of 28 July 1980. Subsequently the applicants brought the present actions on 28 October 1980.

By order of 12 March 1981 the Court (First Chamber) decided to join Cases 219 to 228, 230 to 235, 237, 238 and 240 to 242/80 for the purposes of the procedure and judgment.

In its pleading lodged on 27 March 1981 the Council put forward an objection of inadmissibility pursuant to Article 91 of the Rules of Procedure. As regards the Council the actions brought under Article 179 of the Treaty are not directed against the appointing authority as provided by Article 91 (2) of the Staff Regulations. In so far as the actions seek the annulment of Regulations Nos 160 and 161/80 pursuant to Article 173 of the Treaty they are also inadmissible.

By order of 8 July 1981 the Court (First Chamber) dismissed the actions as inadmissible in so far as they were directed against the Council.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicants* claim that the Court should:

Annul Council Regulations Nos 160 and 161/80 and the calculation of salaries effected pursuant thereto:

Order the Council to pay the costs.

The *Commission* contends that the Court should:

Dismiss the actions as in part inadmissible and as to the rest unfounded;

Order the applicants to pay the costs.

III — Submissions and arguments of the parties

Admissibility

The *Commission*, the *defendant*, considers the actions to be inadmissible in so far as they seek the annulment of Regulations Nos 160 and 161/80 (cf. the judgment of 26 February 1981 in Case 64/80 *Giuffrida and Campogrande* v *Council* [1981] ECR 693).

The *applicants* consider that the regulations constitute a collection of individual decisions affecting a number of specific persons, namely those who in the Commission's opinion received unjustified financial advantages as a result of the incorporation of the weightings into the salary scales.

Moreover they would have no possibility of action if on the one hand action against the Council were inadmissible because it was not directed against the appointing authority and on the other hand action against the Commission were inadmissible because it related to measures in the nature of regulations.

Substance

In various submissions the *applicants* basically allege that the Council was duly alerted by staff representatives of the consequences of incorporating the weightings into the basic salary scales and cannot rely on any alleged error to justify subsequent correction of the distortions which in fact occurred. In that respect the applicants rely on the principle *patere legem quam ipse fecisti.* In so reducing the applicants' salaries, the Council disregarded the applicants' personal rights and the principles of the protection of legitimate expectation and vested rights. Those principles guarantee them maintenance of the salary level once attained.

The applicants next challenge the Council's power to adopt the regulations at issue and allege that they constitute a misuse of powers on its part. Finally they refer to the principles of due care, equality and fairness.

The *defendant*, the *Commission*, answers that notwithstanding the reservations expressed the Council considered that it was urgent to reduce the weighting for Belgium and Luxembourg to 100% and thus to give the weightings back their true function, namely to compensate for the differences in the cost of living in the various places of employment. Nevertheless it stated from the outset that it intended to make any improvements shown to be necessary to the method of adjusting salaries, in particular by correcting any distortions.

Moreover Regulation No 160/80 did not have retroactive effect to the detriment of staff. Although the revised scales were applicable from 1 July 1979 the regulation provides that in the case of officials and other servants whose entitlements are in consequence reduced no part of the amounts paid during the period between 1 July 1979 and the date on which the regulation entered into force should be required to be repaid. In creating a transitional scheme for the benefit of such employees the Council in addition assured them that in future their previous net remuneration would be maintained. In consequence of the annual adjustment of remuneration for

1979 by Regulation No 161/80 it was moreover hardly necessary to apply the transitional system.

In those circumstances the Commission considers that none of the submissions put forward by the applicants is well founded.

V — Oral procedure

At the sitting on 15 September 1983 the parties presented oral argument.

The Advocate General delivered her opinion at the sitting on 10 November 1983.

Decision

1 By applications lodged at the Court Registry on 28 October 1980 Maurice André and 17 other officials of the Commission of the European Communities brought actions under Article 179 of the EEC Treaty for the annulment of Council Regulation No 160/80 of 21 January 1980 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities (Official Journal L 20, p. 1), of Council Regulation No 161/80 of 21 January 1980 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (Official Journal L 20, p. 5) and the calculation of their salary as effected pursuant to those two measures.

2 The Commission raised an objection of inadmissibility in so far as those actions sought the annulment of Regulations Nos 160 and 161/80 and relied *inter alia* on the judgment of the Court of 26 February 1981 in Case 64/80 *Giuffrida and Campogrande* v *Council* [1981] ECR 693.

3 That objection must be upheld pursuant to the aforementioned judgment in so far as it relates to the annulment as such of the two regulations at issue. However, although it is true that the applications are not clear in that respect, there are factors indicating that they referred to the application of the two regulations to the individual cases of the applicants by decisions relating to the calculation of their salaries. The applications must therefore be regarded as seeking the annulment of those individual decisions whilst at the same time challenging the validity of Regulations Nos 160 and 161/80 by means of an objection of illegality.

4 In those circumstances it is necessary to consider the substance of the applications.

5 First of all the applicants consider that the Council in adopting the contested regulations committed a breach of the principle *patere legem quam ipse fecisti.* In incorporating the weighting into the salary scales of officials the Council had been duly alerted by the staff representatives to the consequences of the system which it intended to apply. In nevertheless proceeding as it did the Council must, it is claimed, accept the consequences of its choice and is not entitled to escape the obligations raising therefrom.

