Case C-320/81

Silverio Acerbis and Others
v
Commission of the European Communities

(Officials — Adjustment of weightings)

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Summary of the Judgment

Procedure — Application rendered devoid of purpose — No need to give judgment

REPORT FOR THE HEARING
delivered in Case C-320/81 *

I — Facts, law and background

1. By an application lodged on 24 December 1981, Mr S. Acerbis and 485 other officials of the Commission, all employed at the Joint Research Centre at Ispra (Varese, Italy), contested their salary statements for February and March 1981 which contained the calculation by the Commission of arrears of salary with effect from 1 July 1980, pursuant to Council Regulation (Euratom, ECSC, EEC) No 397/81 of 10 February 1981 fixing, with effect from 1 July 1980, the tables of salaries and other components of remuneration (Official Journal 1981, L 46, p. 1).

2. The applicants are contesting the rate of the weighting applied in Italy on two

* Language of the case: Italian.

grounds: (a) because there is a single weighting for the whole of Italy and, since it is fixed on the basis of price trends in Rome, the capital, it does not take into account the particularly high cost of living at the place where they are employed, and (b) because it is insufficient, even on the basis of the prices in Rome.

3. The provisions of the Staff Regulations that are relevant to this case are Article 64 of the Staff Regulations, according to which 'an official's remuneration . . . shall . . . be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment', and Article 65(2) of the Staff Regulations, according to which 'in the event of a substantial change in the cost of living, the Council shall decide, within two months, what adjustments should be made to the weightings and if appropriate to apply them retrospectively'.

4. The method of adjusting the remuneration of officials and other servants of the Communities adopted by the Council in June 1976 was based on the principle of the periodic review of weightings.

5. On the basis of that method, on 21 December 1978 the Council adopted Regulation (Euratom, ECSC, EEC) No 3087/78 adjusting the weighting applicable to the remuneration and pensions of officials and other servants of the European Communities employed or having a home in Italy (Official Journal 1978, L 369, p. 10). Pursuant to that regulation, with effect from 1 January 1978, the weighting for Italy was reassessed, but the same weighting continued to apply to both Varese and the capital city.

6. Subsequently, on 20 January 1981, the Council, departing from the proposal made by the Commission on 9 December 1980 following investigations carried out by the Statistical Office of the European Communities in the Member States, adopted Regulation (Euratom, ECSC, EEC) No 187/81 adjusting the salaries and pensions of officials and other servants of the European Communities and the weightings applying thereto (Official Journal 1981, L 21, p. 18), although the 1976 method was not amended. That regulation provided for a flat-rate increase in net terms of monthly salaries and pensions.

7. Following the abovementioned regulation, on 10 February 1981 the Council adopted Regulation No 397/81. A single weighting was fixed for Italy, at the rate of 75.3%, with effect from 1 July 1980.

8. The action brought by the applicants is directed against the salary statements containing the calculation worked out on the basis of that regulation for the period from 1 July 1980 to 28 February 1981.

II — Submissions and conclusions of the applicants

9. The applicants challenge the legality of Regulations Nos 187/81 and 397/81 on four grounds:

(1) firstly, those regulations infringe Article 64 of the Staff Regulations which lays down that the weighting must be calculated in relation to the living conditions in the various places of employment whereas the regulations in fact provide for a single weighting for Italy, on the basis of the cost of living in the capital, Rome;

(2) secondly, the said regulations infringe Article 65(2) of the Staff Regulations: not only was the reassessment of the Italian weighting insufficient, but it was also carried out too late, since the cost of living at the place of the applicants' employment underwent an increase of 20% well before the time the adjustment was made;

(3) thirdly, the regulations infringe the principle of non-discrimination because, as a result of the inadequate weighting, the applicants enjoyed less purchasing power than other officials employed elsewhere;

(4) fourthly, the regulations are in breach of the 'principle of the protection of legitimate expectations'. According to the application, this submission refers to the method by which it was decided to adjust weightings. After so many assurances given by the Community authorities concerning the adjustment in real terms of the Italian weighting on the basis of the five-yearly investigations by the Statistical Office of the Communities, the applicants' hopes were ultimately dashed. In fact no account was taken of the investigation carried out by Statistical Office during October 1980.

