JUDGMENT OF THE COURT (First Chamber)
11 July 1985 *

In Case 236/82

A. Brautigam, an official of the Council of the European Communities, residing at Hoeilaart (Belgium), represented by Mrs A.W. Schaper-Van Manen, of The Hague Bar, with an address for service in Luxembourg care of Mrs J. Jansen-Housse, BP 16, Steinfort,

applicant,

v

Council of the European Communities, represented by A. Jossart, of the Brussels Bar, with an address for service in Luxembourg at the offices of J. Käser, Director of the Legal Department of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for the annulment of the Council's refusal to grant a request under Article 17 (2) (b) of Annex VII to the Staff Regulations and for damages with interest in compensation for that refusal,

THE COURT (First Chamber),

composed of: G. Bosco, President of Chamber, T. Koopmans and R. Joliet, Judges,

Advocate General: C. O. Lenz

Registrar: J. A. Pompe, Deputy Registrar

after hearing the Opinion of the Advocate General delivered at the sitting on 21 March 1985,

gives the following

* Language of the Case: Dutch.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 21 September 1982, Mr Arthur Brautigam, an official at the General Secretariat of the Council of the European Communities, brought an action for the annulment of Decision No 629/82 of the Secretary-General of the Council of 18 June 1982 withdrawing the exceptional authorization granted to the applicant, pursuant to Article 17 (2) (c) of Annex VII to the Staff Rgulations, to transfer part of his remuneration in German marks, and for the annulment of the rejection of his complaint against the Council administration's refusal to grant his request to have Article 17 (2) (b) of Annex VII to the Staff Regulations applied to him.

2 Article 17 (2) of Annex VII to the Staff Regulations provides:

'(2) Under the terms laid down in rules drawn up by common agreement by the institutions of the Communities, after consultation of the Staff Regulations Committee, an official may:

(a) through the institution which he serves, regularly have part of his emoluments transferred up to a maximum amount equal to his expatriation or foreign residence allowance:

— either in the currency of the Member State of which he is a national;

— or in the currency of the Member State in which either his own domicile or the place of residence of a dependent relative is located;

— or in the currency of his previous country of employment or of the country in which his institution has its seat, provided that the official in question has been assigned to a post outside the territory of the European Communities;

(b) have regular transfers made in excess of the maximum stated at the beginning of paragraph (a) provided that they are intended to cover expenditure arising in particular out of commitments proved to have been regularly undertaken by the official outside the country where the institution has its seat or outside the country where he carries out his duties;

(c) be authorized, in very exceptional circumstances and for good reasons supported by evidence, to have transferred, apart from the aforementioned regular transfers, sums which he may wish to have available in the currencies referred to in paragraph (a).'

3 The implementing rules which are applicable in this case [the Rules Laying Down the Procedure for the Transfer of Part of an Official's Emoluments] entered into force on 1 January 1980 with effect from 1 April 1979. By Article 2 of those Rules, expenditure regarded as justifying transfers pursuant to Article 17 (2) (b) comprises: study expenses for dependent children, payments to all other persons to whom the official has a legal family obligation, either contributions required for entitlement to a supplementary pension or payments towards annuities or savings accounts for the benefit of handicapped dependent children, all of the above being subject to certain limits, mortgage repayments, spread over at least seven years, for the purchase of land for either a private dwelling or the construction, purchase or conversion of the official's main home or second home in a country of the Community, and payments towards life annuities, life and invalidity insurance premiums or building society payments in connection with the real estate transactions referred to above. Article 3 provides that the total of the regular transfers made pursuant to Article 17 (2) (a) and (b) of Annex VII may not exceed 35% of net monthly remuneration. Article 5 essentially repeats Article 17 (2) (c).

4 Mr Brautigam, who is of Netherlands nationality, concluded two 15 year building loan agreements in 1978 and 1979 in order to pay for the acquisition of a building plot in Belgium and the construction of a house thereon. The agreements were concluded with a German bank, Commerzbank AG, which has its registered office in Düsseldorf and a branch in Brussels. The loans and the payment obligations under them were denominated in German marks.

5 On 12 January 1982 the applicant submitted a request to the Council administration pursuant to Article 17 (2) of Annex VII to have a part of his emoluments exceeding the amount of his expatriation allowance transferred in order to meet his loan obligations under the mortgage agreement. A similar request submitted in October 1979 had been rejected on the ground that the requested transfer in German marks did not fall within any of the categories referred to in Article 17 (2) (a). For that reason, the applicant specified in a memorandum accompanying his second request that it was based on Article 17 (2) (b). By a memorandum dated 29 January 1982 the Council administration informed him that it was unable to accede to his request because the mortgage loan which the requested transfers were intended to repay had been granted to him in Belgium by a bank subsidiary established in Belgium in respect of immovable property situated in Belgium, so that the requirements of Article 17 (2) (b) were not fulfilled.