6 The incorporation of the weighting into the basic salary scales laid down by the Staff Regulations was decided upon by the Council on 29 June 1976 as part of a new method of adjusting the remuneration of officials. The incorporation was effected by Council Regulation No 3177/76 of 21 December 1976 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (Official Journal, L 359, p. 1).The regulation introduced new scales with effect from 1 January 1977 and reduced the weighting for Belgium and Luxembourg, which had been 157.8 from 1 July 1976, to 100.

7 The Commission infers from those circumstances that the Council intended at the time to reduce to 100 the weighting for Belgium and Luxembourg in order to give the weightings back their true function pursuant to Article 64 of the Staff Regulations, namely to compensate for the differences in the cost of living in the various places of employment. Although that operation gave rise to some distortions due in particular to the fact that the increase in the scale intended to neutralize the increase in tax resulting from the incorporation of the weighting was calculated on the basis of the position of an unmarried official not in receipt of the various allowances, the distortions were only secondary effects and not intended by the reform in question.

8 The Commission adds that the Council was aware of the risks involved in the new method; the decision of 29 June 1976 laying down the method includes a review clause for determining possible subsequent improvements and "rectifying any distortions". However, the Council was surprised by the extent of the increases received by certain officials. The Commission points out that Regulation No 160/80 effectively rectified the distortions by amending the scale of remuneration and providing that the "revised" scale should henceforth serve as the basis for the calculation of adjustments in future remuneration.

9 The Commission's arguments must be accepted. It in no way follows from the decisions and regulations prior to the regulations at issue that the Council as part of the method for adjusting remuneration selected in 1976 intended to favour certain officials as against others rather than to regulate the incorporation of the weighting in the scale in a way which would require subsequent rectification of certain distortions.

10 In addition the applicants' argument disregards the fact that the Council inserted a review clause in the decision of 1976 relating in particular to distortions likely to arise from the incorporation of the weighting in the scale.

11 For those reasons the complaints of infringement of vested rights and breach of the principle of the protection of legitimate expectation must be dismissed.

12 The applicants then claim that there has been an infringement of their personal rights. Under Article 85 of the Staff Regulations any sum overpaid may be recovered only on the dual condition that the recipient was aware of the illegality and that the fact of the overpayment was patent. Those conditions are not satisfied in the present case since the payments of salaries prior to the entry into force of the contested regulations were in accordance with Regulation No 3177/76. However, the freezing of the applicants' remuneration by the combined effect of Regulations Nos 160 and 161/80 amounts to repayment of sums which the Commission considers unduly paid.

13 In that respect it must be remembered that Regulation No 160/80, which has retroactive effect from 1 July 1979, provides that no part of the amounts paid during the period between that date and the date of its entry into force, namely 27 January 1980, is to be required to be repaid. Furthermore, it provides transitional measures intended progressively to re-absorb the distortions without bringing about a reduction in the amounts actually paid. Moreover, the effect of Council Regulation No 161/80 of 21 January 1980 was to increase, also from 1 July 1979, the remuneration resulting from the application of Regulation No 160/80 in such a way that, apart from certain special cases, the reductions in basic salaries resulting from the revision of the scale were immediately reabsorbed.

14 In those circumstances there has been no infringement of personal rights. The applicants' argument to the effect that to determine whether there has been such infringement it is necessary to ascertain, not whether or not there has been a reduction in the amounts actually received but whether the rate of remuneration has been frozen for a certain period, must be rejected in circumstances such as the present in which the two contested regulations seek precisely to put an end to unjustified increases such as those resulting from the scale previously applicable without its being necessary to recover sums already paid or to reduce remuneration actually received.

15 Finally the applicants allege that the Council had no power to revoke a salary scale previously adopted and that it committed a misuse of powers inasmuch as the system of weighting was used to amend salaries and not to ensure speedy adjustment of salaries in the event of an appreciable change in the cost of living in one or more places of employment.

16 It must be remembered in that respect that Regulation No 160/80 which amends the structure of the scale of remuneration is a regulation amending the Staff Regulations pursuant to Article 24 of the Treaty Establishing a Single Council and a Single Commission of the European Communities and adopted according to the procedures and with the guarantees involved in such an amendment. Regulation No 161/80 on the other hand was adopted by the Council under the power to make adjustments of remuneration

conferred upon it by Article 65 of the Staff Regulations. The applicants have not established that the Council has acted outside the powers thus vested in it.

17 As to the complaint alleging a misuse of powers by the Council, the applicants have not been able to show that the Commission is wrong in contending that the object and effect of the 1976 reform was to give the weightings back their true function, namely to compensate for the differences in the cost of living in the various places of employment. In those circumstances that complaint also must be rejected.

18 The other complaints put forward by the applicants based *inter alia* on breach of the principle of due care, breach of the principle of equality in the calculation of remuneration and disregard of the principle of fairness have already been answered in the foregoing considerations.

19 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

20 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure in proceedings brought by servants of the Communities the institutions are to bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 19 January 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS

(see Case 211/80, p. 147)