10. The applicants conclude that the Court should:

(i) annul the calculation of arrears of salary with effect from 1 July 1980 since the Italian weighting does not take into account the cost of living at their place of employment;

(ii) annul the said calculation on the ground that the adjustment relating to the capital city was insufficient and made too late;

(iii) declare that the institutions are obliged to adopt the measures consequent upon the requested annulment and in particular, as well as recalculating the arrears, they should apply, with effect from 1 July 1980, an adequate weighting;

(iv) in the alternative, direct that the proceedings be stayed until judgment is delivered in Case 158/79.

11. Since all the parties concurred on the point, the Third Chamber, before which the case was pending at the time, decided on 20 January 1982 to suspend proceedings until judgment had been delivered in Case 59/81 *Commission* v *Council*, which was to be regarded as a test case with regard to the present proceedings. After that judgment had been delivered, the proceedings remained suspended at the request of the Commission until judgments were given in Case 158/79 *Roumengous Carpentier* v *Commission*, Case 737/79 *Battaglia* v *Commission*, and Case 543/79 *Birke* v *Commission*, in which the issues were similar to those of the present case.

III — Subsequent developments with regard to weightings and the annual adjustment of remuneration

12. Following Council Regulation No 3087/78, several cases were brought by Commission officials employed at Ispra.

13. By interim judgments delivered on 15 December 1982 in Case 158/79 *Roumengous Carpentier* v *Commission* [1982] ECR 4379, Case 543/79 *Birke* v *Commission* [1982] ECR 4425, Case 737/79 *Battaglia* v *Commission* [1982] ECR 4497 and Joined Cases 532/79, 534/79, 567/79, 600/79, 618/79 and 660/79 *Amesz and Others* v *Commission* [1982] ECR 4465, which were all cases brought by officials at Ispra against the Commission, the Court held that Regulation No 3087/78 was contrary to Articles 64 and 65 of the Staff Regulations. It annulled the applicants' salary statements for January 1979, in so far as they were restricted to giving effect to Council Regulation No 3087/78, both as to the amount of the adjustment of the weighting and as to the retroactive effect of that adjustment. It declared Regulation No 3087/78 not applicable to the applicants in so far as it took no account of the cost of living in Varese and limited the retroactive effect of the adjustment of the weighting to 1 January 1978.

14. By a judgment of 6 October 1982 in Case 59/81 *Commission* v *Council* [1982] ECR 3329, the Court annulled Regulation No 187/81 and certain provisions of Regulation No 397/81 on the ground that they were contrary to Article 65(1) and (2) of the Staff Regulations. The Court decided, in addition, that the provisions of the said regulations should continue to have effect until such time as the Council had adopted the measures incumbent upon it in order to ensure compliance with the judgment. The applicants in this case also base their action on the unlawfulness of the annulled regulations.

15. Following that judgment and a Commission proposal of 29 October 1982, the Council adopted Regulation (ECSC, EEC, Euratom) No 3139/82 of 22 November 1982 (Official Journal 1982, L 331, p. 1), which provided for payment of arrears of salary with effect from 1 April 1980.

16. Following the abovementioned judgments of 15 December 1982, on 19 December 1983 the Council adopted Regulation (EEC, Euratom, ECSC) No 3681/83 adjusting the weightings applicable in Italy (Official Journal 1983, L 368, p. 1). That regulation contained the reassessment of the weighting for Italy with effect from 1 January 1976 and a separate (higher) weighting for Varese. On the basis of that regulation, the Commission paid the resulting arrears of salary to all officials without distinction.

