JUDGMENT OF THE COURT (Third Chamber)
20 March 1986 *

In Case 8/85

Elio Bevere, an official of the Commission of the European Communities, residing in Luxembourg, represented by Ernest Arendt, of the Luxembourg Bar, with an address for service in Luxembourg at his Chambers, 34 B rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Dimitrios Gouloussis, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Departent, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of a decision taken by the Director of General Administration on 31 January 1984 concerning the transfer of pension rights under Article 11 (2) of Annex VIII to the Staff Regulations,

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Y. Galmot and C. Kakouris, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 27 February 1986,

gives the following

* Language of the Case: French.

JUDGMENT

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

Decision

1 By application lodged at the Court Registry on 16 January 1985 Elio Bevere, an official of the Commission of the European Communities, brought an action for the annulment of a decision dated 31 January 1984 concerning the calculation of the number of years of pensionable service with which he was credited under Article 11 (2) of Annex VIII to the Staff Regulations of Officials.

2 The applicant entered the service of the Commission on 1 December 1971 as a member of its temporary staff in Grade A 3. He was appointed as a probationary official in the same grade with effect from 1 October 1974; he was established as an official with effect from 1 July 1975. In 1982 he made an application under Article 11 (2) of Annex VIII to the Staff Regulations of Officials for the transfer to the Communities of the actuarial equivalent of the retirement pension rights acquired by him in Italy at the Istituto Nazionale della Previdenza Sociale [National Social Security Organization], Milan, in respect of his employment prior to entering the service of the Commission. The amount in question was in fact transferred to the Commission as a result of that application.

3 Article 11 (2) of Annex VIII to the Staff Regulations of Officials provides that where an official exercises that right

'the institution in which an official serves shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent . . . '.

Article 3 of the General Provisions for Giving Effect to Article 11 (2), adopted by the Commission, provides that years of pensionable service are to be credited in respect of the period preceding the date on which an established official enters the service of the Communities and that the number of years of pensionable service to

be credited is to be calculated by reference to the amount transferred according to a formula set out in Article 3 (3). That formula involves, in particular, as the dividing factor,

'the basic annual salary (S) attaching to the grade on establishment'.

4 On 31 January 1984 the applicant was informed in writing by the Director General of Administration of the Commission that, in accordance with its estimate of the period of pensionable service to be credited to him, which had been notified to him in 1982, the number of years of pensionable service, calculated on the basis of the amount transferred and having regard to his grade on establishment, was four years, 11 months and four days.

5 By this application the applicant seeks to have the period of pensionable service with which he is to be credited calculated not by reference to the date of his establishment as an official but by reference to the date on which he was recruited, namely the date on which he entered the service of the Commission as a member of its temporary staff, which in his case would result in three more years of pensionable service.

6 The Commission contends that the application is inadmissible on the ground that it was not brought within the time-limit laid down in Article 91 (2) of the Staff Regulations. Since the act adversely affecting him for the purposes of Article 90 (2) was the communication of 31 January 1984, the 'request' submitted by the applicant on 21 February 1984 to have the decision changed constituted the complaint for the purposes of that provision. Its implied rejection caused the period for lodging an appeal to run.

7 In the applicant's view, the Commission's ambivalent conduct precludes it from raising that objection of inadmissibility. The communication of 31 January 1984 was not a decision in form or tenor. It induced him to submit what was expressly termed a 'request under Article 90 (1)' and not a complaint, in order to have the calculation amended. Since he received no reply to that request despite a reminder sent on 9 July 1984, he lodged a 'complaint under Article 90 (2) of the Staff Regulations' on 5 September 1984. It was not until 16 October 1984 that the Commission informed him by letter that his initial request was to be regarded as a complaint which had been rejected.

8 The Court considers that in the circumstances the substance of the case should be examined first.

9 The applicant considers that it is arbitrary and discriminatory to base the calculation of the period of pensionable service on the date of establishment. The reference date should be the date of entry into service with the Communities in all cases. Where an official has been in the service of the Community as a member of the temporary staff prior to his appointment as an official, reference to the date of his entry into service is the only way to avoid a situation in which, owing to increases in basic salary between the date of his recruitment as a member of the temporary staff and his establishment as an official, such an official is discriminated against in comparison with an official directly appointed in that capacity.

10 The Commission accepts that, with the method of calculation it uses, the period of pensionable service to be credited may vary depending on how soon an official who was previously a member of the temporary staff becomes established. In view of the fact that the positions of officials and members of the temporary staff are governed by separate sets of rules, such differences in treatment, which are covered by the terms of Article 11 (2) of Annex VIII and the general provisions for giving effect to it, are not, however, discriminatory.

11 In this regard it is necessary to state that the first subparagraph of Article 11 (2) of Annex VIII to the Staff Regulations refers to an official's 'becoming established' to determine the date on which the official has the right to pay to the Communities the amount referred to in the provision in order to be credited with additional seniority for the purposes of his retirement pension. According to the second subparagraph of Article 11 (2), 'his grade on establishment', that is to say the grade to which he is appointed on the date on which he is established as an official, must be taken into account for the purpose of the calculation in question. That is therefore the date on which his basic salary is determined for the purpose of the calculation referred to in that subparagraph.

12 Possible differences in treatment between two persons who entered the service of the Communities at the same time and in the same grade but one of whom was initially recruited as a member of the temporary staff and the other immediately as

an official cannot justify a different interpretation of Article 11 (2). In view of the differences between officials and members of the temporary staff covered by the Conditions of Employment of Other Servants of the European Communities as regards guaranteed rights and social security benefits, in particular the right to a retirement pension, the positions of the two categories of persons are not comparable. It should be added, as the Commission has pointed out, that the taking into account of the date of establishment is more advantageous for the officials concerned than the date proposed by the applicant in all cases where the basic salary received at the time of recruitment as a member of the temporary staff is higher than that received on subsequent establishment as an official.

13 At the hearing, the Commission also drew attention to the fact that it makes the calculation in question at the time of entry into service where members of the temporary staff who have become entitled in that capacity to a retirement pension under Article 39 of the Conditions of Employment of Other Servants of the European Communities are concerned. In this regard, it suffices to state that Article 40 of those Conditions, which regulates the position of members of the temporary staff who are appointed officials, does not affect the calculation to be made under Article 11 (2) of Annex VIII to the Staff Regulations.

14 It follows from the foregoing that the submissions to the effect that Article 11 (2) of Annex VIII to the Staff Regulations and the prohibion of discrimination have been infringed are not well founded.

15 The application must therefore be dismissed and the question of its admissibility need not be examined.

Costs

16 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs. However, Article 70 of the rules provides that, in proceedings brought by officials, the costs incurred by the institutions against whom an action has been brought by an official of the Communities are to be borne by such institutions.

On the those grounds,

THE COURT (Third Chamber)

hereby:

(1) Dismisses the application;

(2) Orders each party to pay its own costs.

Everling Galmot Kakouris

Delivered in open court in Luxembourg on 20 March 1986.

P. Heim
Registrar

U. Everling
President of the Third Chamber