Case 322/87 R

Johann Frank
v
Court of Auditors of the European Communities

(Official — Suspension of operation of a decision)

Order of the President of the Court (Fourth Chamber), 10 November 1987 4375

Summary of the Order

Application for interim measures — Suspension of operation of a decision — Conditions for granting — Serious and irreparable damage
(EEC Treaty, Art. 185; Rules of Procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT (Fourth Chamber)
10 November 1987 *

In Case 322/87 R

Johann Frank, a former official of the Court of Auditors of the European Communities, represented by Messrs Potthast and Rüber, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of E. Arendt, 4 avenue Marie-Thérèse, L-2132,

applicant,

* Language of the Case: German.

Court of Auditors of the European Communities, represented by M. Ekelmans, acting as Agent, assisted by J.-A. Stoll, 29 rue Aldringen, Luxembourg L-1118,

defendant,

APPLICATION for the suspension, as an interim measure, of the operation of the decision of the Court of Auditors of 30 September 1987 until judgment on the substance of the case has been given so that the applicant is paid without reduction the amount of pension he has received hitherto,

THE PRESIDENT OF THE COURT (Fourth Chamber)

acting under Articles 9 (4) and 96 of the Rules of Procedure, makes the following

Order

1 Mr Frank was an official of the Court of Auditors of the European Communities as Director of Personnel and Administration in Grade A 2 from 2 June 1978 until the termination of his service on 31 January 1983.

2 Since 1 February 1983 Mr Frank has received, pursuant to Article 50 of the Staff Regulations of Officials, an allowance calculated in accordance with Annex IV to those regulations. Initially that allowance was paid in Belgian francs and later, when the applicant settled in the Federal Republic of Germany, namely with effect from 1 May 1983, it was paid in German marks subject to the weighting applicable to that country.

3 By a letter dated 7 March 1986 the Secretary of the Court of Auditors informed Mr Frank that, on verification of the method of calculating the temporary allowance to which he was entitled, it had become apparent that it had been calculated incorrectly. The letter stated that 'under the method of calculation used to the present time the weighting was taken into account twice, that is to say directly in the first instance and then by means of the conversion rate' and that 'consequently, the amount paid in German marks was too high by an amount which varied between DM 400 and 1 200 per month. The allowance for the month of March 1986 is therefore being paid subject to a final decision by the Court of Auditors with regard to the possible recovery of the amounts overpaid'.

4 On 21 April 1986 the Secretary of the Court of Auditors sent Mr Frank a letter which stated as follows: 'After detailed examination of your case, no request for repayment of the amounts overpaid will be made. Nevertheless, the Court of Auditors reserves the right to set off those amounts against any retroactive increase in salaries or in the weighting'.

5 On 30 September 1987, the President of the Court of Auditors sent Mr Frank a letter which informed him, amongst other things that:

'The incorrect application during the years 1983 to 1985 of the weighting and of an exchange rate which had already been adjusted by reference to the same weighting for the purpose of calculating the temporary allowance and the allowance provided for in Article 50 of the Staff Regulations resulted in an overpayment of ECU 45 523; the Court of Auditors must continue its efforts to recover that amount as soon as possible.

The incorrect application referred to by the Court of Auditors is due to the fact that the Court's administration and, in particular, the senior administrative assistant responsible for calculating your financial entitlement took the relevant weighting into account twice. Subsequently, you were informed by the Court's administration that the amount would not have to be repaid unless the Council adopted any regulation amending salaries or the weighting retroactively (letter ... of 21 April 1986).

The attitude expressed in that letter was that of the Court's administration and not that of the board itself which became aware of the problem only after its own inspectors had investigated the matter.

Now the board has itself decided, contrary to the attitude adopted by the administration, that the sums wrongly paid must be recovered.

In view of the relatively substantial amount at issue I would give instructions for it to be recovered as from next October by the deduction of equal instalments spread over two years'.

6 On 1 October 1987 Mr Frank lodged a complaint under Article 90 (2) of the Staff Regulations of Officials against the letter of 30 September 1987.

7 By a letter dated 9 October 1987 Mr Frank's lawyers gave the administration of the Court of Auditors until 14 October 1987 to reply that the deduction referred to in the letter of 30 September 1987 would not be made.