17. The applicants in the present case did not challenge the changes made by the regulation in question.

18. In final judgments of 15 January 1985 in Cases 158/79 *Roumengous Carpentier* v *Commission*, and 737/79 *Battaglia* v *Commission* [1985] ECR 39 and 71 and in Joined Cases 532/79, 534/79, 567/79, 600/79, 618/79, 660/79 and 543/79 *Amesz and Others* [1985] ECR 55, in which the interim judgments of 15 December 1982 had been given, the Court awarded default interest at the rate of 6% per annum on the arrears of remuneration with effect from the date of the applicants' complaints but rejected the claim for payment of compensatory interest and ordered the Commission to pay the costs.

19. By a decision of 31 July 1985 the Commission paid to all officials employed at Ispra default interest on the sums due pursuant to the reassessment of the weighting applicable in Italy introduced by Regulation No 3681/83.

20. By judgments of 30 September 1986 in Case 174/83 *Ammann and Others* v *Council*

[1982] ECR 2647, Case 175/83 *Culmsee and Others* v *ESC* [1986] ECR 2667, Case 176/83 *Allo and Others* v *Commission* [1982] ECR 2687, Case 233/83 *Agostini and Others* v *Commission* [1982] ECR 2709, Case 247/83 *Ambrosetti and Others* v *Commission* [1982] ECR 2729 and Case 264/83 *Delhez and Others* v *Commission* [1982] ECR 2749, the Court rejected the claim for default interest on the arrears of salary paid pursuant to Regulation No 3139/82.

21. On the basis of the 1981 method for adjusting Community officials' salaries laid down by Council Regulation (Euratom, ECSC, EEC) No 3821/81 and Council Decision 81/1061/Euratom, ECSC, EEC of 15 December 1981 (Official Journal 1981, L 386, pp. 1 and 6), which provide for the five-yearly review of weightings, on 26 November 1986 the Council adopted Regulation (EEC, Euratom, ECSC) No 3619/86, correcting the weightings applicable in Italy and other countries of the remuneration of officials (Official Journal 1986, L 336, p. 1), departing once again from the Commission's proposal. The regulation in question formed the subject-matter of an action for annulment brought by the Commission (Case 7/87 *Commission* v *Council*). The rates of the weightings and the extent of their retroactive effect were challenged, since the Commission had proposed that they should take effect from 1 January 1981 and the Council made them effective only from 1 January 1986.

IV — Course of the procedure in the present case

22. Following the abovementioned interim judgments of 15 December 1982, at the Court's request the applicants submitted observations, in a letter which reached the Court on 3 February 1983, and stated that the said judgments, although favourable in one sense, did not cover all the heads of claim in the present case, in view of the fact that the Court had not ruled on compensation for damage suffered and costs; they therefore asked that the proceedings remain suspended 'until the adoption of the measures and decisions required by the judgment of 15 December 1982'.

23. By a letter received at the Court on 28 June 1985, the Commission, which had been requested by the Court in a letter of 20 May 1985 to state its position following the final judgments of 15 January 1985, indicated that it considered that the applicants had no further interest in pursuing the case; all the applicants' claims had been satisfied following the measures adopted in implementation of the interim and final judgments cited above by Regulation No 3681/83. The Commission pointed out that, contrary to the similar Case 321/81 *Battaglia* v *Commission*, and Case 323/81 *Amesz and Others* v *Commission*, in which proceedings were still suspended for the same reasons, the applicants had not put forward a claim for the payment of interest. The Commission therefore requested the Court not to proceed to judgment and to decide on costs as it thought fit.

24. Replying to the same request on 20 May 1985 in a letter which reached the Court on 16 September 1985, the applicants asked that the case remain suspended, in view of the fact that in the parallel Case 321/81 *Battaglia*, the parties had asked for proceedings to be suspended until judgment had been delivered in Case 176/83 *Allo and Others* v *Commission*, Case 233/83 *Agostini and Others* v *Commission*, Case 247/83 *Ambrosetti and Others* v *Commission* and Case 264/83 *Delhez and Others* v *Commission*, concerning default interest on the payment of arrears of salary and, in particular, because 'the five-yearly weighting revision process (1981) referred to in the fourth submission in the *Acerbis* action, was not yet completed'.