6 On 8 February 1982 the applicant submitted a complaint against that refusal, arguing that the requested transfers in German marks represented commitments regularly undertaken outside the country where he carried out his duties; his creditor was a company incorporated under German law having its registered office in Germany, the Commerzbank branch in Brussels being an integral part of the German company which did not act on its own account. Since the transfers he was requesting were identical to other transfers which the administration made as a matter of course to the Beamtenheimstättenwerk [German Civil Service Building Society] (hereinafter referred to as the BHW), that refusal in his view constituted discrimination in relation to officials with authorizations to pay their mortgage instalments to the BHW in German marks under Article 17 (2) (b).

7 By Decision No 211/82 of 23 March 1982 the Secretary-General of the Council authorized the applicant in view of wholly exceptional circumstances to transfer a part of his monthly remuneration for the period from April 1982 to March 1983 inclusive, with the proviso that the authorization would cease to apply even before the expiry of that period in the event of a change in the situation on which it was based. That decision was adopted pursuant to Article 17 of Annex VII to the Staff Regulations and Article 5 of the implementing rules. By a memorandum of 29 May 1982 addressed to the Director-General of the Council administration, the applicant declared himself satisfied with the outcome but drew attention to the fact that the decision was apparently based on Article 17 (2) (c) whereas his request was explicit in asking for the application of subparagraph (b) of Article 17 (2), adding that he expected the decision to be tacitly extended as long as his justification for the request remained valid, that is, as long as he had mortgage obligations in German marks.

8 It is clear from subsequent correspondence that the reference to exceptional circumstances in Decision No 211/82 was an allusion to the situation regarding the convertibility of remuneration after the Belgo-Luxembourg Exchange Institute suspended the full convertibility of the salaries of officials paid in Belgian or Luxembourg francs.

9 By Decision No 629/82 of 18 June 1982 the Secretary-General of the Council, taking the view that the situation on the basis of which Decision No 211/82 had been adopted no longer existed, revoked with effect from July 1982 the exceptional authorization granted to Mr Brautigam 'in so far as it concerns transfers in German marks to the Commerzbank under a mortgage loan concluded in Belgium'. The Secretary-General added that any other transfers through the Council's General Secretariat of a part of Mr Brautigam's remuneration authorized within the terms of Article 2 of the rules laying down the procedure for transfers would be continued up to 35% of his net remuneration.

10 By a memorandum dated 30 June 1982 the applicant requested a review of that decision in the light of Article 17 (2) (b) of Annex VII. In that connection he drew particular attention to the fact that his request was unrelated to the measures adopted by the Belgo-Luxembourg Exchange Institute in regard to the convertibility of remuneration. The applicant had not requested an exceptional authorization under Article 17 (2) (c) in view of the fact that he had already obtained personal authorization from the Belgo-Luxembourg Exchange Institute on 9 March 1982 to convert more than 25% of his salary at the controlled market rate on account of his mortgage obligations. His situation in the period when the restrictive convertibility measures were in force was therefore no different from what it had been before.

11 On 26 July 1982 the Secretary-General of the Council replied in a memorandum confirming that Decision No 211/82 did indeed constitute an exceptional measure to offset the adverse effects of the convertibility situation and that the decision could no longer be maintained when the full convertibility of remuneration was restored.

12 The documents before the Court show that following the withdrawal of his authorization to transfer part of his remuneration to the Commerzbank, the applicant concluded a savings contract with the BHW and was authorized under Article 17

(2) (b) to transfer sums amounting to approximately 35% of his net remuneration to that body. In explanation the applicant states, with documentary evidence in support, that that arrangement was unrelated to any mortgage loan agreement with the BHW; his savings with the BHW are periodically used for repayments of the mortgage loan with the Commerzbank. According to him, however, that arrangement does not wholly compensate for the loss caused by the Council's refusal to authorize direct transfers to the Commerzbank.

13 The applicant's submissions in support of his application fall under two main heads. In so far as the application asks for the annulment of Decision No 629/82 he maintains that the withdrawal of the exceptional authorization to transfer part of his remuneration in German marks is a breach of the principle of the protection of legitimate expectations and acquired rights since his situation in point of mortgage obligations in German marks is unchanged. Furthermore, the statement of the grounds for the decision is incorrect in that regard in so far as it refers to the re-introduction of full convertibility for remuneration. In the second place the applicant contends that the rejection of his complaint constitutes an infringement of Article 17 (2) (b) of Annex VII and a breach of the principle of non-discrimination.

14 The Council contests both the admissibility and the substance of the application.

Admissibility

15 The Council's first contention is that if the application is directed against Decision No 629/82 it was not preceded by a complaint under Article 91 (2) of the Staff Regulations and if its purpose is to obtain the annulment of the rejection of the applicant's complaint of 8 February 1982 it is out of time.