8 On 16 October 1987 the appointing authority of the Court of Auditors sent a letter to Mr Frank informing him that until the adoption of a decision on his complaint within the period prescribed by Article 90 (2) of the Staff Regulations of Officials 'instructions have been given to suspend the deductions referred to in my letter of 30 September 1987 in order not to prejudice your rights' and that 'clearly the suspension thereof does not imply any admission on the part of the appointing authority which would prejudice its case'.

9 By an application lodged at the Court Registry on 16 October 1987, Mr Frank brought an action seeking, in particular, the annulment of the decision of the Court of Auditors of 30 September 1987.

10 By an application for interim measures lodged on 19 October 1987 under Article 91 (4) of the Staff Regulations the applicant requested the Court before giving judgment and if possible without a hearing to suspend the operation of the defendant's decision of 30 September 1987 until judgment on the substance of the case has been given so that the applicant is paid without any reduction the amount of pension which he has received hitherto and to order the defendant to pay the costs.

11 The defendant submitted its written observations on 26 October 1987. Since the parties' written submissions contain all the information needed to rule on the application, it has not appeared necessary to hear oral argument from the parties.

12 In support of its application the applicant maintains that the Court of Auditors is bound by the terms of the letter which it sent to him on 21 April 1986 and by those of its letter of 7 March 1986. Not only are the terms of the decision set out in the letter of 21 April 1986 clear but they also constitute a breach of the principle of fair dealing, inasmuch as officials and retired officials are no longer able to rely on such a clear and unequivocal assurance on the part of the appointing authority.

13 To establish the urgency for the interim measures applied for, the applicant relies on the difficult financial situation in which he would be placed if his pension amounting to DM 3 741 were to be reduced by approximately one-third. The applicant considers that a rapid interlocutory decision by the Court is necessary in order to avoid that situation.

14 The Court of Auditors contends that the application should be dismissed as inadmissible and, in any event, unfounded. It takes the view that the application for interim measures is inadmissible in view of the fact that it has no purpose as the Court of Auditors informed the applicant by letter of 16 October 1987 that until the adoption of a decision on his complaint and in order not to prejudice his rights instructions had been given to suspend the deductions referred to in the letter of 30 September 1987. There is therefore no need to make any determination and this situation is covered by Article 69 (5) of the Rules of Procedure. In addition, the Court of Auditors considers that the application for interim measures is inadmissible on the grounds that the applicant has no interest in such measures and that the main application is prima facie unfounded.

15 As regards the basic conditions for the grant of the application, the Court of Auditors considers that in view of the fact that the applicant was informed that the overpayment would not be recovered before the adoption of a decision on his complaint the condition of urgency is not satisfied in this case. It also considers that the applicant has not submitted any evidence regarding the alleged damage. In any event, it is not apparent what irreparable damage could be suffered by the applicant as, in the first place, the proposed recovery of the overpayment was to be by instalments over a period of two years so that he would continue to have an

appropriate level of income and, secondly, should it result from the judgment on the main application that recovery of the overpayment was not permissible the corresponding sums would obviously be repaid to the applicant.

16 It should be borne in mind that according to Article 185 of the EEC Treaty actions brought before the Court of Justice do not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

17 In order for such an interim measure to be granted, Article 83 (2) of the Rules of Procedure requires that the application should state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima facie case for the interim measure applied for.

18 The Court has consistently held that the urgency referred to in Article 83 (2) must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure.

19 Without there being any need to consider whether the grounds relied upon by Mr Frank are capable of establishing a prima facie case for the measure he has applied for, it must be stated that the condition that the measure be urgently required in order to avoid serious and irreparable damage is not satisfied in this case. In view of the fact that the President of the Court of Auditors stated expressly in his letter of 16 October 1987 that 'instructions have been given to suspend the deductions referred to in my letter of 30 September 1987' it cannot be considered that in the present circumstances the suspension of the operation of the contested decision is a matter of urgency, since the operation of the decision has been suspended by the authority which adopted it.

20 It follows from the foregoing considerations that the application for interim measures must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT (FOURTH CHAMBER),

by way of interim decision,

after hearing the views of the Advocate General,

hereby orders as follows:

(1) The application for interim measures is dismissed.

(2) The costs are reserved.

Luxembourg, 10 November 1987.

P. Heim
Registrar

G. C. Rodríguez Iglesias
President of the Fourth Chamber