25. That position was maintained in its entirety in a letter which reached the Court on 2 December 1985 replying to a request by the Court of 21 October 1985.

26. In a note dated 6 October 1986 the Judge-Rapporteur had proposed that proceedings should be resumed since the Court had by then delivered judgment in all the similar cases and it was because those cases were pending that the present case had been suspended. Following the decision of 21 October 1986 by the Fourth Chamber, to which the case had meanwhile been assigned, the parties were requested to resume the written procedure which had been suspended at the stage of the defence.

27. By a letter which reached the Court on 19 November 1986 the applicants asked that their case be pleaded at the same hearing as Case 323/81 *Amesz and Others* v *Commission*, mentioned above. That request was not granted because there was a considerable disparity between the stages the procedure had reached in the two cases.

28. The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry.

V — Submissions and arguments of the parties

29. In its defence, the Commission maintains that the applicants no longer have any interest in pursuing the action because, following the abovementioned interim judgments of 15 December 1982 and the final judgments of 15 January 1985, all the applicants' claims have been upheld and, pursuant to Regulation No 3681/83, the Commission has paid arrears of salary to all officials with effect from 1 January 1976.

30. Although no claim for interest was specifically formulated in the present case, the issue should be considered otiose since the Commission paid interest on arrears of salary to all officials at Ispra (decision of 31 July 1985, mentioned above).

31. With regard to the applicants' request in their letter of 16 September 1985 that the case remain suspended because the five-yearly review process was not yet complete, the Commission maintains that such an argument, the basis for which lies, according to the applicants, in the fourth submission of their application, cannot have any effect on the procedure. In their action the applicants relied on the unlawful nature of Regulation No 397/81. Since they did not challenge Regulation No 3681/83, which abrogated Regulation No 397/81, the issue is henceforth devoid of purpose. For the rest, the five-yearly review to be put into effect by the Council was to become operative from 1 January 1981 and thus at a date subsequent to the date of 1 July 1980 to which the applicants refer in their application.

32. If, by their submission that there has been a breach of the principle of the protection of legitimate expectations, the applicants mean that the Commission should have acted to protect their subsequent rights, the Commission stresses that in order

to mount a legitimate challenge an applicant must have an existing and not a potential or future right. Moreover, the Commission did in fact challenge Council Regulation No 3619/86 because the Council had departed from its proposals (Case 7/87 *Commission* v *Council*, cited above.)

33. Consequently the Commission asks the Court to hold that the proceedings have become devoid of purpose and should be removed from the register.

34. As far as costs are concerned, the Commission acknowledges that the case arose as a result of a Council regulation which was subsequently held to be unlawful. However, the Commission took every step possible to restore the applicants' rights and asked them to bring the proceedings to an end, offering to pay their costs. Since, however, the applicants improperly insisted on pursuing proceedings, the Commission asks that the parties be ordered to bear their own costs, wholly or in part.

35. In their reply, the applicants maintain that although it is true that a significant part of their claim has been satisfied — namely, a separate weighting for Varese and Rome — nevertheless there remains the question of whether the adjustment of the weighting for Italy was sufficient. It would appear that they consider that their claim in that respect will remain unsatisfied as long as the date on which the adjustment of the weighting, following the five-yearly review, is not linked to the date of the investigations (October 1980). Thus, with effect from 1 January 1981, a different weighting ought to have been introduced based on the results of the said investigations. Council Regulation No 3619/86, against which the Commission brought an action for annulment (Case 7/87), did not take the above investigations into account and applied an inadequate weighting.