16 According to the applicant Decision No 629/82 of 18 June 1982, which specifies that the exceptional authorization granted by Decision No 211/82 is rescinded in so far as it relates to transfers to the Commerzbank in German marks on account of a mortgage loan concluded in Belgium, must be regarded as an express decision rejecting his complaint of 8 February 1982, adopted after the implied decision rejecting his complaint. Consequently the express decision caused the period for lodging the application to run afresh by virtue of the second indent of Article 91 (3) of the Staff Regulations. In the alternative he contends that the exchange of memoranda following Decision No 629/82 constitutes a supplement to the original complaint procedure prior to this application.

17 The Court would first observe that the exchange of memoranda and decisions preceding the application was marked by a persistent misapprehension between the parties as to the objects pursued on either side. The applicant repeatedly asked for Article 17 (2) (b) to be applied to him to cover his mortgage obligations in German marks. The Council administration refused to grant that request, basing its decision first on Article 17 (2) (a), to which the applicant had made no reference. Following his complaint, the Council granted him an exceptional authorization pursuant to Article 17 (2) (c), which he had not requested. The applicant accepted that authorization as an answer to his complaint while drawing attention to the fact that in his view the legal basis of the authorization was wrong.

18 The result is that at that time the Council neither specified the reasons which had prompted it to adopt Decision No 211/82 nor made clear in what way it was an answer to the applicant's complaint. Moreover, having regard to the applicant's nationality and the currency in which the transfers in question were to be made, the exceptional authorization granted by the decision could not be based on Article 17 (2) (c). In the circumstances it was open to the applicant to regard that decision as an express response to his complaint. For that reason the application cannot be held to be out of time as being directed against the implied rejection of the applicant's complaint.

19 The Council's second contention is that the applicant no longer has an interest in bringing proceedings in view of the fact that he has since been authorized pursuant to Article 17 (2) (b) of Annex VII to the Staff Regulations to transfer monthly amounts in German marks up to the maximum of 35% of his net monthly remuneration permitted by Article 3 of the rules laying down the procedure for transfers.

20 The applicant points out that the authorization to make transfers under his building society savings contract with the BHW cannot compensate for the disadvantages produced by the Council's refusal to authorize direct transfers to the Commerzbank to cover his mortgage obligations.

21 On that point it is sufficient to note that the applicant has an interest in bringing proceedings if and in so far as the action taken by the Council has not put him in the same position as if Article 17 (2) (b) had been applied as originally requested by him.

Substance

22 It is appropriate first of all to examine the submissions directed against the rejection of the applicant's complaint.

23 The applicant's first submission is that the Council's refusal to apply Article 17 (2) (b) in his case is based on an interpretation which is contrary to the provision's purpose.

24 In that connection he contends that the purpose of Article 17 (2) (b), as interpreted in the Court's judgment of 4 February 1982 in Case 828/79 (*Adams* v *Commission*, [1982] ECR 269), is to enable an official employed in a country with a weak currency to make transfers to satisfy financial obligations incurred in a strong currency amounting to the same portion of his total remuneration as may an official employed in a country with a strong currency. Since the choice of currency for transfers under Article 17 (2) (b) is not limited by any condition of nationality or place of origin such as those provided for in subparagraphs (a) and (c), the only condition requiring examination is that the transfers should cover commitments regularly undertaken outside the country of employment. That condition must not be interpreted literally because from the economic point of view it is the currency of the contract alone, and not the location of the creditor's registered office or the actual place of payment, that determines whether the commitments in question are borne outside the country of employment. In this instance the applicant's commitments are mortgage obligations owed to a German undertaking, denominated in German marks and governed by the conditions of the German capital market. They must therefore be regarded as commitments borne by him outside Belgium. In that context, the applicant concludes, it is irrelevant that the loan agreement was concluded in Belgium and that the dwelling on which the mortgage is secured is situated in Belgium.

25 In the Council's view, the application of Article 17 (2) (b) requires that the commitments and expenses incurred in connection with them should be outside the country of employment. It takes the view that the currency in which the obligations are denominated is not a relevant factor in determining the place where the commitments at issue are undertaken because the choice of a currency of the contract other than that of the country of employment does not necessarily entail that the liabilities arising under the contract are borne outside the country of employment. If such a criterion were to be applied it would enable officials to circumvent the principle that an officials's remuneration is to be paid in the currency of the country in which he carries out his duties. In this instance the currency in which the applicant's mortgage obligations are expressed constitutes the only link with the Federal Republic of Germany.

26 The Court notes, first, that under the terms of Article 17 (1) of Annex VII to the Staff Regulations payments due to an official are to be made at the place and in the currency of the country where he carries out his duties. In order to determine the question of interpretation raised by the applicant it is necessary to examine the wording and the purpose of the exceptions to that general rule provided in paragraph (2) of the same article and set out in greater detail in the implementing rules regarding that paragraph.

27 Article 17 (2) (a) provides that an official may, through the institution which he serves, regularly have part of his emoluments transferred in a currency other than that of the country where he carries out his duties. That facility, besides being limited to an amount equal to the official's expatriation or foreign residence allowance, is restricted to certain currencies, including in particular that of the Member State of which the official is a national or in which either his own domicile or the place of residence of a dependent relative is situated. Subparagraph (c) provides in addition that in very exceptional circumstances single sums may also be transferred in currencies referred to in subparagraph (a). The way in which those exceptions to the general rule are defined makes it clear that their purpose is to assist an official whose work has caused him to move to his place of employment in managing private or family interests which he may continue to have in particular in the country from which he comes or in which a dependent relative has his place of residence.

28 Article 17 (2) (b) expands the right conferred by subparagraph (a) in the sense that it permits regular transfers of amounts exceeding the maximum laid down in that subparagraph. Moreover, although the application of that provision is not apparently restricted to the use of particular currencies, its wording nevertheless makes it clear that transfers under it must be intended to cover expenditure arising in particular out of commitments regularly undertaken by the official outside the country where the institution has its seat or outside the country where he carries out his duties. Article 2 of the implementing rules, which defines the categories of expenditure eligible for such transfers, refers in particular to expenditure arising out of certain family obligations, provision for supplementary pensions and payments towards the official's own housing, in each case outside the country of employment. Thus the exception created by subparagraph (b), which has a purpose similar to that of subparagraphs (a) and (c), is to enable the official concerned to continue to manage certain interests situated outside his country of employment and related typically to his family commitments, retirement or housing.

29 Consequently the reference in Article 17 (2) (b) of Annex VII to the Staff Regulations to commitments regularly undertaken by the official outside the country in which the institution has its seat or in which he carries out his duties, as amplified by Article 2 of the implementing rules, must be interpreted to mean commitments related to the management of certain interests of the official concerned, situated outside his country of employment and arising in connection with his family circumstances, retirement or housing.

30 On that interpretation it is clear that the applicant's submission that the cases in which the exception is to be applied must be determined solely by the choice of a currency other than that of the country of employment cannot be accepted.

31 Another submission put forward by the applicant is that the terms of his loan agreements with the Commerzbank are effectively identical to those of loans commonly undertaken by Community officials with the BHW. In his view, neither the status of the BHW, which is in any event a company incorporated under German private law just like the Commerzbank, nor the fact that payments to the BHW in German marks are made at that institution's headquarters in Germany, is capable of justifying any discrimination between his case and that of officials able to take advantage of Article 17 (2) (b) in order to repay mortgage loans with the BHW.

32 In the Council's view, the applicant's case is not comparable to that of officials who have concluded a mortgage loan with the BHW. Initially the Council maintained that the BHW was a body governed by German public law whose objects included granting loans at preferential rates to German officials and, by extension, European officials. In the course of the oral procedure, however, the Council has conceded that in the last analysis transfers to the BHW in German marks authorized pursuant to Article 17 (2) (b) for repayments of loans denominated by German marks differ from the transfers to the Commerzbank requested by the applicant only in being effected at the headquarters of the BHW in the Federal Republic of Germany. It argues that that fact is sufficient to justify different treatment.

33 Without inquiring into the legality of the practice of transfers to the BHW on which the applicant relies, a question with which the Court is not concerned in this instance, the Court can only conclude that the difference between the two cases relied upon by the Council, which is a purely formal one, is not of such a nature as to justify different treatment. The claim that there has been discrimination must therefore be upheld.

34 It is therefore appropriate to annul the Council's decision, notified to the applicant by a memorandum of 29 January 1982, to refuse its authorization for the transfers to the Commerzbank requested by the applicant pursuant to Article 17 (2) (b) of Annex VII to the Staff Regulations.

35 In the circumstances the applicant no longer has an interest in seeking the annulment of Decision No 629/82 rescinding the decision to grant an exceptional authorization pursuant to Article 17 (2) (c) of Annex VII.

Costs

36 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is required to bear the costs. As the Council has failed in its submissions it must be ordered to bear the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Annuls the Council's decision, notified to the applicant by a memorandum of 29 January 1982, to refuse its authorization for the transfers to the Commerzbank requested by the applicant pursuant to Article 17 (2) (b) of Annex VII to the Staff Regulations;

(2) Orders the Council to pay the costs.

Bosco Koopmans Joliet

Delivered in open court in Luxembourg on 11 July 1985.

P. Heim
Registrar

G. Bosco
President of the First Chamber