36. Consequently, the applicants continue to have an interest in bringing an action on the following issues.

37. First, from the point of view of the admissibility of a later application on their part: if they are not successful in this matter they will not be able to return to the Court because inadmissibility will be pleaded against them in any claim for compensation for subsequent harm if they were to withdraw the present proceedings against the first act harming them which occurred on 1 January 1981; secondly, with regard to the date from which interest began to run: according to the case-law of the Court that date is the date of the complaint; if the present action were withdrawn the complaint would disappear with it; thirdly, there is the issue of the amount of the reassessment of the weighting pursuant to the five-yearly review.

38. It is not true that the applicants should have challenged Regulation No 3681/83 (more precisely the measures implementing Regulation No 3681/83) because such an action was uncalled for; the present action against the first calculation of the arrears pursuant to the adjustment of the weighting (which was carried out after the calculation of arrears which formed the subject-matter of Case 158/79 *Roumengous Carpentier* v *Commission*, cited above) was, according to the applicants, introduced in good time on the basis of a 'present' interest.

39. In their reply the applicants ask the Court:

(i) to annul the contested calculations inasmuch as they do not reflect the adjustments which have to be made to the weighting following the investigations of 1980;

(ii) to declare that the Commission is obliged to pay the applicants default and compensatory interest;

(iii) for the purposes of the hearings to join the case to Case 7/87 *Commission* v *Council.*

40. In its rejoinder, the Commission does not dispute the fact that when they instituted proceedings the applicants had an interest in challenging the effects of Regulation No 397/81, with effect from 1 July 1980, the date the regulation took effect. Since, however, that regulation has been abrogated by another regulation which did not give rise to proceedings, the applicants' claims have become devoid of purpose.

41. With regard to defects in the five-yearly review procedure, which in the applicants' view have not been removed, the Commission points out that the action is directed against the effects of Regulation No 397/81, which took as its starting point 1 July 1980, whereas the five-yearly review relates to the period from 1 January 1981 and is therefore later than the regulation being challenged.

42. As regards the applicants' view that their action is a guarantee against any later finding of inadmissibility, the Commission refers to the case-law of the Court to the effect that, where several regulations succeed each other in one area, an action may validly be directed against the last regulation for the purpose of challenging the preceding regulations as well. The Commission adds that it has challenged Council Regulation No 3619/86, which did not take sufficient account of the five-yearly review of weightings.

43. On the question of the date from which interest is to be paid, the Commission points out that by its decision of 31 July 1985 it paid default interest on the arrears due pursuant to Regulation No 3681/83. Any other claim for interest, for instance compensatory interest, is thus inadmissible since it is out of time.

44. The Commission regards the new argument for pursuing the present case, namely that the amount of the reassessment due under the five-yearly review is payable, as simply a pretext. The Commission denies that it is responsible for the negative effects of the mechanism applied and states that it was bound, in any case, to implement Council Regulation No 3619/86. If the Court upholds the Commission's action against that regulation all officials will receive the amounts due as arrears.

45. The Commission points out that the applicants have never claimed compensation for damage in reliance on Article 215 of the Treaty.

46. The intention underlying the request that the case be joined to Case 7/87 *Commission* v *Council,* is to pursue the present action come what may. The application in Case 7/87 has a different purpose; the interests of officials are adequately protected and the Commission has no need of any external protecting factor.

VI — Developments in the case-law after the written procedure was closed

47. After the written procedure in the present action was closed, proceedings were

brought to an end in the final two pending cases that were similar to it: by order of 10 June 1987 the Court (Second Chamber) decided not to proceed to judgment in Case 321/81 *Battaglia* v *Commission* [1987] ECR 2425, because the applicants did not succeed in countering the Commission's arguments that the application had become devoid of purpose, and by order of 2 July 1987 the Court (First Chamber) decided that Case 323/81 *Amesz and Others* v *Commission* [1987] ECR 2935 should be removed from the register following the applicants' withdrawal of the case.

48. Furthermore, by judgment of 28 June 1988 in Case 7/87 *Commission* v *Council* [1988] ECR 3401, the Court annulled Council Regulation No 3619/86.

C. N. Kakouris
Judge-Rapporteur